M. R.

1877

March 2.

PENDER *v.* LUSHINGTON.

[1877 P. 35.]

Company—Member—Transfer of Shares to increase Voting Power—General Meeting—Rejection of Votes—Action against Directors—Injunction—Name of Company, Right to use.

Where the articles of association of a limited company provided that the company should not be affected with notice of any trust, and contained provisions that every member should be entitled to one vote at a general meeting for every ten shares, but should not be entitled to more than 100 votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto:—

Held, that, according to the articles, a member of the company was a person whose name was on the register of shareholders; that the register was the only evidence by which the rights of members to vote at a general meeting could be ascertained; and that at a general meeting no votes of shareholders properly qualified and whose names had been three months on the register should be rejected on the ground that their shares had been transferred to them by other shareholders for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the shares.

An action was brought by a shareholder whose vote was rejected, on behalf of himself and all others who had voted with him, naming the company as co-Plaintiff, against the directors, for an injunction to restrain them from acting on the footing of the votes being bad:—

Held, that the Plaintiffs were entitled to an injunction:

Held, also, that till a meeting should be called to decide whether or not the company's name should be used as Plaintiff, the company's name should remain on the record.

Statement.

THE *Direct United States Cable Company, Limited*, was a company registered under the *Companies Act*, 1862, with a memorandum and articles of association.

By the 2nd article the register of shareholders was directed "to be kept pursuant to the terms of the *Companies Act*, 1862."

By the 19th article it was provided that "the company shall not be affected with notice of any trust," also that "the executors of a deceased member shall be the only persons recognised by the company as having any title to his share."

The following articles related to the provisions for voting at general meetings:—

Article 56: "No member holding less than ten shares is entitled to a vote, and every member holding at least that number of shares shall have one vote for every complete number of ten shares, with the limit that no shareholder shall be entitled to more than 100 votes in all."

Article 58: "If two or more persons are jointly entitled to vote in respect of any share or shares, the member whose name stands first on the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same."

Article 59: "No member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company unless he has been possessed of the shares in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote."

Subsequent articles contained provisions for giving votes by proxy.

The Plaintiff, *John Pender*, was the registered holder of 1000 shares in the company. He was also chairman of the *Globe Telegraph and Trust Company, Limited*, which was formed in 1873 for the purpose of acquiring telegraphic shares and property, and which was worked in connection with the *Anglo-American Telegraph Company*.

On the 2nd of February, 1877, an extraordinary general meeting of the company was held pursuant to notice, at which *Pender* moved a resolution in these terms: "That it is expedient to put an end to the present antagonism of this company towards the *Anglo-American Telegraph Company* and its connections, and to work this company's cable in friendly alliance with their lines; and that a committee of shareholders be appointed to be named by the meeting to confer with the directors as to the best method of giving effect to this resolution, and to report to the shareholders thereon at such time as the meeting shall appoint."

This resolution was seconded and put to the meeting, whereupon

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an amendment thereto was moved by Mr. *Bramwell*, a shareholder of the company, which having been seconded was put to the meeting by the chairman, and declared to be carried by a large majority.

A poll was then demanded by Mr. *Pender*, and the meeting was adjourned to the 5th of February. Meanwhile the votes and the proxies, which had been duly lodged at the office, were examined by the scrutineers.

At the adjourned meeting it appeared from the report of the scrutineers that according to the number of votes recorded there would have been a majority of forty against the amendment, but the chairman ruled out 649 votes, and declared the amendment carried by a majority of 609. Mr. *Pender* then moved a second resolution, and the votes were again taken, and it would have been carried, but the chairman ruled out the same votes as before, and it was accordingly lost.

The grounds on which the chairman ruled out these votes were that they were given in respect of shares which had been transferred by certain large shareholders in the *Direct United States Cable Company*, who were also shareholders in the *Globe Telegraph and Trust Company*, and whose voting power was by Article 56 limited to 100 votes, to their own nominees who had no beneficial interest in the *Direct United States Cable Company*, and with the object of increasing the voting powers of the transferors and of furthering the views of the *Globe Telegraph and Trust Company*. These shares had been duly transferred to their present holders three months before the meeting was held, according to Article 59, and the names of the holders were on the register.

An action was then brought by *Pender* (on behalf of himself and all other the shareholders in the *Direct United States Cable Company, Limited*, who voted against the amendment to the first resolution, and in favour of the second resolution, at the said meetings) and the said *Direct United States Cable Company*, as Plaintiffs, and *E. H. Lushington* and others, the directors of the same company, as Defendants.

A motion was now made on behalf of the Plaintiffs to restrain the Defendants from ruling out the 649 votes, and acting contrary to the second resolution, until the hearing of the action.

A summons was also taken out by the Defendants to strike out the name of the company as Plaintiffs, inasmuch as it had been used without the authority of the directors or of a general meeting.

Argument.

Fry, Q.C., *Davey*, Q.C., and *H. B. Buckley*, in support of the motion:—

The Plaintiff and those whom he represents are entitled to an injunction to restrain the rejection of the votes representing the 649 shares standing in the names of the Plaintiff and the shareholders in the *Globe Company*. They were clearly registered members of the company, and entitled to vote, having held their shares for three months before the general meeting was held. The fact that some of them were trustees for other persons, or that they were shareholders in a rival company, is immaterial, as the chairman had no right to inquire into the question whether they were beneficial owners, or whether they exercised their right of voting in the interest of another company.

In the case of *In re Stranton Iron and Steel Company* (1), where the holders of 1000 fully paid-up shares made nine transfers of 100 shares each to as many nominees of their own, in order that they might secure full voting power at a meeting of the company, and the directors refused to register the transfers, Vice-Chancellor *Bacon* held that the directors had no right to refuse to register them for the purpose of excluding the transferees from the exercise of their legal rights.

With regard to the form of the action, the directors have taken out a summons to strike out the name of the company, on the ground that it has been used without the authority of the directors or of a general meeting. This case, however, does not fall within the principle of *MacDougall* v. *Gardiner* (2) or *Foss* v. *Harbottle* (3). We submit that it comes within the exception referred to in *Foss* v. *Harbottle*, that when no action could otherwise brought, the shareholders must have a right to bring an action in the name of the company. Here the chairman acted improperly in the rejection of the votes, and, according to the principles

(1) Law Rep. 16 Eq. 559. (2) 1 Ch. D. 13.
(3) 2 Hare, 461.

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laid down in many cases, the action is properly framed: *Atwool* v. *Merryweather* (1); *Russell* v. *Wakefield Waterworks Company* (2); *East Pant Du United Lead Mining Company* v. *Merryweather* (3); *Exeter and Crediton Railway Company* v. *Buller* (4).

Argument.

Chitty, Q.C., and *W. G. Harrison*, for the Defendants:—

When it is clear that shares have been transferred to persons who have no beneficial interest in the company, and for the purpose of creating votes, and to be used in the interests of a rival company, you may then go behind the register: *Ex parte Bugg* (5); *Budd's Case* (6); *Cox's Case* (7).

Here the votes tendered, which were ruled out by the chairman, were given in respect of shares transferred by shareholders, who were also shareholders in the *Globe Company*, to their own nominees. By Article 56, the right of voting of each shareholder was limited to 100 votes. By transferring their shares to the present holders, the transferors virtually annulled that article, and increased their own voting power by the votes of persons who had no interest in the company. The chairman, therefore, was justified in rejecting them.

On the question raised by the summons, the name of the company cannot properly be used without the consent of a general meeting. The Defendants would not object to such a meeting being held, but the Court cannot in the meantime grant the injunction with the name of the company remaining improperly on the record.

Judgment.

JESSEL, M.R.:—

This is a motion by Mr. *J. Pender*, on behalf of himself and all shareholders who voted with him against an amendment, and the *Direct United States Cable Company, Limited*, as Plaintiffs, against *E. H. Lushington* and other gentlemen as Defendants, in substance to obtain the opinion of the Court that certain votes at a general meeting on behalf of the Plaintiff were improperly rejected by

(1) Law Rep. 5 Eq. 464, n.
(2) Ibid. 20 Eq. 474.
(3) 2 H. & M. 254.
(4) 11 Jur. 527.
(5) 2 Dr. & Sm. 452.
(6) 3 D. F. & J. 297.
(7) 4 D. J. & S. 53.

the chairman. That is the substance of the case, though there are other technical questions to which I must also refer.

In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise—that is as regards a Court of Law as distinguished from a court of morality or conscience, if such a court exists. I put to Mr. *Harrison*, as a crucial test, whether, if a landlord had six tenants whose rent was in arrear, and three of them voted in a way he approved of for a member of Parliament, and three did not, the Court could restrain the landlord from distraining on the three who did not, because he did not at the same time distrain on the three who did. He admitted at once that whatever the motive might be, even if it could be proved that the landlord had distrained on them for that reason, that I could not prevent him from distraining because they had not paid their rent. I cannot deprive him of his property, although he may not make use of that right of property in a way I might altogether approve. That is really the question, because if these shareholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question.

I am confirmed in that view by the case of *Menier* v. *Hooper's Telegraph Works* (1), where Lord Justice *Mellish* observes: "I am of opinion that, although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration." In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to

(1) Law Rep. 9 Ch. 350, 354.

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give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

This being so, the arguments which have been addressed to me as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the principles on which this company was founded, appear to me to be wholly irrelevant. Therefore I do not intend to enter into the question as to what the objects of the company were, or what was the mode in which it was proposed to carry out those objects. I am only bound to decide whether or not these people were entitled to vote. To that question I am now going to address myself.

It is admitted that the votes tendered were the votes of persons on the register of shareholders, and it is admitted that they had been possessed of those shares for at least three months previously to the time of holding the general meeting, which is what is required by the 59th article. That being so, their votes were rejected on this ground: It was said that the persons who gave the votes were trustees for other persons, and that these other persons, the *cestuis que trust* of those trustees, were also either holders in their own name or as *cestuis que trust* of other shares, amounting in the whole to more than 1000 shares, so that if all the shares to which the persons were entitled had been registered in one name, that person could not have given more than 100 votes, the 56th section of the articles saying, that every member holding at least ten shares shall have one vote for every complete number of ten shares, with this limit, that no shareholder shall be entitled to more than 100 votes in all.

Now the argument is, that the words "every member" mean, not a man registered on the list of shareholders, but any person beneficially entitled to shares, because if not carried to that extent I do not understand the argument at all. If it means that a man may hold 1000 shares beneficially, or that a man may disunite his shares, then there is no reason why he should be disqualified

because he has one share in his own name or ten shares in his own name. Therefore the argument must go the whole length that any one man entitled beneficially to more than 1000 shares is not entitled to put them in the name of two or more persons as trustees for him, so as to allow those two or more persons to exercise the power of voting under the articles. It must go to that extent. But, taking even the restricted view, and reading the words "every member" to mean only a person whose name is on the register, then it means this, that any man whose name is registered as a holder of shares cannot, if he is the *cestui que trust* of other shares, give together with his trustee more votes than if all the shares were registered in his own name. Those are the propositions with which I must deal.

The first observation which strikes one is that these are votes at general meetings. How are you to ascertain who is to vote? That is pointed out by the articles of association. First, who are to be summoned to attend the general meetings? You find by Article 48 that notice is to be given to "the members hereinafter mentioned." What does the word "members" mean in that article? The definition clause, like many other definition clauses, is one which defines nothing. It says: "Member means member for the time being of the company," that is, member means member. But then one must remember that the word "member" has a meaning in the *Companies Act*, and it means *primâ facie* a registered shareholder or stockholder, and that must be the meaning here, because how else are you to give him notice at all? You can only give him notice by referring to the register which, under Article 2, is "to be kept pursuant to the terms of the *Companies Act*, 1862." So that a member is a man who is on the register.

[His Lordship then reviewed the several articles of association, which shewed that a member of this company meant a person whose name was on the register of shareholders, and that the title of any member to vote could only be found out by reference to the register. His Lordship then continued:—]

It appears to me that it is plain from reading these articles alone that the articles meant to refer to a registered member, but I think it is made, if possible, plainer—though I doubt whether it could be made plainer when you come to consider that it would not

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be possible to work the company in any other way, for how else could the company hold meetings or demand a poll, or have the votes taken by the scrutineers?—but if possible it is made plainer by the 19th article, which says: "The executors and administrators of a deceased member shall be the only persons recognised by the company as having any title to his share," and also provides that "the company shall not be affected by notice of any trust." And the 30th section of the *Companies Act*, 1862, says: "No notice of any trust express, implied, or constructive, shall be entered on the register, or be receivable by the Registrar in the case of companies under this Act, and registered in *England* or *Ireland*." It comes, therefore, to this, that the register of shareholders, on which there can be no notice of a trust, furnishes the only means of ascertaining whether you have a lawful meeting or a lawful demand for a poll, or of enabling the scrutineers to strike out votes.

The result appears to me to be manifest, that the company has no right whatever to enter into the question of the beneficial ownership of the shares. Any such suggestion is quite inadmissible, and therefore it is clear that the chairman had no right to inquire who was the beneficial owner of the shares, and the votes in question ought to have been admitted as good votes independently of any inquiry as to whether the parties tendering them were or were not, and to what extent, trustees for other persons beneficially entitled to the shares.

I now come to the subordinate question, not very material in the view I take of the case, namely, whether you have the right Plaintiffs here. The Plaintiffs may be described as three, though they are really two. There is, first, Mr. *Pender* himself, on behalf of himself; next, as the representative of the class of shareholders who voted with him, whose votes I hold to have been improperly rejected; and, next, there is the *Direct United States Cable Company*. It is said that the company ought not to have been made Plaintiffs.

The reasons given were reasons of some singularity, but there is no doubt of this, that under the articles the directors are the custodians of the seal of the company, and the directors, who in fact are Defendants, have certainly not given any authority to the

solicitor for the Plaintiffs on this record to institute this suit in the name of the company as Plaintiffs. It is equally clear, if I am right in the conclusion to which I have come as to the impropriety of the decision of the chairman in rejecting these votes, that it is a case in which the company might properly sue as Plaintiffs to restrain the directors from carrying out a resolution which had not been properly carried, and then comes the question whether I ought or ought not to allow the company now to remain as Plaintiffs.

The first point to be considered is this: Supposing there was no objection to the right of a general meeting to direct an action to be brought, could I, even in that case, allow the company to sue? I think I could. In that case the general meeting, having a right to direct an action to be brought, would act by the majority of the members. The majority wish their rights to be protected. A meeting could be called, and, if the Court was satisfied that the majority would direct an action to be brought, the company's name would not be taken away. In the meantime the Court must act. It being decided that the company is a proper Plaintiff, that the grievance is one of which the company could complain, that the majority of the company are of that opinion, and that there is no time to call a formal meeting, what is the Court to do? Is it to refuse justice altogether, and say, it being a case for an injunction, that the directors are to have for several weeks (for the articles require three weeks' notice at least of a general meeting) the power of destroying the property and rights of the company altogether.

Such a course in cases of injunction would be equivalent to saying that there shall be no justice at all administered. It would be an absolute denial of justice, and it appears to me that the Court of Appeal, in the case of *MacDougall* v. *Gardiner* (1), have deliberately adopted that view of the matter, as I read the following observations of Lord Justice *James*: "Any one of the shareholders might have filed his bill in the name of the company, and then, if the directors had said, 'You are not the company; the majority do not act with you, but with us,' the Court would, as it has done in other cases, have taken the means of ascertaining which party

(1) 1 Ch. D. 22.

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it is, the Plaintiff's or the Defendant's, which really represents the majority of the company." I suppose he means that the Court may direct a meeting to be called. But what is the Court to do in the meantime, if it is satisfied that a real majority decided in favour of bringing an action? Surely it must do something in the meantime, and it follows, I think, from that portion of the judgment, that in the meantime the Court ought to grant the injunction to keep things *in statu quo*. It may be said that there is no such majority now, but it is nothing to me that the majority is changed. Therefore, while the Court directs a meeting to be called, or gives the shareholders facilities for calling a meeting, it acts in the meantime on the assumption that the majority of the former meeting have not changed their minds. Even if that is not the true meaning of the judgment, and it is not quite so explicit as I could have wished for my guidance, then the only other alternative is that it is a case in which it would be impossible for relief to be obtained by the company bringing an action, and it must be within the exception pointed out in *Foss* v. *Harbottle* (1), that the shareholders must have a right to institute an action in the name of one or more, because otherwise it would be impossible to maintain an action at all. Therefore on that view this is a perfectly good action.

But, acting on the first view, which appears to me to be the correct one, I think I ought not on this summons to take away the name of the company, but to let the summons stand over, leaving either party to call a meeting to decide whether the company's name is to be used or not. In the meantime, whether this is an action in the name of the shareholders or in the name of the company, in either case I think there should be an injunction.

[His Lordship then adverted to a point raised in argument, whether, according to the true construction of the articles, there was not absolute power in the directors for a period of five years to do what they pleased without the control of the company, and considered that they had no such power as to prevent an action being brought against them. He then continued:—]

But there is another ground on which the action may be maintained. This is an action by Mr. *Pender* for himself. He is a

(1) 2 Hare, 461.

member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss* v. *Harbottle* (1) and that line of cases. He has a right to say, "Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you." What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.

Then it is said that there are several rights. No doubt they are rights of suing in a distinct character. I turn to Rules of Court, 1875, Order XVI., rule 1, and I find this: "All persons may be joined as Plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." It seems to me that this ground of defence must necessarily fail.

The only other point was as to the resolutions themselves. I am not going to give any opinion as to what the effect of the resolutions may be when passed. The only point on which I am asked to decide is to say they ought to have been passed, in other words, that there was a majority for them, and to restrain the Defendants until further order from acting in contravention of them. It follows that, whether or not any reasons can be adduced at the trial to lead me to decide that the injunction shall be further continued, at the present moment it is my duty to say that the resolutions, being on the face of them quite legal, and having been passed by a majority, ought to be obeyed by the directors. I only grant that until further order. The majority in this case, as in other cases, may change their minds; and therefore it is suggested that the following words should be introduced into the order I am about to make: "Until some other resolution shall be passed by a general meeting;" so that my injunction may go no further than the present opinion of the majority warrants. I object to that modification. I think the applicants are entitled to the order they

(1) 2 Hare, 461.

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ask, which is subject to further order. The summons will stand over till the trial or further order, with liberty to either party to call a meeting.

Solicitors for Plaintiffs: *Bircham & Co.*
Solicitors for Defendants: *Johnsons, Upton, Budd, & Co.*

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DUCKETT *v.* GOVER.

[1876 D. 149.]

Practice—Company's Authority to sue—Company—Secret Contract—Action by one Shareholder on behalf of himself and others—Company Defendant—Name of Company, Right to use—Demurrer—Mistake of Law—Rules of Court, 1875, *Orders* XVI., *r.* 2; XXVIII., *r.* 8—*Making Company Plaintiff without Consent—Charges of Fraud—Costs.*

A shareholder in a company brought an action on behalf of himself and the other shareholders against the company's solicitors and vendor to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as Defendants instead of Plaintiffs.

A demurrer to the statement of claim by the Defendants, other than the company, on the ground that the action could only be maintained by the company, was allowed, but the Plaintiff obtained leave under Rules of Court, 1875, Order XVI., r. 2, to amend his writ and statement of claim by adding the company as Plaintiffs, the production by him of any authority from the company to sue in their name being held to be unnecessary.

As the Plaintiff charged fraud against the demurring Defendants, the question whether their costs of the demurrer should be paid by him was reserved till the trial of the action.

"*Bonâ fide* mistake" in Order XVI., r. 2, of the Rules of Court, 1875, includes a mistake of law as well as of fact.

Statement.

DEMURRERS to statement of claim.

The action was instituted by Sir *G. F. Duckett*, "on behalf of himself and all other the shareholders of the *Alton Coal, Coke, and Iron Company, Limited.*" The statement of claim alleged that the company was started in 1873 for the purpose of purchasing the *Alton Colliery*, the property of the Defendant *Nicholls*; that the Defendants *Gover & Norton*, acting as solicitors for and on behalf of the proposed company, agreed with the Defendant