

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ho Tung v. The "Man On" Insurance Company, Limited, from the Supreme Court of Hong Kong; delivered 30th November 1901.

Present at the Hearing :

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

[*Delivered by Lord Davey.*]

This is an Appeal from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated the 3rd July 1900 affirming a judgment of the same Court in its original Jurisdiction dated the 26th February 1900.

The sole question to be determined is whether the regulations of the Respondent Company are those contained in its Articles of Association registered in Hong Kong or are those contained in Table A in the First Schedule to the Companies Ordinance Hong Kong 1865, under the provisions of which the Company was incorporated on the 14th March 1881 as a company limited by shares. Sections 6, 11, and 14 to 18, of the Ordinance are substantially and for all material purposes identical with the sections bearing the same numbers in the Companies Act 1862 and Table A in the Schedule to the Ordinance corresponds with Table A in the Companies Act.

By Section 14 it is enacted that the Memorandum of Association may in the case of a company limited by shares be accompanied when registered by Articles of Association signed by the subscribers to the Memorandum of Association. By Section 15 if the Memorandum of Association is not accompanied by Articles or so far as the Articles do not exclude the regulations in Table A those regulations become the regulations of the Company and by Section 17 it is enacted that the Memorandum of Association and the Articles of Association if any shall be delivered to the Registrar who is to retain and register the same.

In the present case the Memorandum of Association was duly signed by nine persons and their signature was duly attested. The Memorandum was accompanied by a small printed book purporting to contain "Articles of Association of the Man On Insurance Company Limited" but these Articles were not signed. The Registrar however registered them with the Memorandum and thereupon gave a certificate of the incorporation of the Company. The Articles so registered have been in use by the Company from that date until the present time. They have been twice amended by special resolutions which have been registered. In 1885 certain Articles were added and the special resolution was in the following words:—

"That at the end of the Articles of Association of the Company there be added to and incorporated with the said Articles the following regulations that is to say:—&c.

And in 1894 the resolution was "that Article 72 of the Company's Articles of Association is hereby cancelled and that there should be substituted therefor the following regulation."

The present question has arisen in this way. A purchaser and transferee of shares in the

Company applied for registration. The registered Articles contain a power for the directors to prevent and disallow the sale or transfer of shares to a transferee whom they do not consider a fit person to hold shares. In exercise of this power the directors refused to register the transferee who thereupon moved the Court to have the register rectified by registering him as the holder of the shares, and raised the question whether the directors had the power which they claimed to reject the transfer. It was contended that in the circumstances above stated the regulations contained in Table A were the only regulations of the Company. The Chief Justice held that the enactment in Section 18 of the Ordinance making the Certificate of Incorporation conclusive evidence that all the requisitions of this Ordinance had been complied with applied to this case and refused the motion. On appeal the Chief Justice adhered to his opinion: Mr. Justice Sercombe Smith differed from him. The original order was therefore affirmed. It is not denied that if the Company is governed by the registered Articles the directors were entitled to reject the transfer. In Table A on the other hand there is no such power.

It appears therefore that these Articles have been registered and have been published and put forward as the Company's only Articles of Association and have been acted on amended and added to by the shareholders of the Company and the Company's business has been conducted under the regulations contained therein for 19 years without any objection and the Company on the record says that these Articles are its Articles of Association. Their Lordships think that in these circumstances they are entitled to draw the inference that all the shareholders have accepted and adopted the Articles as the valid and operative Articles of Association

of the Company. The Articles of Association stand on a very different footing from the Memorandum and are in the power of the shareholders themselves. The apparent object of requiring the Articles to be signed before registration is to secure the adhesion of the only members of the Company at that time to the regulations contained therein. It was no doubt imperative on the Registrar to require the Articles to be signed before registering them as it was to see that they complied with the other requisitions of the Ordinance as for example that they were printed and expressed in paragraphs numbered arithmetically. But there is no reason why the shareholders should not adopt them although irregularly registered. The statutory mode of doing so is by Special Resolution but this again is only machinery for securing the assent of the shareholders or a sufficient majority of them. In the *Phosphate of Lime Company v. Green* L. R. 7 C. P. 43 it was held that the Company was bound by the acquiescence of the shareholders in an act done by the directors in direct violation of the Articles of Association although there had been no alteration of the Articles by a special resolution. In commenting on the cases arising out of the Agriculturist Cattle Insurance Company* Lord Cairns in *Ashbury Railway Carriage Company v. Riche* (L. R. 7 H. L. 653 at p. 675) says "If they had sanctioned what had been done without the formality of a resolution it was quite clear that that would have been perfectly sufficient." He adds "So also in the case of the Phosphate of Lime Company the question was whether that had been done by the sanction of the Company which clearly might have been done by a resolution passed by the Company."

Their Lordships think that by the acquiescence and agreement of the shareholders shown by a

* *Spackman v. Evans* L. R. 3 H. L. 171. *Evans v. Smallcombe* ibid. 249. *Houldsworth v. Evans* ibid. 263.

long course of dealing the registered Articles have become and are the Articles of Association of the Company as surely as if they had been formally adopted by Special Resolution.

They will therefore humbly advise His Majesty that the appeal be dismissed. The Appellant will pay the costs of it.
