deliveries or make any provision under which the deliveries should be equal. On the contrary, he refused to take any quantity except that which suited him for the time, and he has so acted that if I were to hold that the contract was still in force, I do not see how I could determine the obligations of the seller under it. If I were to hold that the seller was bound to deliver the balance in equal monthly quantities, I think that I would be making an entirely new contract.

When we heard the case, the pursuer claimed damages under the contract alone. But as I read the record, his claim is founded more on a new agreement to be discovered from the course of dealing, and I think that it was on this view that his case was presented in the Sheriff Court. I can find no such agreement. The pursuer was in evident breach of the contract very soon after it was made. The defender complained of the breach, and desired orders for equal monthly quantities. On 12th May 1801 he wrote—"If you cannot take up the cannel now due for delivery under contract, I cannot bind myself to give it later on." Nothing could be more distinct. While the pursuer was in breach of the contract the defender adhered to it, and he never altered his position. He gave great accommodation to the pursuer, but he made no new contract. I must say that I have no sympathy with the pursuer. He has, I think, been very generously dealt with, and I am surprised that he should have brought such an action as the present.

The LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

The Court assoilzied the defender.

Counsel for the Appellant—C. S. Dickson—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Salvesen—A. S. D. Thomson. Agent—A. C. D. Vert, S.S.C,

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Friday, December 8.

FIRST DIVISION.

FURNESS & COMPANY *v.* THE LIQUIDATORS OF THE "CYNTHIANA" STEAMSHIP COMPANY AND "FELICIANA" STEAMSHIP COMPANY.

Company—"Fully Paid-up" Shares—Representation—Agreement—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 25—*Transfer—Liquidation—Rectification of List of Contributories.*

In April 1891 C. F. & Company, under agreements, lent two steamship companies sums of money, receiving in security mortgages, assignments of freight, and "scrip" of the companies. There was no registered agreement as to the scrip under the 25th section of the Companies Act 1867, and no payment was made other than the loans, but shares in the companies, upon which nothing had been paid, were allotted by M and S, the directors, to C. F. & Company, with receipts for all possible calls, and with certificates representing that the shares were fully paid-up.

In November 1891 C. F. & Company, becoming apprehensive of liability, transferred the shares to S, who was then insolvent but not bankrupt. By inadvertence the transfers were not included in the annual returns, but with the authority of the Registrar of Joint-Stock Companies the return was rectified in March 1892. By mistake, however, the shares transferred to S were differently numbered from those held by C. F. & Company, although admittedly the same, and C. F. & Company's names still remained on the register although jottings opposite these shares stated that they were "transferred." The companies went into liquidation in June 1892, and the liquidators put the names of C. F. & Company on the "A" lists of contributories. C. F. & Company petitioned to have their names removed, on the ground (1) that their shares must be treated as fully paid-up, because they had only accepted shares represented to be so; and (2) that these shares had been duly transferred, and that there had been undue delay in removing their names.

Held that the shares could not be regarded as fully paid-up, but that they had been timeously transferred, and that accordingly C. F. & Company were entitled to have their names removed from the "A" lists, although they would require to go upon the "B" lists should such be made up.

Opinion expressed that under a petition for rectification of the list of contributories it is competent incidentally to rectify the register of shareholders.

The Cynthiana Steamship Company, Limited, was registered and incorporated under the Companies Acts 1862-1890 on 15th November 1890, having its registered office in Scotland. The nominal capital of the company was £400,000 divided into 800 shares of £50 each.

By sec. 55 of the company's articles of association Messrs Maclean & Sutherland, 71 Queen Street, Glasgow, were appointed managers, and it was provided that "so long as the said managers hold office they shall possess the whole powers and rights conferred by these articles or by law as directors.

Sec. 2 provides that "the company may decline, in respect of all shares not fully paid-up, to register any transfer of shares made by a member who is indebted to them . . . or bankrupt, and every transferror who is aware or suspects that his transferee is . . . bankrupt shall be bound to intimate his knowledge or suspicion to the directors. No member shall cease to

be such until a transfer or other legal title to his shares in favour of some other person has been registered."

Sec. 12 provides "that the instrument or transfer of any share in the company shall be executed both by the transferror and transferee, and the transferror shall be deemed to remain a holder of such share until the name of the transferee is entered in the register-book in respect thereof."

Sec. 14 provides that "the company may decline in respect of all shares not fully paid up to register any transfer of shares made by a member who is indebted to them or made to . . . a bankrupt." . . .

Christopher Furness & Company, London, who acted as managers for the British Maritime Mortgage Trust Limited, by agreement dated 13th April 1891, agreed to make a loan to the "Cynthiana" Steamship Company Limited of £1000, and in security thereof that company agreed to deposit with the Trust scrip of the company for £1000, and to give an assignment of freight and a second mortgage over the ship and certain acceptances.

Upon 6th May 1891 the following receipt was granted by the "Cynthiana" Steamship Company:— "Received of Messrs Christopher Furness & Company the sum of £1000, being four calls of £12, 10s. for 20 shares of the 'Cynthiana' Steamship Company Limited," and on the same date the following certificate was granted:—"This is to certify that Messrs Christopher Furness & Company . . . is registered proprietor of 20 shares of £50 each fully paid up, numbered from 193 to 212 inclusive in the "Cynthiana" Steamship Company Limited."

Messrs Christopher Furness & Company had previously lent on behalf of the same trust £6000 to the "Feliciana" Steamship Company Limited, a company in all respects similar to the "Cynthiana" Steamship Company, having the same articles of association and the same gentlemen, Messrs Maclean and Sutherland, as its managers. The loan was arranged on similar terms, except that "scrip" of the company was not originally bargained for, but 120 shares were afterwards given with receipt and certificate in form similar to those used in the case of the other company.

In October 1891 doubts having been suggested as to whether the shares of these two companies were really fully paid-up, Messrs Christopher Furness & Company executed transfer thereof in favour of Mr Sutherland, who was at that date insolvent but not bankrupt. The transferee on 8th November 1891 received from the company certificates in his favour as registered proprietor, which also certified that the shares were fully paid-up. By mistake the transfers were omitted from the annual return. This omission having been observed by the secretary of the trust, and leave to amend having been obtained from the Registrar of Joint-Stock Companies, the return was altered on 18th March 1892, but the numbers on the shares transferred to Sutherland were not the same as those on the shares allotted to Furness & Company, although the shares were identical, and the names of Furness & Company were not removed from the register, although "transferred" was pencilled against their shares.

On 23rd June 1892 both companies went into voluntary liquidation, and on 10th January 1893 the liquidators, notwithstanding their objections and explanations, put Messrs Christopher Furness & Company upon the "A" list of contributories in both cases.

Thereupon on 26th January 1893 Furness & Company presented petitions to the First Division of the Court of Session under the 138th section of the Companies Act 1862 to have their names removed from said "A" lists on the following grounds:— "(1) The petitioners stipulated for fully paid-up shares, and the company represented and certified that the shares taken by them were fully paid-up, and the liquidators are now barred from maintaining the contrary. (2) The shares are fully paid-up in cash. (3) In no case do the petitioners fall to be placed on the "A" list as present members, having transferred their shares about eight months before the winding-up began."

In their answers the liquidators submitted that the petitions should be refused, in respect that (1) the petitioners were registered owners of shares upon which nothing had been paid, the only payment of any kind being the sums lent by the petitioners. The receipts were granted to and received by the petitioners in the full knowledge that no such payment had been made, and that they had given the company no value for said shares. No agreement, such as is required by the 25th section of the Companies Act of 1867, had been executed or filed by the Registrar of Joint-Stock Companies. (2) The transfer alleged was executed for no consideration, and was not intended to transfer the said shares to Mr Sutherland, but was executed in pursuance of a collusive arrangement by which the petitioners sought to avoid liability. (3) Under the articles of association the company was entitled to decline, in respect of all shares not fully paid, to register a transfer until the whole calls due thereon were paid, and in the present case the petitioners were and are not entitled to have the said transfer registered. (4) In any case, the petitioners fell to be placed upon the B list, as having held the shares in question up to 15th March 1892, and there being debts due to creditors prior to that date to an amount greatly exceeding the total calls payable upon the said shares, which the total calls payable by the contributories in the A list are unable to meet.

Section 25 of the Companies Act (30 and 31 Vict. c. 131) provides that "Every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

The Court allowed a proof, which was taken by Lord Kinnear, and which brought out the facts given above.

At the hearing upon evidence the petitioners argued—(1) There had been what was equivalent to "payment in cash"—*cf. Spargo's* case (1873), 8 Ch. Ap. 407. (2) They only contracted for fully paid-up shares. They were entitled to rely upon the representations of the companies' directors that the shares allotted to them were fully paid-up, and they must therefore be regarded as holders of fully paid-up shares. *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004, laid it down that a transferee who accepted shares with a certificate by the company that they were fully paid-up, could not be put on the register as the holder of unpaid shares although in fact nothing had been paid upon them—*cf. Arnot's* case (1887), 36 C. D. 702; *in re Macdonald* (1893), 9 *Times'* L.R. 643; and *Carling's* case (1875), 1 C. D. 115, showed that a nominee in a position resembling that of the petitioners here was to be treated as a transferee. The petitioners here were third parties, being neither directors nor vendors, but brought in to lend money to the company. The *onus* of proving that the petitioners knew these shares were not fully paid-up lay on the liquidators, and had not been discharged—*In re Hall* (1887), 37 C. D. 712. (3) Weeks before the liquidation the petitioners had transferred their shares, and should not have been now on the register. If technically they were still on, they were entitled to have their names removed, because there had been undue delay in registering it. See *Nation's* case (1866), 3 Eq. 77. Contrast *Stenhouse* v. *City of Glasgow Bank*, October 31, 1879, 7 R. 102.

Argued for respondents—(1) There had been no payment in cash. The only money which had passed was by way of loan, and for that the petitioners had throughout occupied the position of creditors, having indeed sold one of the steamships under their mortgage. The requirements of the 25th section of the Act of 1867 had accordingly not been complied with, for there had been payment in cash, or its equivalent, and no registered agreement—*Barge's* case (1868), 5 Eq. 420; *Johannesburg Hotel Company* (1891), 1 Ch. 119; *Ooregum Gold Mining Company of India* v. *Roper* (1892), App. Cas. 125; *Eddystone Marine Insurance Company* (1893), 3 Ch. 9. (2) The case of *Burkinshaw* (*supra*) established an exception in favour of a transferee, or purchaser in the open market, who could not know that shares represented as fully paid-up were not so in fact. Here the only representation was the use of the words "fully paid-up" in the certificate. The form of receipt showed that no money had been paid upon them. The petitioners knew well their true character, and besides they occupied the position of allottees not of transferees. Their case fell under the law of the *London Celluloid Company* (1888), 39 C. D. 190. (3) There had been no *bona fide* transfer to which effect could be given. The directors ought to have refused under the 14th section of the articles of association to register the transfer, because at the time it was executed Furness & Company were indebted to the company in respect of the unpaid calls, and Sutherland, the transferee, was really bankrupt. The petitioners' names should not be removed. In previous cases where erroneously removed they had been restored—*Addison's* case (1870), 5 Ch. App. 294, which closely resembled the present one. The transfer was *ab initio* bad. It was a colourable transfer to a non-substantial person made to avoid liability, and was not such a transfer as the Court ought to recognise—*Shipman's* case (1868), 5 Eq. 219; *Anderson's* case (1869), 8 Eq. 509; *Gilbert's* case (1870), 5 Ch. App. 559; *Addlestone Linoleum Company* (1887), 37 C. D. 191.

At advising—

LORD PRESIDENT—This case presents an appearance of some complexity, and the full debate which we heard involved it in many conflicting and alternative legal views. When regard is had to the salient and clearly established facts the difficulty largely disappears.

In the first place, the petitioners were allottees of the shares now in question—that is to say, they received them on their first issue direct from the companies. *Prima facie*, therefore, they are not in the position of third parties who acquire shares by transference from the original allottee.

Upon what contracts, then, did they acquire the shares? Now, upon this, and upon all branches of the case, some apparent confusion is created by the interposition of Messrs M'Lean and Sutherland. The position of these gentlemen, however, is easily fixed. They were, under the articles of association, managers of the two companies; there were no directors, and the managers had all the powers of directors. This is made perfectly clear by article 55 of the articles of association of either company. In the matters in question, then, these gentlemen were the executive of the companies, and their acts were the acts of the companies. Acting, then, in this character Messrs M'Lean and Sutherland negotiated loans from the Mortgage Company, of which the petitioners were the managers. The securities on which those advances were made were mortgages over the steamers, policies of insurance, assignment of freights, and certain amounts of what is described in the documents constituting the agreement as "scrip" of the companies.

The whole case of the petitioners is that it was represented to them that the shares thus stipulated as security were fully paid-up, and that they having advanced their money on this representation, the shares must be held to be fully paid-up, the companies and the liquidators being barred from denying it.

There is a conflict of evidence as to whether in conversation between M'Lean and Sutherland, on the one hand, and Mr Stoker (who represented the petitioners on the other) it was made matter of stipula-

tion that the shares to be given as security should be "fully paid-up shares." In the correspondence the neutral term "scrip" is employed. The fact that at an earlier stage of the ships' history the former managers of the Mortgage Company expressly stipulated for fully paid-up shares is not decisive, as this was at a time when the ships not being built no mortgage could be granted. When the shares were delivered, however, they were accompanied by certificates that they were fully paid-up shares; and these certificates are the representation on which the petitioners substantially rely.

Now, I take it to be perfectly clear that the companies received no consideration whatever for the issue of these shares except the loans from the petitioners, for which they were delivered as security. Further, it has not been suggested that the petitioners were told that any other consideration had been granted to the companies by anybody else. It seems to me therefore that when the petitioners had these shares allotted to them the only representation made to them consisted in the shares being called fully paid-up shares, their history being perfectly well known to all concerned.

The sense in which this name was given to those shares was brought home to the petitioners, had that been necessary, a month after their issue, when they got a receipt for the calls on the shares of one of the steamers, by which the £1000 advanced for that vessel were said to have been received from the petitioners, "being four calls of £12, 10s. for 20 shares of the 'Cynthiana' Steamship Company, Limited." In the case of the "Feliciana" a similar receipt was called for and obtained some time afterwards, avowedly for the purpose of supporting the assertion of the certificate that the shares were fully paid-up.

All this while, and down to the present time, the petitioners have adhered to the position of creditors for the moneys advanced, have drawn interest on their loans, and in the case of one of the two vessels have sold her under their mortgage.

It appears to me, therefore, that these shares when issued were not *de facto* fully paid-up in cash, that this was known to the petitioners, and that the agreement upon which they were issued was one which, if legal at all, required to be registered under section 25 of the Act of 1867. No such agreement has been registered.

Now, in those circumstances the petitioners went upon the registers of the companies. They do not say that this was done without their knowledge, or that it was not according to the contract with the companies that they should become members, and they acted as members when subsequently they executed transfers of the shares.

Upon this state of the facts the petitioners seem to me to have no case in law apart from the transfers to which I am presently to refer. The central facts are, that on their own showing they directly contract with the companies for the issue of those shares as "fully paid-up," they well-knowing that cash had not been paid, and that they accept the position of members of the company. It is surely in vain for them to appeal to such cases as *Burkinshaw*, in which third parties acquiring shares in ordinary course have been held entitled to found on the representations of the company.

The petitioners, however, have an alternative contention that they have transferred their shares to Mr Sutherland, and that the registers ought to be rectified so as to give effect to those transfers. The facts relating to this branch of the case are identically the same in the case of the "Feliciana" as of the "Cynthiana." That such transfers were executed there is no doubt. It is also proved that in March 1892 the petitioners applied to have the registers altered accordingly. This request was not refused; but, on the other hand, the registers were not effectively altered, the thing apparently having been blundered. Mr Sutherland was put on the register as holder of different sets of shares from those which were the subjects of the transfers, although he had acquired none others, while the petitioners' names were not struck off the registers, but in each case a pencil note was put opposite their names to the effect that their shares were transferred. At present I think it clear that in law the petitioners are still on the register, especially having regard to section 25 of the Companies Act 1862 and section 12 of the articles of association of these companies. The question remains, whether the petitioners are not entitled now to have the registers rectified. Although the petitions relate to the lists of contributories, it seems competent incidentally to rectify the registers, and the respondent did not take any technical objection to our considering the question as if we had before us petitions to rectify the registers. After full consideration, I have come to the conclusion that the petitioners are entitled to have their names removed from the registers.

I do not think that the 14th article of association applies to this case so as to confer on the managers any right to refuse to register these transfers. The transferrors were not indebted to the company, nor was the transferee bankrupt. That he was insolvent I think is now established; but I do not consider that he was bankrupt in the sense of the article. Well, then, if the constitution of these particular companies did not give to the managers a special right to refuse to register these transfers, are they open to challenge on the general law of companies? It is plain, and indeed admitted, that the reason why the petitioners transferred the shares was that doubt having been thrown on their position as holders of paid-up shares, they wanted to be free of liability. I think it is pretty clear, on the other hand, that Mr Sutherland became transferee partly because he was insolvent. But, on the authorities, neither of these facts nor the two combined seem to render

the transfer illegal. Nor was the position of the company such as to make it the duty of its executive to refuse to alter the register. The company had not resolved to stop or to go into liquidation; in fact, it seems to have been, as it always had been, in low water, but not more. Accordingly, I think that in March 1892, when they asked it, the petitioners were entitled to have the transfers registered, and their names taken off the register. As this has not been done through no fault of theirs, I think they are now entitled to have it done.

If this should be the view of your Lordships, the prayer of each petition will be granted, and we may also order the registers to be rectified. It was admitted that in this event the petitioners' names must be put on the B list of contributories, should such a list be required.

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

The Court pronounced the following interlocutor:—

"Ordain the register of the 'Feliciana' Steamship Company, Limited, to be rectified by deleting therefrom the name of the petitioners Christopher Furness & Company as holders of 120 shares in said company, numbered 375 to 494 inclusive; also ordain the name of the petitioners, the said Furness & Company, to be removed from the A list of contributories of said Steamship Company in respect of said 120 shares, numbered 375 to 494 inclusive, and decern: Find the petitioners liable to the respondents in expenses, modified to one-half of the taxed amount thereof," &c.

Counsel for the Petitioners—Lorimer—Dickson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Liquidators—Guthrie—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, December 8.

SECOND DIVISION.

MAXWELL HERON *v.* DUNLOP.

Entail—Disentail—Value of Next Heir's Expectancy — Proper Security — Duties and Liabilities of Curator ad litem—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 53), *sec.* 12.

By section 12 of the Entail (Scotland) Act 1882 it is, *inter alia*, enacted that no curator *ad litem* who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or inadequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter."

An heir of entail presented a petition for disentail of the estate. The Court appointed a curator *ad litem* to the heir-apparent, who was a minor. By minute of agreement with the heir of entail the curator *ad litem* agreed to consent to the disentail, in exchange for a bond for £16,000 granted to his ward over the estate to be disentailed, postponed to bonds for certain debts mentioned in the agreement.

Thereafter the estates were sold, and the price left no balance to pay the £16,000. On the heir-apparent reaching majority he brought an action against his former curator *ad litem* for the £16,000 and interest, averring (1) that the security accepted by the defender as the value of his consent was improper and inadequate; (2) that the security accepted was postponed to debts which were not mentioned in the minute of agreement, and that therefore the curator *ad litem* had failed to get the security for which he stipulated in the minute of agreement.

Held that the action was irrelevant —*diss.* Lord Rutherfurd Clark, who was of opinion that there ought to be inquiry as to the second of the pursuer's averments, because if the defender gave his consent without getting the consideration for which he bargained, that was a failure of duty on his part from which the statute did not protect him.

By section 12 of the Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), it is enacted—"In any application under the Entail Acts to which the consent of any person is required, where such person is disabled under the provisions of the Entail Acts or otherwise from consenting by reason of being under age, or subject to other legal incapacity, the Court shall appoint his tutor curator, . . . or another person to be curator *ad litem* to the person under disability, and such curator *ad litem* may consent on his behalf, and no curator *ad litem* who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or inadequacy of consideration or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter."

In 1883 Captain John Maxwell Heron presented a petition to disentail the lands of Heron and Kirrouchtree, in the Stewartry of Kirkcudbright. Captain Maxwell Heron was born prior to 2nd June 1851, and his eldest son, Guy Maxwell Heron, being a minor, it was necessary that the value of his consent to the disentail should be ascertained. George Dunlop, W.S., Edinburgh, was appointed in the process curator *ad litem* to Guy Maxwell Heron. As such he gave his consent to the disentail, and on 18th February 1884, in respect of that consent, the Court approved of and interponed authority to the instrument of disentail.

The terms on which Mr Dunlop gave his consent appear from a minute of agreement between Captain Maxwell Heron