it was incumbent on me to explain my views as fully and as clearly as I could.

LORD RUTHERFURD CLARK—I agree with the opinion expressed by Lord Trayner.

The Court adhered

Counsel for the Pursuer and Respondent — Sol.-Gen. Graham Murray, Q.C.— M'Kechnie — M'Lennan. Agents — Miller & Murray, S.S.C.

Counsel for the Defenders and Reclaimers — D.-F. Balfour, Q.C. — Sym. Agents—Cumming & Duff, S.S.C.

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*Friday, March* 4.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## THE LIQUIDATORS OF THE EDINBURGH EMPLOYERS AND GENERAL ASSURANCE COMPANY, LIMITED *v.* GRIFFITHS AND OTHERS.

*Company — Misrepresentation — Winding-up—Contributory.*

The directors of a company formed in 1887 issued a prospectus in December 1890, which contained material misrepresentations as to the state of the company's affairs. After a number of new shares had been taken up on the faith of this prospectus, the directors, on 12th May 1891, issued a circular to all the new shareholders acknowledging the misleading character of the prospectus, and intimating that they proposed to present to the Court a petition for authority to rectify the register by deleting therefrom the names of the new shareholders. Two of the new shareholders, W. and D., wrote in reply to this circular on 14th and 20th May respectively, expressing their desire to have their names removed from the register, and approving of the course which the directors proposed to take. On 18th May the directors issued a notice of an extraordinary general meeting, to be held on 26th May, for the purpose of passing resolutions confirming a provisional agreement for the transference of the company's business to another company, and for the voluntary winding-up of the company. On 20th May the directors presented a petition for removal of the new shareholders' names from the register. The petition was intimated to each of the new shareholders and no answers were lodged, but before the *inducice* had expired a petition was presented on 26th May to have the company wound up by the Court, and under this petition an order was subsequently pronounced for the judicial winding-up of the company.

In a note by the liquidators for settlement of the list of contributories, the Court *held* (1) that the company not having been publicly declared insolvent, the directors were acting within their powers in issuing the circular of 12th May and presenting the petition of 20th May, and that it was irrelevant for the liquidators to aver that the directors had acted in the knowledge that the company was insolvent at the date the circular was issued, and in order fraudulently to avoid the personal liability which they had incurred; (2) that W. and D. were entitled to have their names removed from the list of contributories in respect that before the petition for winding-up was presented they had, by their acceptance of the offer contained in the directors' circular, taken steps to have their names removed from the register; and (3) that the names of all the other new shareholders must be placed on the list of contributories.

The Edinburgh Employers Liability and General Assurance Company was incorporated under the Companies Acts on 18th February 1887, its registered office being in Edinburgh. The nominal capital of the company was £150,000, divided into 150,000 shares of £1 each, of which 5s. per share was paid up. Down to December 1890 only 27,063 of these shares were subscribed for.

In December 1890 the company issued a prospectus offering a new issue of shares, with the result that 6108 additional shares were taken up by 65 new shareholders at a premium of 1s. 3d. per share in addition to the 5s. paid up. On 12th May 1891 the directors of the company issued the following circular to the new shareholders (at the same time sending a copy of it to the old shareholders):—"Dear Sir,—The financial year of this company expired on 28th February last. The directors have since had a thorough investigation made into the affairs of the company, and they regret to inform you that their investigation discloses some startling results. When the prospectus for the issue of new shares was published in December last the directors, proceeding upon the previous balance-sheet, and the business which was subsequently placed before them, were of opinion that the company was in a satisfactory condition. The investigation, however, has brought to light the fact that claims to a large amount had been intimated to the late manager before the balance-sheet for 1889-1890 was adjusted, and many of them before the financial year expired, which he omitted to disclose to the board or to the auditor, and of which no account is taken in that balance-sheet. The directors had no means of knowing of these claims except through the manager. The result is that the directors are now satisfied that no profit was earned for the previous year, and, on the contrary, that the sum treated as a premium reserve was more than exhausted by claims actually intimated before the balance-sheet was issued. As at 28th February last, therefore, the paid-up capital of the company has been practically lost,

though it has a large uncalled capital. A good business has, however, been built up, and the directors are negotiating for the amalgamation of the company with another, so that the full benefit of the value of the business may be obtained for the shareholders. The directors feel that in the above circumstances a grave injustice has been done to those shareholders who applied for shares on the prospectus issued in December, and had shares allotted to them. They have taken legal advice on the subject, and specially whether they have or can get the power to enable them to remove the names of the new shareholders from the register, and to repay them the money paid on their shares, together with the premium thereon. They have been advised that under section 35 of the Companies Act of 1862 this can legally be done with the authority of the Court, and they propose immediately to present a petition to the Court setting forth the whole circumstances and craving the necessary authority. We think it right to inform you of this at once, so that your mind may be set at rest in regard to your position as a new shareholder. A copy of the petition to the Court will afterwards be served upon you. In the meantime any of your friends will be perfectly safe to insure with the company, or to renew insurances already existing, and we trust you will use your influence to prevent the business being prejudiced while the negotiations are in progress."

On 18th May the directors issued a notice to the shareholders of an extraordinary general meeting of the company, to be held on 26th May 1891, for the purpose of passing the following resolutions:—(1) A resolution confirming a provisional agreement for transference of the company's business to another company; "(2) that in respect of said agreement, and also in respect of the company having suffered such losses, that it is inexpedient to carry on the business, the meeting declare the company to be dissolved, except for the winding-up of the same; (3) that the Edinburgh Employers Liability and General Assurance Company, Limited, be wound up voluntarily."

On 20th May the directors presented a petition to the Court, in terms of the undertaking contained in their circular of 12th May, to have the register rectified by removal of the names of the new shareholders, and for authority to repay to them, out of the funds of the company, the sums paid by them on their shares, including the premium thereon. This petition was intimated to the new shareholders, and no answers were lodged, but before the *inducice* had expired, viz., on 26th May, a petition was presented by some of the old shareholders (in which certain creditors compeared) to have the company wound up by the Court, and on 24th June the Court on this petition pronounced an order for a judicial winding up. On 20th June Elizabeth Griffiths and nineteen other new shareholders boxed to the Court a minute of compearance in the directors' petition of 20th May, but as this minute did not appear in the rolls until after the order for a judicial winding up had been pronounced, the Court held that they could not deal with it except by sisting process, leaving all questions to be decided in the liquidation proceedings.

On 3rd July 1891 Robert Cockburn Millar and James Romanes, the official liquidators of the company, presented a note for the settlement of the list of contributories. In the list appended to the note they included the names of all the new shareholders. To this note answers were lodged by (1) Elizabeth Griffiths and the other new shareholders who had previously compeared in the directors' petition of 20th May, and (2) by eight other new shareholders. Four other new shareholders also took separate proceedings for rectification of the register by deletion of their names thereon.

In a condescendence lodged by the respondents they averred that they had been induced to take shares by material misrepresentations contained in the prospectus issued in December 1890, and that the uncalled capital on the old shares would amply meet all liabilities, and that the liquidation was therefore not a creditors' but a shareholders' liquidation.

The liquidators in answer denied that the uncalled capital on the old shares would meet the company's liabilities, and averred that the claims already lodged for creditors amounted to £25,000, whereas the total capital of the company at the date of liquidation, including old and new shares alike, only amounted to £24,878, 5s.

The respondents pleaded, *inter alia*—"(1) The respondents are not liable to be placed on the list of contributories, in respect that they were induced to take the said new shares by material misrepresentations, and their names were entered on the register of members without sufficient cause; *et separatim*, because their right to be relieved and to have the contract rescinded was intimated to them and judicially admitted by the company, prior to the commencement of the winding-up. (2) The respondents mentioned in the first branch of the title hereof are not liable to have their names placed on the list of contributories in respect of the judicial proceedings taken by them before the winding-up order. (5) Even assuming the respondents to be liable to the creditors of the company as contributories they are not liable as in a question with the 'old' shareholders, and the interests of shareholders only being involved, they are entitled to relief from liability as contributories."

The liquidators pleaded, *inter alia*—"(2) The respondents are barred by *mora* and taciturnity, and by their own actings as condescended on, from objecting to their names being entered on the list of contributories. (4) The respondents' objection should be repelled in respect—1st, that the petition of 20th May was incompetent, irrelevant, and *ultra vires*, and was truly presented, not in the interests of the company, but in the interests of the directors, and after liquidation had been resolved on, and was not authorised by the company;

2nd, that the liquidation order of the Court precludes the Court from now sustaining the respondents' objections."

After the case was in the Inner House the liquidators amended their record by adding thereto the following averment—"The said circular of 12th May 1891 was issued, and said petition of 20th May 1891 was presented, at a time when the company had failed to meet, and was unable to meet, its due debts, and when it was in the knowledge of the directors insolvent. They were issued and presented respectively by the directors, not in the *bona fide* performance of their duty to the company, but in pursuance of a fraudulent scheme which they had devised for avoiding the personal liability which they knew they had incurred to the new shareholders. They were so issued and presented after the directors were aware that liquidation was inevitable, and after they had determined on winding-up the company. The result of the removal of the new shareholders from the register, thereby proposed at said dates, would have been to defraud both the remaining shareholders and creditors of the company. The said petition of 20th May was presented without the authority of the respondents and other new shareholders, and was not adopted by them prior to the liquidation. The respondents and other new shareholders continued to be treated and acted as shareholders of the company after the said circular, and the presentation of said petition at said respective dates."

They also amended their fourth plea-in-law by making it read as follows—"(4) The respondents' objections should be repelled in respect—1st, that the petition of 20th May was incompetent, irrelevant, and *ultra vires*, and was truly presented, not in the interests of the company, but fraudulently in the interests of the directors themselves, and after liquidation had been resolved on, and was not authorised by the company; 2nd, that the company was, as the directors knew, insolvent and unable to carry on business at and prior to 12th May 1891, and the directors had in consequence before said 12th May resolved that the company must go into liquidation; and 3rd, that the liquidation order of the Court precludes the Court from now sustaining the respondents' objections."

In a joint minute of admissions lodged by the parties after the case was in the Inner House it was admitted, *inter alia*—"1. That the prospectus of new shares issued by the company in December 1890 contained material misrepresentations which would entitle the subscribers for said shares, including the respondents, to have their names removed from the register, and the money paid in respect of said shares repaid, provided steps for obtaining removal and repayment were timeously taken. 2. Between the issue of the said new shares and the date of the liquidation, numerous transfers of old shares took place, and numerous contracts, involving substantial new liabilities subsisting at the date of the liquidation, were entered into by the company."

The following admissions were also made in regard to particular respondents—two of the respondents, West and Duke, wrote (in reply to the directors' circular of 12th May) on 14th and 20th May respectively, intimating their desire to have their names removed from the register of shareholders, and agreeing to the course which the directors proposed to take in order to effect that object.

Another respondent, Vallays, wrote to the directors in similar terms on 14th May, but subsequently he granted a proxy in favour of the directors for the meeting of 26th May. Several of the other respondents also granted proxies for that meeting.

Another respondent, Shand, it appeared, wrote to the directors on 24th March 1891 repudiating his shares in respect of the misrepresentations contained in the prospectus of December 1890. He did not, however, follow up this letter by taking any active steps for removal of his name from the register. On 19th May he wrote to the directors intimating that he held them personally liable for any loss he might sustain in connection with his shares in the company, and adding—"In the circular of 12th inst. the directors undertook immediately to 'present a petition to the Court setting forth the whole circumstances, and craving the necessary authority' to enable them 'to remove the names of the new shareholders from the register, and to repay them the money paid on their shares together with the premium thereon.' This circular added—'We think it right to inform you of this at once, so that your mind may be set at rest in regard to your position as a new shareholder.' After such an assurance I naturally concluded that I did not require to attend further to the matter, and I was the more willing to take no active steps as I was unwilling to cause additional expense to the company. The circular of the 18th inst., however, informs me that steps are to be taken to put the company into liquidation. Liquidation may have effect of prejudicing the rights of 'new shareholders.'"

On 5th January 1892 the Lord Ordinary in the liquidation (STORMONTH DARLING) repelled the pleas-in-law for the respondents and settled their names on the list of contributories.

"*Opinion.*—The question here is, whether the respondents, Mrs Griffiths and others, are to be placed on the list of contributories of this company as holders of shares allotted to them in or about December 1890.

"The company was formed in 1887 with a nominal capital of £150,000, divided into 150,000 shares of £1 each, of which 5s. per share were paid up. Down to December 1890 only 27,063 of these shares were subscribed for. In that month the company issued a prospectus offering a new issue of shares, and the result was that 6108 additional shares were accepted at a premium of 1s. 3d. per share in addition to the 5s. paid up. The present respondents, who are twenty-eight in number, hold 4134 of these new shares. Four other persons, repre-

senting 800 shares, have taken separate proceedings in the liquidation, objecting to their names being placed on the list of contributories. The remaining 1174 new shares are held by thirty-three persons, who have down to this time taken no steps to repudiate liability. Only two of these thirty-three are holders of old shares as well.

"The prospectus issued by the directors, on which the new shares were taken, represented the company as in a flourishing condition. In particular, it asserted that a 6 per cent. dividend had been earned and paid since the commencement of the company, and that the company possessed a sum of £4200 of 'premium reserve.' Both of these statements turned out to be false, the premium reserve being entirely absorbed by claims which had been intimated before the date of the prospectus, and the dividend of 6 per cent. having been paid out of capital. I shall assume, therefore, that the 'new' shareholders were induced to take their shares by misrepresentation of material facts, and that while the company was a going concern, they would have been entitled, if they chose, to have their contracts rescinded and their names removed from the register.

"It by no means follows that this right remains now that the company has gone into liquidation. And here it is necessary to attend very closely to certain material dates. The financial year of the company expired on 28th February 1891. On 12th May the directors addressed a circular to all the new shareholders (sending at the same time a copy of it to the old shareholders), in which they acknowledged with great frankness the misleading character of the prospectus, which they ascribed to the suppression of certain facts by the manager, and intimated that they proposed immediately to present a petition to the Court under sec. 35 of the Companies Act of 1862, setting forth the whole circumstances, and craving the necessary authority to remove the names of the new shareholders from the register, and to repay them the money paid on their shares, together with the premium thereon. On 18th May they issued a notice for an extraordinary general meeting of the company to be held on 26th May for the purpose of passing resolutions to confirm a provisional agreement for transference of the business to another company, and for voluntary winding-up. Under sec. 129 (3) of the Act of 1862 an extraordinary (as distinguished from a special) resolution to wind-up must bear that it has been proved to the company's satisfaction that it cannot by reason of its liabilities continue its business, and that it is advisable to wind-up the company. The notice in this case did not contain these very words, but it bore that the company had suffered such losses that it was inexpedient to carry on the business, and I take it that these words must, in the circumstances, be read as meaning the same thing. On 20th May the directors presented a petition in terms of the intimation in their circular, to have the register rectified by removal of the names of the new shareholders, and for authority to repay to them out of the funds of the company the sums paid by them on their shares including the premium thereon. This petition was ordered to be intimated to the new shareholders, and no answers were lodged, but before the *inducice* had expired, viz., on 26th May, a petition was presented by some of the old shareholders (in which certain creditors appeared) to have the company wound up by the Court, and as an order for judicial liquidation was on 24th June pronounced on this petition, the 26th of May must be taken as the commencement of the winding-up. On 20th June a number of the present respondents boxed to the Court a minute of compearance in the directors' petition of 20th May, but this minute did not appear in the rolls until after the order for liquidation had been pronounced, and accordingly their Lordships of the First Division held that they could not deal with it except by sisting process, leaving all questions to be decided in the liquidation proceedings.

"In order to appreciate the importance of these dates it is necessary to consider the case law (chiefly English) as to the right of a shareholder to have his name removed from the register on the ground that he has been induced to take his shares by fraud imputable to the company.

"In the first place it is clear that such a contract is not void but only voidable. In the second place the general rule is that after the company has gone into liquidation the demand of the shareholder comes too late—*Oakes* v. *Turquand*, L.R., 2 Eng. & Ir. App. 325. But to this there is the exception that if the shareholder, before the commencement of the winding-up, has taken legal proceedings to have his name removed, that will be enough—*Reese River Company* v. *Smith*, L.R., 4 Eng. & Ir. App. 64. Mere repudiation without legal proceedings being taken will not do—*Hare's* case, L.R., 4 Ch. 503. But the legal proceedings need not be at the instance of the repudiating shareholder himself, provided there be an agreement between him and the company that they shall stand or fall by the result of legal proceedings taken by other shareholders in the same position—*Pawle's* case, L.R., 4 Ch. 497, and *M'Neill's* case, L.R., 10 Eq. 503. The mere fact of legal proceedings being taken by other shareholders will not be enough, unless there is a positive agreement to abide by the result of them—*In re Scottish Petroleum Company*, 23 Ch. Div. 413. The general rule that after winding-up has commenced the demand of the shareholder comes too late has not been further relaxed, and the relaxations which have been allowed all present the feature of active steps being taken before the liquidation, either by the repudiating shareholder himself or by some one else representing him by agreement with the company. Nor is the commencement of the winding-up in all cases the earliest point of time at which the right of a shareholder to get rid of his shares is lost. The case of *Tennent* v. *City of Glas-*

*gow Bank*, 6 R. 554—*aff.* 4 App. Cas. 615, establishes that a declaration of insolvency will have the same effect, for in that case it was held, in the words of Lord Cairns (4 App. Cas. 623), that 'it became impossible after the advertisement of the 5th of October for the body of shareholders in the company, whose agents the directors were, to make any alteration in their status, whether by a transfer or by a repudiation of shares, which would affect the rights of creditors in the company.' Now, the advertisement of 5th October in that case was a notice convening an extraordinary general meeting for the purpose of winding-up, similar to the notice which was issued in this case on 18th May.

"Such being the law, as established by decisions, the first question is, whether the presentation of the directors' petition for rectification of the register on 20th May (six days before the commencement of the winding-up) was equivalent to a taking of legal proceedings by the respondents themselves. It is plausibly urged that this step on the part of the directors as representing the company was a concession of the respondents' right to have their names removed, and made it unnecessary for them to take proceedings of their own. But I am of opinion that it cannot be regarded as a proper equivalent—(1) Because there was no concurrence on the part of the respondents, and nothing to prevent them from afterwards objecting to the removal of their names from the register; and (2) because it was impossible, after the circular of 18th May, either on the application of the directors or of the respondents themselves, to make any alteration in the status of the body of shareholders. It is said by the respondents (condescendence 12) that the liquidation is not a creditors' but a shareholders' liquidation, and that the uncalled capital on the old shares will be sufficient to meet all the liabilities, but this is denied by the liquidators who assert (statement 1) that the entire uncalled capital, on both old and new shares, falls short of the claims which have been lodged. I cannot therefore assume that the interests of creditors would not be prejudiced by the release of the respondents, and even if that were so, the case of *Burgess*, 15 Ch. Div. 507, is an authority for holding that the interests of contributories are to be regarded as well as those of creditors, on the ground that by section 38 of the Act of 1862 the winding-up order imposes new liabilities on members (including past members) and entirely alters the position of parties.

"It was urged by the liquidators that the petition of 20th May was *ultra vires* of the directors, at all events without the consent of the company, as being practically a reduction of capital. I cannot adopt that view, for the directors had power under the articles to compromise any liability in respect of an agreement to take shares, and I think if the company had been a solvent and going concern, it would have been their duty to consent to the names of the respondents being removed from the register on a demand to that effect being made. If so, I cannot see that there would have been in that case anything improper in their proposing to get the authority of the Court themselves. I do not go into the question whether they were actuated by any motive for avoiding personal liability under the Directors Liability Act of 1890. For I think that either of the two grounds which I have mentioned above is sufficient to deprive their petition of any efficacy as an equivalent for a legal proceeding taken by the respondents in proper time.

"There remains the question whether the directors' circular of 12th May, though not of course a legal proceeding, had the effect of operating, by agreement, a rescission of the respondents' contract to take shares. It certainly was couched in very strong terms, and was well calculated in its own words to set the minds of its recipients 'at rest in regard to their position as new shareholders,' so completely as to stay their hands from taking any personal action. It is not said that down to that time any of the respondents, except Mr D. L. Shand, had asked that his name should be removed from the register. Waiving the question whether, in the knowledge which the directors must then have possessed of the company's insolvency, they had any right to take the initiative in rescinding the respondents' contracts, I am unable to see that their circular constituted anything like an agreement for rescission. Every one of the persons who received it (with perhaps the exception of Mr Shand) might have refused to allow his name to be taken off, and it is admitted not only that thirty-three of the sixty-five new shareholders have allowed their names to be settled on the list of contributories without objection, but that four of the respondents granted proxies for the meeting of 26th May, and that a fifth attended the meeting, which of course was conduct altogether inconsistent with the idea that they had ceased to be shareholders. I think it is impossible to hold that the mere fact of the respondents not objecting to the course which the directors proposed, inferred on their part a consent to the rescission of their contracts; and if the circular had the effect (as very likely it had) of lulling them to sleep, I am afraid they must take the consequences of not themselves adopting those legal proceedings which alone are effectual, where liquidation ensues, to vindicate a shareholder's right to have his name removed on the ground of fraud.

"With regard to Mr Shand, he had certainly repudiated as early as 24th March, but I am afraid he is open to the objection that he failed timeously to take active steps to have his name removed. For if he knew on 24th March that his contract to take shares was voidable on the ground of fraud, and intended to avoid it, I think he was bound to take immediate steps for that purpose in justice to all concerned.

"In the view which I take, there is no distinction between those of the respondents who compeared and those who did not

compear in the directors' petition of 20th May. All of them must, I think, be settled on the list of contributories."

The respondents reclaimed, and argued—Where a party had been induced to take shares in a company by material misrepresentations, his contract with the company might be rescinded at any time prior to the declared insolvency of the company, or the commencement of winding-up proceedings. The fact that the company was actually insolvent, and was known to the directors to be so, did not render rescission impossible, provided no public declaration of insolvency had been made. To ascertain whether rescission had been timeously effected it was necessary to inquire, whether at the date of rescission the company was a going company, conducting business with all the chances of trade. So long as these chances remained, there was no change in the quality of the shares, and the repudiating shareholder could give back what he got. *Tennent's* case was distinguished because in that case there was a declaration of insolvency prior to the proceedings for the winding-up of the company, while in the present case the circulars of 12th and 18th May rather declared the solvency than the insolvency of the company — *Tennent* v *City of Glasgow Bank*, January 22, 1879, 6 R. 554—*aff.* May 20, 1879, 6 R. (H. of L.) 69, & L. R., 4 App. Ca. 615. In the present case therefore the respondents were entitled to rescind their contracts with the company down to the presentation of the petition for winding-up on 26th May. Rescission could be effected either by both sides agreeing to be quit of their bargain, or by an offer on the part of the company to take steps to rescind being acquiesced in and tacitly accepted by the shareholder—*Ashley's case*, 1870, L.R., 9 Eq. 263; *Burgess' Case*, 1880, L.R., 15 Ch. Div. 507. Where both sides agreed to put an end to the contract, actions at law were unnecessary and indeed out of place—*Reese River Company* v *Smith*, 1869, L.R., 4 Eng. & Ir. App. 64, *per* Lord Chancellor Hatherley 73-4; *Wright's Case*, 1871, L.R., 12 Eq. 331, and 7 Chan. 55. In the present case the directors should have removed the respondents' names from the register as soon as it appeared from their silence that they did not dissent from the course which the directors proposed to take in the circular of 12th May, and their acquiescence in that course was certainly apparent before 26th May. In any view, the respondents West and Duke were entitled to have their names removed from the list of contributories, as they had expressly closed with the directors' offer prior to 26th May, and had thus timeously taken steps to have their names removed from the register. The respondent Shand was also entitled to relief, as he had repudiated his shares before the directors issued their circular of 12th May, and must be held to have approved of their proposal.

Argued for the liquidators — Where a party who had been induced to take shares by misrepresentation desired to rescind his contract, he must not only repudiate his shares, but also take steps to have his name removed from the register—*Oakes* v. *Turquand*, 1867, L.R., 2 Eng. & Ir. 325; *Reese River Company* v. *Smith*, 1869, L.R., 4 Eng. & Ir. App., *per* Lord Chancellor Hatherley, 73; *in re Scottish Petroleum Company*, 1883, L.R., 23 Ch. Div. 413. Without the authority of the Court directors had no power to take back a shareholder's shares and give him back his money, as such a proceeding was equivalent to a purchase by a company of its own shares, which was settled to be illegal in *Trevor* v. *Whitworth*, 1887, L.R., 12 App. Cas. 409. Assuming that a contract to take shares could be rescinded by agreement, the great majority of the respondents, including the respondent Shand, did not close with the offer made by the directors, and so entered into no agreement for rescission of their contracts with the company, while some granted proxies for the meeting of 26th May—conduct quite inconsistent with the notion that they were no longer shareholders. Even in the cases of West and Duke the contracts were not timeously rescinded, as the company was on 12th May known to the directors to be insolvent, and it was after that *ultra vires* of the directors to take any steps for removing the names of shareholders from the register.

At advising—

Lord President—Since this case came into the Inner House a minute of admissions has been lodged, and the record has been amended. The parties were agreed that the questions raised are thus in a position for final judgment unless we should be of opinion that certain statements of the liquidator are relevant, and ought to be remitted to probation. My opinion is that they are not relevant, and accordingly that we are able now to dispose of the whole case. My reasons for considering those averments to be irrelevant may more conveniently be explained after I have stated my views on the case as it stands.

The Lord Ordinary has collected the facts with clearness and accuracy. On 20th May the Edinburgh Employers Liability and General Assurance Company presented a petition to this Court praying that the register should be rectified by the removal of the names of certain persons—those persons forming a whole class of shareholders. The usual order was made that this petition should be served on all the persons so named, allowing them to lodge answers within eight days. While this period was current, namely, on 26th May, a petition for judicial liquidation was presented, and on 24th June an order for winding-up was pronounced. The company thus went into liquidation on 26th May.

The reclaimers are certain of the persons whose names were sought to be removed from the register under the petition of the company. Their names being on the register at the date of the liquidation, they *prima facie* must be contributories, but they seek to show that judicial proceedings having been taken before the liquidation

for their removal from the register, they are now entitled to relief. They found themselves upon what is now formally admitted in the first article of the minute of admissions, viz., that material misrepresentations had been made in the prospectus of the shares allotted to them, which would entitle them to have their names removed provided steps for obtaining such removal were timeously taken, and they say that the petition for the removal of their names having in these circumstances been presented by the directors after notice had been given to them in terms of a circular of 12th May, and no dissent having been expressed by them, they are entitled now to claim the relief which they might before the liquidation have claimed for themselves, and which the directors had petitioned for before the commencement of the winding-up. It appears to me that the question whether any shareholder can successfully claim the benefit of the company's petition depends upon whether he did or did not prior to the liquidation close with the offer of the directors made in the circular of 12th May that he should cease to be a shareholder. That circular of 12th May was, I think, an open offer to any shareholder, but then it was an offer requiring acceptance.

The contracts under which each of the defrauded shareholders became a shareholder was voidable, but only at the instance and in the option of each shareholder. The mere fact that each shareholder was apprised of his having this option in no wise implied either in law or in fact that he would choose to exercise it. All or any of these persons might prefer to keep their shares, and unless and until they intimated their choice they had the right to remain and did remain shareholders.

The case of Mr West, who, in my opinion, is entitled to the relief he seeks, very well illustrates by contrast the general case of the reclaimers. In answer to the circular he wrote as follows—"I am in receipt of your circular herein, and am surprised to learn the position of affairs. I, however, note that you are going to present a petition for rectification at once, and I therefore rely upon that, and shall be glad to receive payment in due course." Now, that letter, following the circular and followed by the petition, entitles Mr West to say that the petition is his petition, for it was presented in pursuance of an agreement between him and the directors that they should petition for the removal of his name. Mr West is thus entitled to plead the law of *The Reese River Company* v. *Smith*, L.R., 4 Eng. & Ir. App. Cas. 64, and his case is, I think, *a fortiori* of *Pawle's* case, L.R., 4 Ch. 497, and *M'Niell's* case, L.R., 10 Eq. 503.

The case of the Rev. Mr Duke is indistinguishable from Mr West's, and he is, in my opinion, entitled to the same relief. I regret that I am unable to assimilate any other case to those of these two gentlemen. Those cases were singled out and developed since the case came into the Inner House, and accordingly they are not dealt with by the Lord Ordinary.

What is wanting in the case of all the others is any closing with the proposal of the directors that they should go off the register. It appears to me that no one of them had deprived himself of the right to hold to his shares, which unquestionably belonged to him in spite of the directors' petition to remove their names. Apart from some renunciation of this right, any one of them might have lodged answers to the petition and opposed it, and I find it impossible to hold that mere silence or abstaining from announcing resistance to the directors' proposal amounts to such renunciation. The proper criterion is, I think, stated by Lord Justice Selwyn in *Hare's* case, L.R., 4 Ch. 511, in words directly applicable to the present case—"There is nothing in my judgment to show that Mr Hare had deprived himself of the power which he possessed of acting for himself, and of exercising his own judgment or option, either to retain the shares or to have his name removed." Mr West and Mr Duke satisfy this test; all the others fail to satisfy it.

This leads me to consider the parts of the liquidators' record which admittedly furnish their only answer to the claim of the two gentlemen I have named.

The liquidators contended that even on the admitted facts the petition for the removal of the shareholders' names was incompetent and *ultra vires*, inasmuch as it was presented after liquidation had been resolved on. Now, it is scarcely accurate to speak of liquidation as having been resolved on, for at the 20th May the company had not resolved upon anything, and the directors only announced, and could only announce, their intention to propose a liquidation to the meeting of shareholders which they were calling. Nor does the circular of 12th May announce or imply either insolvency or inability to carry on business, for it does no more than state that while the paid-up capital, amounting to 5s. of the £1 shares, had been lost, a good business had been built up, and the directors were negotiating for the amalgamation of the company with another. These are the statements made as to the position of the company, and the provisional agreement for amalgamation which was recommended by the directors in their circular of 18th May is in harmony with these statements.

In these circumstances I do not think that the admitted facts support this contention of the liquidators. *De facto* the company at 20th May was a going concern; neither to the public nor to the shareholders had any announcement been made of insolvency or inability to go on, or of a resolution *cedere foro*.

The liquidators, however, point to certain averments of theirs which are not covered by the minute of admissions. Those averments resolve into two propositions—(1) It is said that at the date of the circulars and the petition the company was in the knowledge of the directors insolvent,

and that the directors had resolved that the company must go into liquidation. Even if the company was *ex post facto* proved to have been insolvent in the knowledge of the directors, this would not, in my opinion, avail to cut down the validity of the actings of the directors in relation to this petition, those facts being latent. The statement that the directors knew that the company must go into liquidation is a mere amplification of the principal averment, and does not add to its value. (2) It is averred that the petition to rectify the register was not truly presented in the interests of the company, but fraudulently in the interests of the directors themselves. Taken by itself this proposition does not vitiate the petition, for the shareholders proposed to be relieved were, on the admitted facts, entitled to this remedy if timeously applied for, and a sinister motive on the part of the directors in tendering to them the justice to which they were entitled could not prejudice their right to obtain it. Nor does this averment of fraud impart to the averment of insolvency any additional weight against the objections to its relevancy which I have already considered.

My opinion is therefore that we should adhere to the Lord Ordinary's interlocutor, with this variation, that we remit to his Lordship to direct that the names of Leonard H. West and William Duke be removed from the register of shareholders.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to the Lord Ordinary to direct that the names of West and Duke should be removed from the list of contributories, and with this variation adhered to the Lord Ordinary's interlocutor.

Counsel for the Liquidators—Asher, Q.C. —H. Johnston—C. S. Dickson. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondents—D.-F. Balfour, Q.C.—Sym. Agents—Pringle, Dallas, & Company, W.S.

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*Thursday, March* 17.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

## LAWRIES *v.* LAWRIE'S TRUSTEES.

*Trust—Powers of Trustees—Partnership—One of Three Trustees Partner in a Business forming part of the Trust-Estate—Trust Administration.*

By trust-disposition and settlement in favour of his children a truster nominated three persons to be his trustees, with power to carry on any business in which he might be engaged at the time of his death, or to continue his interest in any business in which he might be a partner at his death. One of the three trustees was his brother, who for several years had managed two of his businesses, receiving in return half of the profits of one them. There was no writing instructing a partnership. The trustees after deliberation, and having taken legal advice, continued to carry on these businesses for some years under the same arrangement as to management and remuneration as before, with great benefit to the trust-estate.

In an action of count, reckoning, and payment at the instance of some of the beneficiaries against the trustees for the purpose of having the share of profits paid to the truster's brother replaced to the credit of the trust funds, it was *held*, after a proof—chiefly parole, and at which the principal witnesses were the trustees and their law-agent,—that the truster's brother was at the time of the truster's death a partner with him in the business from which he had drawn half the profits, and that the continued payment of these to him was not in the circumstances open to challenge.

*Opinion per* Lord Kyllachy, but *reserved* by the Judges of the Inner House, that even if the truster's brother were not held to have been a partner, the arrangement with him was in the circumstances a proper act of trust administration.

The late John Lawrie, wine and spirit merchant in Rothesay and Glasgow, died in May 1876, leaving a trust-disposition and settlement, dated 1870, in favour of his children, by which he appointed his brother James Wilson Lawrie, David Lawrie his brother's son, and James Birrell to be his trustees. Among the special powers conferred upon the trustees in carrying out the purposes of the settlement was a power to carry on for the estate, for such time as they might think proper, any business in which the testator might be engaged at his death, or to continue for such time as they may think proper, his interest in any business in which he might be a partner at his death.

At the time of his death the truster had a wine and spirit business in Bath Street, Glasgow, and another in Queen Street, Glasgow. He resided chiefly at Rothesay, and since 1868 both his Glasgow businesses had been managed by his brother James Wilson Lawrie, to whom, after a year of gratuitous management, he had annually paid half of the profits of the Queen Street business. There was no writing instructing a partnership, but there was no other partnership of which the truster was a member. The trustees accepted office, and after consultation with Dr David Murray, partner in the firm of Messrs Maclay, Murray, & Spens, writers, Glasgow, agreed, in the interest of the truster's children, to carry on the Glasgow businesses under the management as before of J. W. Lawrie, one of their number, who was to continue to receive half the profits of the business in Queen Street. This arrangement, which was throughout beneficial to the trust-