employed for one week; he had only been employed for a few days; and the English court said that in these circumstances you could not ascertain the amount of compensation due, and therefore you could not make an award. It is only in that indirect way that it is made out that a workman requires to be a fortnight in his employment before compensation can be due. I am not concerned to dispute that proposition. But I find nothing in the Act to the effect that employment during a week necessarily means employment during the whole seven days. Suppose a workman was engaged for six months, are we to leave out of account, in estimating his average weekly earnings for that period, every week in which he has not been working every day? That would be the logical result of the appellant's contention. If a workman works only three days a week, so much the worse for him and for his average weekly earnings. The proper course is to take the number of weeks of employment and the amount of wages, without inquiring how many days he worked each week. What is wanted is a man in employment for at least two weeks, and then there is no difficulty in striking an average. I see nothing in the Act to compel us to hold that you must have two whole working weeks, and work every day of those weeks. I see no authority for that, and I therefore agree with your Lordship.

LORD M'LAREN—I concur with your Lordship in the chair, and only desire to add that I do not wish to be understood as expressing any opinion to the effect that employment for two weeks is necessary to give a workman a claim under the Act. That question does not arise here, but it may arise, and there is a great deal to be said for the view that "average weekly earnings" simply means the arithmetical mean arrived at by dividing the total earnings by the number of weeks in which the workman was employed. That would include the case of a single week, and would be so treated in all scientific and actuarial computations.

LORD KINNEAR concurred.

The Court answered the first and second questions in the case in the negative, and in answer to the third question found that the sums earned by M'Cluskey and his two sons should not be divided into three equal parts, and that the wages of the deceased should not be stated to be one of these three equal parts.

Counsel for the Appellant — Salvesen, Q.C.—Younger. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents—H. Johnston, Q.C. — Orr. Agents — Simpson & Marwick, W.S.

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*Friday, July 20.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## MOIR *v.* THOMAS DUFF & COMPANY, LIMITED.

*Company—Limited Liability Company—Articles of Association—Power to Refuse to Register Successor of Deceased Member other than a Purchaser—Illegal Obligation—Obligation to Purchase Shares of Deceased Member—Offer by Company to Procure Purchaser Instead of Purchasing—Power to Exclude Representative of Deceased Member by Altering Articles—Ultra vires—Pendente lite nihil innovandum—Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 50.

The articles of association of a limited liability company empowered the directors to decline to register any successor to a deceased member other than a purchaser, and provided that in the event of such declinature the company should be bound to purchase his shares at the price at which they were valued in terms of the articles of association. The widow and executrix of a deceased member claimed to be registered as owner of the shares held by her husband. The directors refused to register her, but offered to procure a purchaser for the shares at the price fixed as provided by the articles, and to register him as owner. At an extraordinary general meeting, held after the pursuer's demand had been made, the company altered the articles of association to the effect that no transfer should be made or registered in favour of a woman. Before the meeting of the company at which the amended articles were confirmed, the executrix raised an action concluding for declarator that she was entitled to be registered as owner of the shares in question.

*Held*, assuming but not deciding that the pursuer's rights must necessarily be determined by the original articles of association, (1) that the directors had an absolute and unconditional right under the original articles to decline to register any successor to a deceased member other than a purchaser; (2) that their offer to procure a purchaser, whose name they would register, deprived the pursuer of any ground she might have otherwise had for maintaining that it was inequitable for the company to insist upon their right to refuse to register her name, in view of their inability legally to fulfil their corresponding obligation to purchase the shares themselves; and (3) that consequently the defenders were entitled to refuse to register her name as a holder of shares in their company—*diss.* Lord Moncreiff, who was of opinion (1) that the defenders were not entitled to alter the articles of association to the prejudice of the pursuer, after her rights

had emerged, and had been asserted by action raised, and that her rights therefore depended upon the original articles of association; (2) that the defenders' obligation to purchase the shares was a condition of their right to refuse registration; and (3) that the condition being illegal the defenders were not entitled to remodel their contract by offering to procure a purchaser, and that consequently the pursuer was entitled to be registered as owner of the shares.

*Opinion* (*per* Lord Kincairney, Ordinary) that the rights of parties depended on the original articles.

*Allen* v. *Goldreefs of West Africa, Limited* [1900], 1 Ch. 656, *considered and commented on.*

This was an action at the instance of Mrs Margaret Stewart Erskine or Moir, widow and executrix-dative *qua* relict of the deceased William Moir, Beach House, Broughty Ferry, against Thomas Duff & Company, Limited, having their registered office in Dundee. The pursuer concluded (1) for declarator that she was the owner, as executrix-dative of her deceased husband, of 22 shares of £100 each in the defenders' company which were formerly held by her husband, and that the defenders were bound to enter her name in the register of members of the company as the owner of these shares; and (2) for decree ordaining the defenders to enter the pursuer's name in the said register as the owner of the said shares. There were also conclusions for payment of the sums of £450 and £550, being the dividends which had accrued since the date of Mr Moir's death.

The defenders were incorporated as a limited liability company under the Companies Acts in 1883, with a nominal capital of £50,000, divided into 500 shares of £100 each. On the shares which were allotted and issued £25 was paid up; and the deceased William Moir at the time of his death was the registered owner of the 22 shares in question. Among the original articles of association of the company dated 30th June and 9th August 1883 were the following:—"12. The directors may, after 31st December 1888, without assigning any reason therefor, decline to register any successor to a deceased member other than a purchaser. 13. The directors may from the commencement of the company, in like manner, decline to register any successor to a bankrupt member, or any transfers of shares to purchasers or others. 14. If such declinature is made as above provided for, the company shall be bound to purchase the shares in question at the price at which they were valued under section 61 of these articles. . . . 59. No dividends shall bear interest as against the company. All dividends on any share not having a legal and registered owner entitled to require payment of and competent to give a valid receipt for the same shall remain in suspense until some competent person be registered as the holder of the share; provided that all dividends remaining for three years after the declaration thereof unclaimed by some person entitled and competent to receive and give a valid receipt for the same, shall at the end of that period cease to be payable, and be added to the reserved fund; but the board may remit the forfeiture in whole or in part whenever they may think proper. When two years shall elapse after the decease of any shareholder, without any person being registered as successor to him in respect of any shares, the directors, at any time after the lapse of such two years, may sell any such share, holding and accounting for the nett proceeds thereof to those equitably entitled. . . . 61. Once at least in every year, and from time to time as the directors may consider convenient, the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained and certified by an auditor, and after six months from the date of certifying, the balance-sheet shall be unchallengeable. On the occasion of every such balance the directors shall value the shares of the company, and report thereon to the members; and all questions arising as to the value of the shares shall be fixed, determined, and regulated by such valuation, until a re-valuation is made." Art. 74 provided that all differences between the company and its shareholders should be referred to arbitration.

On Mr Moir's death, on 27th July 1898, the defenders wrote to the pursuer's agents offering to take over the shares held by the deceased "at the last valuation, viz., £100 per share, in terms of the articles of association." It appeared from a minute of meeting of the directors of the company held on 28th March 1898 that the directors had, as provided by art. 61, valued the shares of the company, and had fixed their value at £100 per share, and that the directors' report had been approved at the annual general meeting held on 30th March. On 22nd December the pursuer was decerned executrix-dative *qua* relict of her deceased husband, and on 24th December her agents wrote to the defenders requesting them to transfer the shares in question to her. The defenders, by letter dated 27th December, intimated that they refused to transfer the shares to the pursuer, and in reply to a request that they should pay to the pursuer the dividend effeiring thereto, which was declared on 27th December, the defenders also refused to pay it to the pursuer, "seeing that these shares have no legal and registered owner entitled to require payment of and competent to give a valid receipt for same."

At an extraordinary general meeting of the defenders' company held on 5th May 1899 a resolution was passed by which certain of the original articles of association (including articles, 12, 13, 14, 59, and 61 above quoted) were altered and other articles substituted therefor.

Section 31 of the amended articles of association was in these terms—"No transfer shall be made or registered in favour of a transferee under the age of twenty-one years, or in favour of a woman, married, widowed, or single." Section 38 empowered

the directors to refuse to register any transfer of a share where the directors were of opinion that it was not desirable to allow the proposed transferee to become a member of the company. The amended articles further provided that in the event of the death of a member of the company the directors might require his representatives to serve the company with notice that they desired to transfer the shares (secs. 32 and 52), and if the company found a purchaser for the shares the representatives were to be bound to transfer them to him at the "current price," "current price" being defined (sec. 39) as the price fixed at the last preceding general meeting, and in default thereof as a sum equal to the amount of the capital paid upon the shares.

On 18th May 1899 the pursuer raised the present action.

At an extraordinary general meeting of the defenders' company held on 22nd May the amended articles of association were duly confirmed, and on 21st June the defenders addressed a letter to the pursuer requiring her to serve the company with a transfer notice in terms of the amended articles.

The pursuer averred that the valuation of £100 per share was much under the true value of the shares, the balance-sheets for the years 1897 to 1899 showing an average nett profit of between £6000 and £7000 upon the paid-up capital of £5000. She averred further that she believed that the defenders' object in passing the resolution altering the articles of association was to exclude her from becoming a shareholder, and to compulsorily acquire the shares for their own behoof at a most inadequate price.

The pursuer pleaded—"(1) The pursuer as executrix-dative of her said husband being entitled to and vested in his shares of the defenders' company, she is entitled to decree as concluded for. (3) The existing articles of association having no retrospective effect as from the date of their adoption, and *separatim*, having no retrospective effect as from the date of the institution of the present action, the defenders' second plea-in-law should be repelled. (4) In respect that the restriction upon the pursuer's right to be registered as her husband's executrix contained in the said articles of association is invalid and illegal, the pursuer is entitled to decree as concluded for."

The defenders pleaded—"(1) The action as laid is excluded by the 74th section of the articles of association as existing at the date of Mr Moir's death. (2) The pursuer's averments are irrelevant. (3) The defenders having acted within the powers conferred on them by the articles of association as existing as at the date of Mr Moir's death, (*a*) in refusing to register the pursuer as proprietrix of the shares libelled, and (*b*) in holding in suspense the said dividends, the defenders ought to be assoilzied from the whole conclusions of the summons with expenses. (4) In respect that the shares of the late Mr Moir fall to be dealt with in accordance with the defenders' articles of association, as confirmed and approved by the defenders at the extraordinary general meeting held on 22nd May 1899, and the defenders being willing to implement the obligations in pursuer's favour incumbent upon them under said articles of association, the defenders are entitled to absolvitor."

The Companies Act 1862 (25 and 26 Vict. c. 89), sec. 50, enacts as follows:—"Subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association, . . . or make new regulations to the exclusion of or in addition to all or any of the regulations of the company, and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution."

On 23rd January 1900 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor, finding, *inter alia*, that the question between the parties, so far as it depended on articles of association, depended on the original articles, and was not affected by the new articles, and that the questions raised in the action fell under the 74th section thereof, to be submitted to an arbiter as therein provided, and sisted the cause in order that it might be submitted to arbitration.

*Opinion.*—[*After stating the facts*]—"This action is based on the original articles, and the pursuer cannot succeed if her right depends on the new articles, which admittedly the defenders are ready and have offered to implement. The defenders contend that the pursuer's right as executrix depends on the new articles.

"The distinction between the original articles and the new articles, so far as they bear on the pursuer's rights as executrix of her husband, is not at first sight obvious. Both articles purport to authorise the directors to refuse to register the successor of a deceased member, and both purport to provide for the sale of the deceased member's shares and the payment of the price to his representative.

"Section 12 of the original articles provides that the directors may 'without assigning any reason therefor decline to register any successor to a deceased member other than a purchaser.' The 59th section provides that 'when two years shall elapse after the decease of any shareholder without any person being registered as successor to him in respect of any shares, the directors, after the lapse of such two years, may sell any such shares, holding and accounting for the nett proceeds thereof to those equitably entitled.' The same section contains provisions as to dividends on such shares, to which at present it is sufficient to refer.

"But the original articles contain, besides, a clause (the 14th) which is as follows:—'If such declinature is made as above provided for, the company shall be bound to purchase the shares in question at the price at which they were valued under section 61 of these articles.' That is, apparently, at the price at which they were valued at the immediately prior annual valuation.

"The pursuer attaches importance to this section, for a reason which will be afterwards explained. But the defenders contend that it does not refer to section 12 at all, but only to section 14, which provides for the bankruptcy of a member. The pursuer contends that it refers to both.

"Clause 38 of the new articles provides that the directors may refuse to register a transfer when they are of opinion that it is not desirable to allow the proposed transferee to become a member. The effect of clause 32 and clause 52, read together, is to provide that when a member dies, his share may be sold by the company to their nominee at the current price, that is (section 39) at the price fixed at the last general meeting, 'and in default thereof, for the capital sum paid upon the shares.'

"There thus appears on the surface to be no very material difference between the provisions of the one set of articles and the other. The power to refuse to enter the name of a person in the position of the pursuer on the register is as explicit in the original articles as in the new. But the reason why the pursuer prefers the original articles is this—that she has been advised that clause 12 of the original articles above quoted is invalid and ineffectual, and that therefore these articles do not negative her right to be placed on the register; but that she cannot maintain the same argument in reference to the new articles, under which she (as I understand) concedes that the directors are entitled to exclude her; and for that reason her claim to be entered on the register is of necessity based on the original articles.

"In the original articles there is a reference clause (the 74th), expressed in very comprehensive language, by which it is provided—[*His Lordship quoted the clause*]. There is no corresponding clause in the new articles.

"The questions which were debated in the procedure roll were four:—(*First*) Whether the case is to be determined in accordance with the original articles or with the new articles? If with the new articles, the defenders are admittedly entitled to absolvitor from the first conclusions, and no further question regarding them has to be considered. But if the question depends on the original articles, then the following additional questions arise, viz.—(*Secondly*) Whether the Court is excluded under section 74, or, if not, whether the questions between the parties must under that clause be submitted to arbitration? (*Thirdly*) If the question should be held not to fall under the clause of arbitration, whether the defenders are bound to register the pursuer? And (*Fourthly*) What is the pursuer's right to dividends? In the view of the case which has commended itself to me, I shall require to deal with the first and second questions only.

"*First.* Which of the two articles of association applies to this case? That seems to be clearly the question which must be decided first. It is to be observed, in the first place, that the validity of the resolution to adopt the new articles has not been questioned. These rules are not said to be in conflict with the memorandum, or for any other reason *ultra vires.* It is admitted that the new articles are the articles which, along with the memorandum, now regulate the company. Their validity dates, not from the date of the adoption of the resolution, viz., 5th May 1899, but from the date of confirmation, *i.e.*, 22nd May 1899, which is four days after the summons was signeted and served, and at and from that date the original articles were abolished. But although the new articles are now the articles of the company, it does not follow that they apply to this particular question which the pursuer has raised. That question is not, it will be observed, a question about the rights of the pursuer as a partner, but about her right to be a partner. At the date of her husband's death, and also at the date of her confirmation as executrix, and of her demand to be put on the register, the original articles were in force; and she certainly had then such right as the original articles or the law conferred. If that was a right to be put on the register, then the defenders' obligation was to put her on the register on 24th December 1898, the date of her demand. The pursuer maintains that that was her right under the original articles. I by no means affirm that she had that right under the original articles or in law, but I think that in considering this question whether the case is governed by the original articles or the new, she is entitled to say that the argument is to be taken on the footing that at that date she was entitled to be registered. The case may be put thus—Suppose that the original articles gave her an express right to be put on the register, could she be deprived of that right by new rules to which she was not and could not have been a consenting party, which as expressly denied that right. I am of opinion that that question should be answered in the negative. I think the pursuer had a vested right to be admitted as a partner if the original articles conferred that right, and that that was a right of which she could not be deprived without her consent. It is true, as the defenders contend, that her claim is founded on the articles, and that the articles could be altered by special resolution by the requisite majority,—indeed, could be altered as they have been altered, and therefore that her right under the articles was subject to variation, and, it may be, defeat; and it is maintained that it was only a right to be registered if the rules of the company were not altered. But I think that before the articles were altered her right was determined, and that the alterations of the articles could only have effect upon her if she was a member.

Strictly speaking, she was not a member, because she was not on the register (Companies Act 1862, section 22), but she is entitled to say that she must be dealt with as if that had been done which she was entitled to insist on at the date of her demand. If she was then entitled to insist on being entered, I think she must have that right still, and that her right, such as it was, could not be affected by delay in registering her name contrary to the articles then subsisting.

"Various authorities were referred to on this point, none of which appear to be conclusive. The pursuer referred to *Auld* v. *The Glasgow Working Men's Provident Investment Building Society*, July 16, 1885, 12 R. 1320, *rev.* February 15, 1887, 14 R. 27. That was a case as to a building society, the rules of which provided for payment to a withdrawing member of the sum at his credit. But in consequence of depreciation of the property of the society a resolution was adopted reducing the amount so payable. It was held in the House of Lords that the contract between the withdrawing member and the society was embodied in the rules, and could not be altered to the detriment of a member without his consent. In that case the rules appear not to have authorised the alteration, which was held to be *ultra vires*, which is an important distinction between that case and the present. The pursuer further referred to *The Liquidator of the Milford Fishing Company, Limited* v. *Jones*, May 20, 1895, 22 R. 577. But all that was decided in that case was that an alteration by the company of its articles of association was *ultra vires* because it conflicted with the memorandum. In this case the material alteration was admittedly *intra vires*.

"The defenders referred to the case of *Pope* v. *City and Suburban Permanent Building Society*, 1893, 2 Ch. 311, a case about which I feel some difficulty. Justice Chitty decided that a member of a building society who had given a month's notice of withdrawal was bound by an alteration of the rules of the society affecting injuriously the conditions of his withdrawal, which was made after the notice but before the money was paid. The alteration, however, was made under the sanction of a special clause in the rules, and was not said to be *ultra vires*. Justice Chitty held that although the member had a vested right to be paid according to the rule existing at the date of the notice, yet that his vested right was liable to be divested by a later rule authorised by the contract. The report is unsatisfactory, and does not shew why the money had not previously been paid under the notice, and it does not appear that the society had refused to pay it when it was due. That circumstance, which I think important, and the fact that it was a building society case, differentiate that case from the present, and make it unnecessary for me to say whether otherwise I would be prepared to follow it. It is a judgment by a single judge.

"The recent case of *Allen* v. *Gold Reefs of West Africa, Limited*, May 9-10, 1899, referred to on both sides, does not appear to be a satisfactory case or report, or an available authority. The question was different. It was whether an alteration of the rules which extended the lien of the company over shares held by a member, adopted after the member's death, affected his executor. That was a totally different question, but even on that question there was no judgment, because the case was decided on insufficiency of notice.

"The case of *James* v. *Buena Ventura Nitrate Syndicate, Limited*, 1896, 1 Ch. 456, is not in my opinion applicable. It was to the effect that the estate of a deceased member might participate in an allotment of shares made after his death but while his name was on the register. It was contended by the defender that so long as the name of a deceased member was on the register, his estate was to be treated as if it were the member, and was subject to all the fluctuations in the fortunes of the company, and to all the alterations of its rules to which the member would have been subject if he were alive. That may be quite sound, but I do not think that it affects the right of the company to destroy a vested interest to be admitted as a member by the retrospective effect of a special resolution.

"I am, on the whole, of opinion that the vested interest of the pursuer is to be dealt with at the date of her demand, 24th December 1898, on the footing that her rights were expressed in the original articles, and that her right to be entered in the register (if that was her right under these original articles) has not been affected by the special resolution confirmed on 22nd May 1899.

"If that were doubtful, there is a specialty in this case which I take to be conclusive; for not only did the pursuer's right depend on the original rules at the time when she made her demand extrajudicially, but it did so when her claim became litigious. She raised this action on 18th May, and at that date the new rules had no existence, and it appears to me that the maxim *pendente lite nihil innovandum* applies, and concludes the question.

"For these reasons I have come to the conclusion that the right of the pursuer, on the one hand, to be put on the register, and the right of the defenders, on the other hand, to refuse to put her on the register, depends on the original articles and not on the new articles."

His Lordship then dealt with the arbitration clause, and expressed the opinion that the questions raised in the action fell to be determined thereunder.

The pursuer reclaimed. In the interval between the date of the Lord Ordinary's interlocutor, and the debate in the Inner House, the last of the three arbiters named in the arbitration clause died and the whole case therefore fell to be determined by the Court. When the case came on for hearing, the defenders stated that they reclaimed against the interlocutor of the Lord Ordinary so far as it found that the question depended on the original articles of association, and was not affected by the new

articles. They contended further that assuming the pursuer's rights depended on the original articles, they were entitled thereunder to refuse to register her as owner of the shares. They offered to procure a purchaser at the price fixed in terms of article 61, and to register him as owner.

Argued for the defenders—1. The pursuers' rights depended on the amended articles of association, and not on the original articles. Under sec. 50 of the company's Act 1862, a limited company had power to alter its articles of association. Mr Moir was thus a party to an alterable contract, and his executrix could have no higher right than he had—*Allen* v. *Gold Reefs of West Africa Limited* [1900], 1 Ch. 656; *Andrews* v. *Gas Meter Company* [1897], 1 Ch. 361; *Pope* v. *City and Suburban Permanent Building Society* [1893], 2 Ch. 311. The cases of *Pope* and *Allen* were *a fortiori* of the present. In *Allen* the Court held that the rights of creditors could be defeated by subsequent alteration of the articles. Had the articles expressly provided that an executor should be registered, it was within the power of the defenders to refuse to register, and then alter the articles so as to exclude executors. In any view, the new articles, even if reducible, stood unreduced, and must be held to be valid. The pursuer's claim to be registered was therefore excluded, under section 31 of the amended articles, or at least under section 52, the defenders having served her with a notice in terms of that section, and she was therefore bound to transfer the shares at the current price to the defenders' nominee. 2. But if the Lord Ordinary's view were sound, that the pursuer's rights depended on the original articles, she had no absolute right to be registered thereunder. The obligation on the defenders to purchase under section 14, applied only to the case of a bankrupt member, and did not refer to section 12, which gave the defenders an absolute right to refuse to register any successor of a deceased member other than a purchaser. An executor had a complete remedy under section 12 apart from section 14, for he could sell his shares, and the company was obliged to register the purchaser. But if section 14 applied to the present case, it was not the law that a company could under no circumstances purchase its own shares—*British and American Trustee and Finance Corporation* v. *Couper* [1894] A.C. 399, *per* L. Ch. Herschell. The rule of *Trevor* v. *Whitworth* [1887], 12 App. Ca. 409, quoted by the pursuer, did not apply *inter socios*, but only in a question with creditors. It was not to be assumed that the company would exercise their right in an illegal way. If they purchased the shares without reducing their capital, no doubt that would be illegal, and the pursuer might be liable in the event of the company becoming bankrupt. But the defenders were prepared to find a purchaser, and give the pursuer the current price of the shares in terms of section 14. That was a perfectly legal mode of discharging their obligation to purchase the shares, and it was all that the pursuer had a right to demand. In any view, if section 14 were *ultra vires*, it might be struck out; section 59 remained, which provided for the rights of executors.

Argued for the pursuer—(1) The Lord Ordinary was right in holding that the pursuer's claim to be registered must be determined under the original articles, which constituted the contract between the company and Mr Moir. The amended articles did not purport to affect vested rights or act retrospectively; if they did they were *ultra vires*. The company could not break its contract—*James* v. *Buena Ventura Nitrate Grounds Syndicate*, 1896, 1 Ch. 456, *per* Rigby, L.J.; *Auld* v. *Glasgow Working Men's Building Society*, Feb. 15, 1887, 14 R. (H.L.) 27; *Allen*, *supra*. (2) The question therefore was, what was the contract under the original articles? Sections 12 and 14 must stand or fall together, and section 14 purported to give power to the company to purchase its own shares, which was illegal—*Trevor* v. *Whitworth*, *supra*; *Hope* v. *International Financial Society* (1876), 4 Ch. Div. 327. No doubt a company might reduce its capital with the sanction of the Court, but in the present case it had not done so, and the Court would never sanction reduction with an unpaid liability of £75 on each £100. The company was thus never *in titulo* to enforce section 14. The whole scheme had broken down, and there was therefore nothing to justify the defenders' refusal to register the pursuer as a shareholder. The cases of *Pope* and *Allen* were distinguishable from the present, because here the defenders were *in mora;* the pursuer was entitled to be registered, and the defenders had no right to delay registration. In *Allen* the application was not made till after the alteration of the rules. Section 59 applied only to unclaimed shares or dividends, and had no application to the present case.

At advising—

LORD TRAYNER—The late Mr Moir held and was registered as holder of twenty-two shares in the defenders' company. The pursuer as executrix of Mr Moir is now the owner of these shares, and the first and leading purpose of this action is to have the defenders ordained to enter the pursuer's name in the share register as such owner, which they refuse to do. The Lord Ordinary has decided that the question thus raised is one which, according to the provisions of the company's articles of association, must be determined by arbitration. But we have been informed that the question cannot now be decided in that manner, because the arbiters named in the articles are all dead. The clause of arbitration has thus fallen, and the matter at issue must be determined by the Court.

By the original articles of association of the defenders' company it was provided as follows:—"12. The directors may, after 31st December 1888, without assigning any reason therefor, decline to register any successor to a deceased member other than a purchaser." And "14. If such declinature is made as above provided for, the company shall be bound

to purchase the shares in question at the price at which they were valued under section 61 of these articles."

These articles were in full force and observance when the late Mr Moir purchased his shares, and they continued to be so until after his death, which happened in the month of July 1898. Shortly thereafter the pursuer desired the defenders to enter her name on the register of the company, but the defenders declined to do this, and offered to take over the shares at the price at which they were valued at their last valuation by the company, all as they maintained in terms of the articles of association. Pending the discussion as to the pursuer's right to be registered as the owner of the shares, the defenders' company on 5th May 1899 passed a special resolution altering the articles of association, which was duly confirmed in terms of the Companies Acts on 22nd May 1899, whereby they resolved that "No transfer shall be made or registered in favour of a transferee under the age of twenty-one years, or in favour of a woman, married, widowed, or single." If this resolution can be pleaded against the pursuer, *cadit quæstio*, but she maintains that it cannot. She does not dispute the power of the company to pass such a resolution, nor dispute that it was passed and confirmed in all respects regularly according to statutory requirements, but she contends that it cannot affect her rights, (1) because the resolution, which was passed after the date of her acquiring right to the shares, and her demand to be registered, cannot have a retrospective effect, and (2) because her demand was made judicially by service of her summons on 18th May 1899 before the resolution was confirmed, and therefore before it had any legal effect. *Pendente lite nihil innovandum.* The defenders, on the other hand, maintain that under section 50 of the Act of 1862 they had power to alter the articles; that any such alteration is by statute declared to be of the same validity "as if they had been originally contained in the articles of association;" that Mr Moir bought his shares subject to this right of alteration, and would have been bound thereby had he survived, and that the pursuer is in no better position than her husband would have been. In support of their view the defenders cited various decisions pronounced in England, the latest in date (and, as it appears to me, the most apposite to the present case) being the case of *Allen* (1900), 1 Ch. 656, in which it was decided (to state it generally) that in view of the statutory power to alter articles by resolution of the company, an alteration so made upon the articles of association was effectual against the executors of a deceased shareholder, although the alteration was made (1) after the shareholder's death; and (2) after a demand had been made by his executors, which could not have been resisted by the company had the articles remained unaltered. It is right to notice that there was some difference of judicial opinion in that case, but if it were necessary to decide the same question here, I would, as at present advised, be inclined to follow the views expressed by the Master of the Rolls—views which I think are supported by the reasons he assigns for them as well as by the authorities to which he refers. But I think it unnecessary to decide here the question I have been dealing with, for it appears to me that the pursuer's claim to be registered as a shareholder in the defenders' company is excluded by the original articles of association to which she appeals. At the outset of my opinion I quoted the two articles to which I now specially refer. By the first of them (article 12) the right of the defenders to refuse to register the pursuer is as plain as language can make it; by the second (article 14) the defenders bind themselves, if they exercise the power conferred on them by article 12, "to purchase the shares in question at the price at which they were valued," &c. The pursuer admits that under article 12 her present claim would be excluded if it stood alone. But she says that articles 12 and 14 must be read together as parts of one clause; that the condition of the defenders' right to refuse to register her is that they shall purchase her shares; that they cannot legally do so, and that not being in a position to fulfil the condition they cannot exercise the right. It appears to me immaterial whether the two articles are read separately or together. To separate them or to connect them does not alter their tenor or effect. But taken separately or together I think the one is not a condition of the other as the pursuer maintains. The first article (or the first part of the article) contains the expression of an absolute right, and is not limited or burdened by any condition. But it is accompanied by the statement that the company shall underlie a certain obligation if they exercise the right. The pursuer says that that obligation cannot be fulfilled; that to do so would be illegal. That, however, is only saying that the obligation as granted (and it is the defenders' only obligation) is one which cannot be enforced. It need scarcely be observed that the obligation such as it is was given by the defenders in good faith. At the date when the articles of association were framed it had not been decided that companies with limited liability could not purchase their own shares. There is therefore no ground for supposing that the late Mr Moir was induced to become a shareholder by the company offering him (in certain circumstances) their obligation to do something which they knew they could not, and could not be called upon to perform. Mr Moir was equally acquainted with or equally ignorant of the law with the defenders. I notice this because it was urged upon us that to hold the defenders entitled to exercise their right to reject the pursuer as a shareholder without compelling them to fulfil the obligation to purchase would result in an inequity. But this argument does not affect my mind in the least. The company has no desire to escape the fulfilment of the obligation; the law prevents them from fulfilling it literally. But recognising a duty towards the

pursuer, in consequence of their refusal to register her name as a shareholder, and being unable to fulfil their obligation according to the letter of it, they now offer to procure for the pursuer a purchaser of the shares, whose name they will register, and at the price ascertained according to the provisions of article 61 of the articles of association. This appears to me to be an offer which deprives the pursuer of all ground for saying that she is being subjected to inequitable treatment.

I am therefore of opinion that the defenders are entitled to refuse to register the pursuer's name as a holder of shares in their company.

The summons contains petitory conclusions which have reference to the dividends due on the shares in question. The defenders decline to pay these, in respect the articles of association (article 59) provide that all dividends on shares "not having a legal and registered owner entitled to require payment, and competent to give a valid receipt for the same, shall remain in suspense," &c. Now, the pursuer is certainly not the registered owner of the shares in question, but just as certainly she is the legal owner of them, and *in titulo* to give a valid receipt for the dividends. I am not therefore disposed at present to reject this part of the pursuer's claim, and I do not understand why the defenders oppose it. But that is a secondary question, which may be allowed to stand over in the meantime. If the pursuer consents to transfer the shares to a purchaser named by the company, the dividends will no doubt be paid to her. The defenders may possibly disembarrass the case of this question by paying the dividends at once. I would propose therefore to assoilzie the defenders from the first and second conclusions of the summons, and continue the cause meantime *quoad* the petitory conclusions.

LORD YOUNG—I concur. I have more doubt than Lord Trayner of the applicability of the amended articles of association to the effect of causing a loss to the pursuer in the circumstances in which she was placed when the change was made, but I agree with his Lordship that there is sufficient in the case for its decision on the same grounds as he has assigned without pronouncing any opinion on that question. The only other remark I have to make is with reference to the declinature of the defenders to register the pursuer as owner of the shares in dispute. By section 14 of the original articles it is provided that the company shall be bound to purchase the shares at the price at which they were valued under section 61. Under that clause I think the only interest which the pursuer or any other person in her position has is to get the price of her shares. If she is not to be registered as a shareholder, and the defenders are entitled to refuse to register her, she is entitled to get the price, and the defenders are ready to give her that price on the transference of the shares to them.

LORD MONCREIFF—(whose opinion was read by the LORD JUSTICE-CLERK)—The pursuer's husband Mr William Moir died on 27th July 1898. He was then possessed of twenty-two shares of the nominal value of £100 each in the defenders' company, on which the sum of £25 per share had been paid.

The pursuer having been confirmed executrix-dative to her husband, called upon the defenders through her agents on 24th December 1898 to transfer the said shares to her name. By letter dated 27th December 1898 the defenders' agents were informed that the directors declined to transfer the shares to the pursuer. This declinature was rested upon the 12th article of association, which was as follows:—"The directors may, after 31st December 1888, without assigning any reason therefor, decline to register any successor to a deceased member other than a purchaser." The pursuer maintains that this article, which *ex facie* was sufficient to justify the action of the directors, was invalid on account of the invalidity of the 14th article, which must be read in connection with it, and runs as follows;—"If such declinature is made, as above provided for, the company shall be bound to purchase the shares in question at the price at which they were valued under section 61 of these articles"—that is, at the last yearly balance.

The defenders' directors seem to have had some doubt about the validity of these articles, because on 5th May 1899 they convened an extraordinary general meeting of the company and resolved to alter articles 3 to 75 of the original articles of association. In regard to this alteration it is enough to say in the meantime that its main object was to get rid of the illegal power conferred by the 14th of the original articles; secondly, that under the 31st of the new articles it was provided that "no transfer shall be made or registered in favour of a transferee under the age of twenty-one years, or in favour of a woman, married, widowed, or single." This article, if it applies effectually, excludes the pursuer. Then by the articles 32 to 39 elaborate provisions are made for the disposal of the shares of persons who are desirous of transferring shares to which they have right, where the directors either cannot or may refuse to register the person whose name is submitted. It comes to this, that in such a case the board are empowered to nominate the person who is to take the shares.

Before these resolutions were confirmed the present action was raised, the summons being signeted 18th May 1899.

On 22nd May 1899 the said resolution was confirmed and unanimously approved at an extraordinary general meeting of the defenders' company.

1. The defenders plead in the first place that the pursuer's rights must be determined under the new articles of association, and that accordingly is the first thing to be considered. This question must be taken on the assumption that under the original articles the defenders could not have refused to register the pursuer as her husband's successor.

I am of opinion that the new articles do not affect the pursuer's rights. The defenders' proposition, as I understand it, is that if a company has power to alter its articles of association no shareholder or representative of a shareholder can acquire an indefeasible right under the original articles even while they remain unaltered, and that although a vested and exigible right has emerged and has been asserted, the company can defeat it by altering the articles of association *ex post facto* if they find that they can at any time command a sufficient majority of the shareholders to pass and confirm the necessary resolutions. I am unable to concur in this view. It is true that if Mr Moir had survived he could not have prevented the company from altering the articles if the requisite majority of shareholders desired to do so. But he could at least have appeared and opposed the motion, and besides in the case supposed nothing would have happened to interpel the company from passing and confirming the resolution if they were able to do so.

But here the pursuer's right to be registered had emerged and had been asserted, and what the company now desire to do is to exclude the deceased shareholder's representative by means of these new articles, which were passed after the pursuer's claim had been made, and after the directors had by their declinature to register her prevented her or anyone representing the shares from voting on the subject.

In my opinion the directors were bound under the existing articles, assuming their meaning and effect to be as I have said, to comply with the pursuer's demand, and that they were effectually interpelled from affecting her interests by the resolutions which they subsequently passed and confirmed.

The defender's counsel pressed upon us certain English decisions which are said to establish an opposite view, and in particular the cases of *Pope* v. *City and Suburban Permanent Building Society*, L.R., 2 Ch. [1893] p. 311; and *Allen* v. *Gold Reefs of West Africa, Limited*, L.R., 1 Ch. [1900], p. 656. The first case was decided by Mr Justice Chitty sitting alone; the second case was decided by the Court of Appeal varying the judgment of Mr Justice Kekewich (2 Ch. [1899], p. 40), Lord Justice Vaughan Williams dissenting.

In *Pope's* case, by one of the rules of a building society, any member upon giving one month's notice in writing might withdraw his investment at any monthly meeting. From this I understand that at the next monthly meeting after expiry of the month's notice the member was entitled to withdraw and receive payment of his investments. In the report it is stated that the plaintiff gave notice on 5th January 1891, but it is not stated whether he appeared at a monthly meeting and demanded payment of his investments. All that is said is that he did not receive payment, and that some months later, in May 1891, the Society altered the rule in question to the effect of giving the directors power in their discretion to make payments to other members which might have the effect of postponing payment to the plaintiff. It may be that if the plaintiff did not follow up his notice of withdrawal by claiming payment at a monthly meeting, the Court may have been justified in holding that he had departed from his notice, and that as he still remained a member the society was entitled to alter the rule. But I do not think that this is the ground on which Mr Justice Chitty's judgment proceeds, and if it was the case that the plaintiff not only gave notice of withdrawal, but demanded payment in terms of the rule before it was altered, the society was, in my opinion, bound to pay him out. Mr Justice Chitty's judgment seems to proceed on the ground that the plaintiff still remained a member of the society, but that, as I read the case, was because the society declined to do what they were bound to do under the existing rules, viz., to pay him out.

As to *Allen's* case I am inclined to agree with Lord Justice Vaughan Williams, that in the circumstances the company were not entitled to defeat the shareholder's rights and give themselves a lien on the fully paid-up shares which the shareholders held free of lien. But even if that case is to be held to be well decided, I am not sure that it necessarily rules the present, because it may be argued that where a shareholder holds shares under articles of association which may be altered, the mere fact of his death will not necessarily deprive the company of the power of altering them. If, for instance, Zuccani's executors had been registered in his stead, they would have taken the shares subject to the same power of alteration, assuming that the power to alter existed. A distinction—and I think it is a solid one in the present case—is that what is sought to be struck at here is the pursuer's right to be registered, which was a matter which fell to be decided at the time when the claim was made, a decision which could not be indefinitely postponed until the company found themselves in a position to defeat it by altering the rule.

On this point therefore I am of opinion that the pursuer's rights must be judged of under the original articles.

2. The second question which the Lord Ordinary has not decided (and which is now open for our decision owing to the death of the sole arbiter) is in my opinion more difficult. It is, whether under the original articles the directors were entitled to refuse to register the pursuer. Standing the first article they certainly were; but then the 14th article provides that in the event of their declining to register the successor of a deceased member "the company should be bound to purchase the shares in question at the price at which they were valued under section 61 of these articles." This, as I read the articles, is the only provision for the disposal of the shares of a deceased member where his successor appears and asks to be registered, and is declined.

Now, purchase of its own shares by a company is illegal—*Trevor* v. *Whitworth*,

L.R., 12 App. Ca. 409; and if the pursuer had sold the shares to the company she would have remained liable for calls, and might have been called upon to repay the price which she received in the event of the bankruptcy of the company — *General Property Investment Company* v. *Mathieson*, 16 R. 280.

I read the 14th article as if it formed part of the 12th. It is the counterpart of it, and not separable from it. In one view it appears to be a concession to the rejected successor—the company must purchase her shares; but from another point of view the 12th and 14th articles enable the company to force a sale to themselves of a deceased member's shares in every case where they choose, without reason assigned, to decline to register the successor. Thus I think that this part of the contract is one and indivisible, and as the power to the company to purchase its own shares is illegal, both articles 12th and 14th must be read out.

The defenders, however, maintain that assuming that the company cannot purchase its own shares it is entitled to substitute for its obligation to do so an undertaking to find a nominee to take over and pay for the pursuer's shares. The question of law therefore is, whether when a contract or part of a contract is *ex facie* void, because it contains an impossible condition or a condition contrary to law, the party on whom the impossible or unlawful condition lies can, against the wish of the other party, maintain or revive the contract by tendering performance in a manner which is lawful but is not provided for or contemplated by the contract.

Now, however reasonable such a proposal as that which the defenders make may be, I doubt the power of the company to remodel the original articles in this way. If articles 12 and 14 are indivisible, they are void, because on its face the 14th article is unlawful, and the articles do not provide for any alternative mode by which the company may relieve the successor of the shares; because the 59th article which was referred to plainly refers only to a case where the representatives of a deceased shareholder do not come forward and claim the shares or dividends.

In connection with this I observe that in the new articles of association the company considered it necessary to take power to the board to nominate a purchaser in the event of any person proposing to transfer his shares; and it will be seen, if the articles 32 to 38 are examined, that it required a somewhat complicated set of provisions to effect what the defenders now seek to read into the original articles.

Therefore on this point also, although not without hesitation, I think that the pursuer has the best of a somewhat technical argument. The contentions of both parties have been somewhat extreme, but on the whole I think the balance lies with the pursuer and that she is entitled to succeed.

The LORD JUSTICE-CLERK concurred with Lord Trayner.

The Court assoilzied the defenders from the first and second conclusions of the summons, and *quoad ultra* continued the cause. By a subsequent interlocutor, dated 20th July 1900, the Court granted decree in terms of the petitory conclusions, and ordained the defenders to make payment to the pursuer of the sums of £440 and £550 concluded for.

Counsel for the Pursuer—W. Campbell, Q.C. — Duncan Smith. Agent — Thomas Henderson, W.S.

Counsel for the Defenders—Salvesen, Q.C. —T. B. Morison. Agents—Boyd, Jameson, & Kelly, W.S.

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*Friday, July* 20.

## FIRST DIVISION.

## STARK'S TRUSTEES *v.* COOPER'S TRUSTEES.

*Sheriff—Jurisdiction—Heritable Right or Title—Action for Half Cost of Mutual Gable—Sheriff Courts (Scotland) Act* 1877 (40 *and* 41 *Vict. cap.* 50), *sec.* 8, *sub-sec.* 4.

The Sheriff Courts (Scotland) Act 1877 provides, section 8, sub-section (4), "Actions relating to questions of heritable right or title . . . raised in a Sheriff Court shall be raised in the Sheriff Court of the county in which the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall be subject to the jurisdiction of the Sheriff and Sheriff-Substitute of such county."

In an action raised in the Sheriff Court of Lanarkshire against a body of English trustees owning property in Glasgow, concluding for payment of half the cost of re-erecting a mutual gable, the defenders pleaded no jurisdiction, and raised a question as to whether the gable in question was in reality mutual, or whether it was not entirely the property of the pursuers. *Held* that the Sheriff had jurisdiction, in respect (*a*) that the question as to the property in the gable was a question relating to "heritable right or title" within the meaning of the sub-section quoted above, and, *separatim*, (*b*) that apart from that sub-section a Sheriff has always jurisdiction in an action directed to recover half the cost of a wall alleged to be mutual between properties situated within his sheriffdom.

*Property — Mutual Gable—New Gable in Place of Old Demolished by Judicial Authority — Half Cost of Re-erection — Common Property — Common Interest — Right of Support.*

A and B were proprietors of adjoining houses in a burgh. Under A's titles full power was reserved to build a tenement to the south of A's tenement, and to use vents in A's south