1908

*Oct. 13.
*Dec. 15.

S. J. CASTLEMAN (PLAINTIFF) ..... APPELLANT;

AND

WAGHORN, GWYNN AND COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of stock—Evidence of title—Duty of vendor—Defective certificate.

When shares in the stock of a company are sold for cash and a certificate delivered with a form of transfer indorsed purporting to be signed by the holder named therein who is not the seller, the latter must be taken to affirm that a title which will enable the purchaser to become the legal holder is vested in him by virtue of such certificate and transfer.

A transfer was signed by the wife of the holder at his direction but not acted upon until after his death.

Held, that the authority of the wife to deal with the certificate was revoked by the holder's death and on a cash sale of the shares the purchaser who received the certificate and transfer so signed being unable, under the company's rules, to be registered as holder had a right of action to recover back the purchase money from the seller.

The fact that the purchaser endeavoured to have himself registered as holder of the shares was not an acceptance by him of the contract of sale which deprived him of his right of action to have it rescinded. Nor was his action barred by loss of the defective certificate by no fault of his nor of the seller.

Judgment appealed from (13 B.C. Rep. 351) reversed.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial by which the plaintiff's action was dismissed.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 13 B.C. Rep. 351.

The circumstances of the case are stated in the judgments now reported.

Wallace Nesbitt K.C. and *Livingston,* for the appellant. The judgment appealed from is wrong in following respects: (1) in holding that there was a transfer of the stock in question in due and proper form; (2) in failing to hold that it was the duty of the seller of the shares to give the purchaser such a transfer as would vest in him a present, absolute and unconditional right to have the shares registered, as between himself and the company; (3) in failing to hold, inasmuch as the transfer of the shares purported to be made by James Boecher, who died three years before the transfer was negotiated, that under the articles of association of the company the only person who could make title or transfer the shares was the executor or administrator of the said Boecher, that the transfer by the indorsement of Mrs. Boecher was incapable of passing any title to the shares, and that neither the plaintiff nor the defendants were or had been in a position at any time to compel the company to register the transfer; and (4) that, as between the company and any person seeking a transfer, the by-law of the company provided that in the case of the death of a member the executors or administrators of the deceased shall be the only person recognized by the company as having any title to his shares. The company, therefore, was not bound to register except title was made by the executors or administrators, and, therefore, as the company was not bound to register the consideration as between the plaintiff and defendants failed and the plaintiff is entitled to recover.

The plaintiff was unaware when he accepted the

1908

CASTLEMAN v. WAGHORN, GWYNN & CO.

certificate of stock in question that the indorsement thereon was not in the proper handwriting of the transferor, James Boecher, and did not become aware of this fact until he presented it for transfer to the managing director of the company. He was, therefore, unable to reject the certificate on this ground prior to payment therefor. By article 25 of the company the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register in respect thereof, and the effect of the word "deemed" in this article was to make the said Boecher the only person who could be recognized as holder of the shares. *Nunes* v. *Carter* (1); *Campbell* v. *Barrie* (2), at p. 292. By article 29, the executors or administrators of Boecher were, at the time the said shares were purchased by the plaintiff, the only persons recognized or whom the company could recognize as having any title to the shares, and thus the only persons who could make title to the shares, and as the shares did not purport to be transferred by Boecher's executors or administrators and as the notice called for by article 31, which is to be deemed to be a transfer, had not been given, the company correctly considered that no transfer of the shares to the plaintiff had been made, and the plaintiff was never in a position to compel them to register the document received by him from the defendants, purporting to be a transfer of the shares to him. The defendants became liable to him for the loss occasioned by reason of their having given him no title to the shares. Cook on Corporations (4 ed.), p. 651; *Wil-*

(1) L.R. 1 P.C. 342.

(2) 31 U.C.Q.B. 279.

kinson v. *Lloyd*(1); *Stray* v. *Russell*(2), is distinguished, at p. 284, from *Wilkinson* v. *Lloyd*(1) as being under the rules of the Stock Exchange by which on a certain day the seller's broker hands over the transfers and certificates, and the other broker pays and is bound to pay.

The company had a right to delay making the transfer so as to make inquiries and avoid liability. *Société Générale de Paris* v. *Walker*(3), at p. 41; *Ireland* v. *Hart*(4), at p. 528; Cook on Corporations (4 ed.), p. 651; *East Wheal Martha Mining Co.* (5), pp. 119-121; *Bermingham* v. *Sheridan*(6); Buckley, Company Law (8 ed.), p. 41. The company would be liable if the indorsement was irregular. *In re Bahia and San Francisco Railway Co.*(7). If the plaintiff had persuaded the company to register the irregular transfer the company would have had an action of indemnity against him. *Sheffield Corporation* v. *Barclay*(8). The company exercised their right of delay and notified the defendants of the irregularity, and it was the duty of the defendants to furnish the evidence required or otherwise make the transfer regular. *Re East Wheal Martha Mining Co.*(5), pp. 119-121. This they failed to do and the plaintiff then became entitled to a return of his money. *Ireland* v. *Hart*(4).

Ewart K.C., for the respondents. James Boecher was at one time the owner of the shares. The day before his death, his wife at his request signed his name to a blank transfer of them, in the presence of his

(1) 7 Q.B. 27.
(2) 28 L.J.Q.B. 279.
(3) 11 App. Cas. 20.
(4) (1902) 1 Ch. 522.
(5) 33 Beav. 119.
(6) 33 Beav. 660.
(7) L.R. 3 Q.B. 584.
(8) (1905) A.C. 392.

1908

CASTLEMAN v. WAGHORN, GWYNN & Co.

sons, one of whom attested the signature. James Boecher left a will by which he bequeathed all that he had, including the shares, to his wife. Three years afterwards the shares were sold to the defendants, who accepted the transfer, believing it to be in perfect order; and they then clearly became entitled, as against the wife and everybody else, to be registered as holders of the shares. The defendants, while thus holding the certificate and transfer, sold the shares to one Amess. The plaintiff says that Amess, in purchasing the shares, was acting as his agent. But that is not true. The defendants, admittedly, believed, and had good reason to believe, that Amess was purchasing for himself, and selling over again to the plaintiff, The defendants and Amess live in Vancouver. The plaintiff lives in Ottawa; and, in order to close the transfer, Amess and the defendants drew upon the plaintiff in Ottawa, attaching the certificate and transfer to the draft. This was on the 29th November, 1905. The plaintiff accepted the documents and paid the draft. At this stage the plaintiff could elect whether to rest satisfied with the documents which he had received or to send them to the company for registration. He could not retain the documents indefinitely, and then raise as against the defendants some unsubstantial, or even substantial objection to them, or to their form. He did nothing until between the 7th and 10th of December, when he presented the documents to the president of the company. He did nothing further till the 6th January, meanwhile keeping a sharp lookout upon the share market, and saying nothing to the defendants from whom he had obtained, as he then thought, a great bargain. He had bought at 35c. a share and wrote to Amess (15th

Nov.): "I can place them here at 50; and I will share the rake-off with you when I get back." On the 6th January he sent the documents to the president at Vancouver to be put in proper form; and in connection with that action makes, in his evidence, two misstatements: (1) He says that he sent the documents to the company "for transfer to myself." In reality he sent them for correction to the president, who had volunteered to get them put in form for him; (2) he says that the reason for delaying to send the documents was "to give the president time to reach" Vancouver. That is not true. He reached Vancouver on the 20th or 21st November.

Boecher, living and in possession of his faculties, authorized and witnessed his wife's signature to the transfer in question in this action. The signature so made was the signature of Boecher: *The King* v. *Inhabitants of Longnor*(1).

Amess went outside any authority given him, and therefore cannot be considered plaintiff's agent at time of purchase: Wright on Principal and Agent, 72; *Watson* v. *Swann*(2).

The defendants were not required to do more on sale of shares than deliver share certificate and transfers in common form, and abstain from interfering with registration of transfer: *Stray* v. *Russell*(3); *London Founders Association* v. *Clarke*(4); *Hooper* v. *Herts*(5); *Skinner* v. *City of London Marine Insurance Corporation*(6).

(1) 4 B. & Ad. 647; 1 Nev. & M. 576.
(2) 11 C.B. (N.S.) 756.
(3) 28 L.J.Q.B. 279.
(4) 20 Q.B.D. 576.
(5) (1906) 1 Ch. 549.
(6) 54 L.J.Q.B. 437.

1908

CASTLEMAN v. WAGHORN, GWYNN & CO.

The Chief Justice.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff.

The obligation of the seller, Waghorn, was to deliver the shares into the possession of the buyer, Castleman. Can it be said that, in the circumstances, he fulfilled that obligation? All that he gave was a certificate of shares on which was indorsed a transfer in blank. The indorsation, which was not signed by Boecher, the registered owner of the shares, but by his wife for him, may have been regular if the wife was authorized to sign, but it does not appear that there ever was a transfer to Waghorn that would vest in him the property in the shares, which, so far as I can gather from the record, remained in the estate of the deceased Boecher and could not be dealt with except by the executors. The action was brought *en temps utile,* and respondent has not been prejudiced in any way by the loss of the original certificate or by the delay in forwarding to the office of the company for registration the alleged transfer.

DAVIES J.—I concur in the judgment allowing the appeal.

IDINGTON J.—It seems to me this appeal should be allowed with costs on the broad ground that the appellant bargained for that which he never got and which respondent, the vendor, had never in his power to give.

The mistake was mutual. The supposed title to the stock rested on a signature which might as well, by reason of its legal inefficacy, have been pure forgery (though I assume it was not), and this defect of title

was not discovered by appellant till after the money had been paid by him.

I do not think the loss of the certificate with this supposed valid indorsement had the effect of depriving the appellant of his right to recover his money.

The case is not encumbered with any Stock Exchange rules as to dealing in stock, nor yet with the difficulties presented in *Wilkinson* v. *Lloyd*(1), in 1845, as to getting a transfer admitted for register.

The shares for $400 of stock to which there may have been a title formed such a mere fraction of the bargain that it seems to me the bargain as a whole failed.

Indeed the appellants have properly made no contest over that.

MACLENNAN J.—I would allow the appeal, and agree with the reasons given by Mr. Justice Idington.

DUFF J.—This action arises out of a sale of shares in the Diamond Vale Coal Company, a company incorporated under the "British Columbia Companies Act," which in all respects material to the questions now to be determined, is a reproduction of the "Companies Act, 1862."

The company's articles of association provide that the company shall not recognize, in respect of any share, any trust, any equitable interest, or any right other than the absolute title of the registered holder; that any member may, subject to the restrictions provided by the articles, transfer his share by a transfer

(1) 7 Q.B. 27.

1908

CASTLEMAN v. WAGHORN, GWYNN & Co.

Duff J.

in writing signed by the transferor; and that the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register as the holder. There are further articles which are to the effect that, when a share is to be transferred, the transfer accompanied by the certificate of the share to be transferred shall be left at the office of the company with such evidence, if any, as the directors may require to prove the title of the intending transferor; that in the case of the death of a member who is the sole holder of a share the executors or adminstrators of the deceased holder shall be the only persons recognized as having a title to his shares. The articles so far as appears from the extracts placed before us do not impose any restrictions upon the right of a holder of shares to transfer them; but we are informed on the argument that there is in the articles as filed the common provision conferring upon the directors the right to object (upon reasonable grounds) to any proposed transferee; and doubtless the restriction created by this provision, is that referred to in the article (the substance of which is given above), declaring the right of members to transfer their shares.

Under an executory sale of shares in such a company the vendor undertakes to execute a valid transfer of shares which he has the right to transfer or to procure the execution of a valid transfer by somebody else who has the right to transfer them. He does not undertake, I think, to procure the entry of the vendee's name in the register. On that point I respectfully concur with the observations of Lord

Blackburn (then Blackburn J.) in *Maxted* v. *Paine* (1), at pp. 150 and 151, and with the decision of the Court of Session in *Stevenson* v. *Wilson* (2).

On the contrary it is, I think, as stated by Lord Blackburn in the passage referred to, the duty of the vendee to procure the registration of himself or some other person as holder of the shares sold and thus to relieve the vendor from any burdens which may arise from the fact that the shares are registered in his name.

Where the sale is not executory but made by the delivery (in exchange for cash) of a share certificate with a transfer purporting to be executed in blank by the holder named in the certificate (who is not the vendor) the obligation of the vendor cannot be stated in precisely the same terms. In such a case the vendor must, I think, be taken to affirm that the *jus disponendi* of the shares represented by the certificate is vested in him. He does not represent that he is the legal owner of the shares; for the legal ownership of shares in a company governed by articles such as we have to consider in this case is vested in the person registered as the owner. But the delivery of a share certificate accompanied by a transfer executed in blank by the registered holder may pass to the person receiving such documents "a title legal and equitable which will enable the holder to vest himself with the shares" (*Colonial Bank* v. *Cady* (3), at p. 277), subject only to any right the company may have to object to register such person as a shareholder; and when a vendor of shares offers such documents for cash he must, I think, be taken by offering them to affirm

(1) L.R. 6 Ex. 132.

(2) (1907) Sess. Cas. 445, at p. 455.

(3) 15 App. Cas. 267.

1908

CASTLEMAN v. WAGHORN, GWYNN & CO.

Duff J.

that such a title (subject to the restriction mentioned) is vested in him by virtue of the certificate and the transfer he thus offers.

In the case before us it seems to be quite clear that no such right was vested in the respondents. The evidence shews that the name of the registered holder (James Boecher) had been written by his wife at the bottom of a blank form of transfer indorsed on the share certificate. This was done by Boecher's direction, but the facts in evidence do not warrant any inference that any transaction took place between the husband and the wife which would have the effect of passing to her in his lifetime any interest in the shares. At the utmost his act can only be said to have conferred upon his wife a revocable authority to deal with them which was in fact revoked by his death a short time afterwards. The document so executed thereupon became wholly ineffective for any purpose whatever. Neither the respondents nor the appellant could acquire anything under it; the subsequent delivery of the certificate with the purported transfer indorsed being, in point of law, equivalent to the manual delivery of the certificate alone.

It follows that upon the discovery of the facts the appellant had a right to rescind the bargain with the respondents and recover back the purchase money as upon a failure of the consideration for which it was paid. He paid for a certificate of shares accompanied by a valid transfer. He received manual delivery of a certificate only. Between the thing paid for and the thing received there was such a diversity of substance as to constitute a failure of consideration.

It has been suggested that the respondents had acquired an equitable interest to which the appellant

succeeded and that, therefore, the failure of consideration was partial only. I do not think the evidence makes it appear clearly that Mrs. Boecher was at the time of the sale of the certificate to the respondents the sole beneficial owner of the shares—although it may be a nice question whether, since she was under her husband's will the sole residuary legatee, having regard to the fact that the will had been proved (in China) a little over a year previous to that occurrence, it should not be presumed that the debts had been paid in the ordinary course of administration. It would follow (if we were entitled to act on this presumption) that the executor was a bare trustee of these shares for Mrs. Boecher at the time of the sale to the respondents. This will not having, however, been proved in British Columbia the presumption would be of questionable validity; and assuming that at the time of the delivery of the certificate to the respondents Mrs. Boecher had the right to dispose of the shares as the beneficial owner, still I think the difficulty is not met. If I am right in the view I have just expressed touching the character of the representation made by the vendor on the delivery of the documents, then it is quite clear that the appellant did not get what the respondents represented they were giving him. A transfer entitling the purchaser to the registration either of himself or of some nominee of his as owner of the shares purchased is one thing; a right of action, based upon an estoppel against the beneficial owner to compel a trustee to execute such a transfer is in substance a wholly different thing. It was observed in *Chanter* v. *Leese*(1), that it is not a sufficient answer to a claim to recover money paid upon

(1) 5 M. & W. 698.

1908

CASTLEMAN v. WAGHORN, GWYNN & Co.

Duff J.

consideration which is alleged to have failed to shew that the plaintiff has received something of value:

> We see, therefore, (said the court) that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely;* and it follows that no action can be maintained for the money.

Mr. Ewart's principal contention—the only contention perhaps offering any hope of success—was that assuming the appellant to have had a right to rescind the contract for the reasons mentioned he must in the circumstances of this case be held to have lost it and consequently he must rely upon the appropriate remedy (if any) under the contract. The principle of law is plain. A purchaser who seeks to recover back the purchase money paid under a contract of sale upon an allegation that the consideration has failed must be in a position to rescind the sale. Losing that right he is, of course, confined to his remedy under the contract.

I think, however, the contention fails on the facts. It is based on two distinct grounds: first, that after discovering the facts the appellant's conduct amounted to an election not to exercise his right to rescind; and second, that when he attempted to exercise that right such changes had taken place that the parties could not be replaced *in statu quo.*

As to the first of these grounds it is said that the appellant having learned of the defect in the transfer not only waited an unreasonable time before making the facts known to the respondents, but that he assumed dominion over the shares by applying to have himself registered as the purchaser. In the circumstances I do not think the delay was unreasonable; nor do I think the action of the appellant in applying

for registration affords a solid ground for imputing to him an election to affirm the contract. The head office of the company was in Vancouver; the appellant received the certificate with the transfer in Ottawa about 7th December, 1905; meeting one Smith, the president of the company, in Ottawa, about the same time, he shewed him the transfer stating that he wished it registered. Smith told him the signature appended to the transfer was not in the handwriting of Boecher, but that it was in the handwriting of his widow, who he said (as he erroneously believed) was Boecher's executrix. Smith also told the appellant that if he would send the document to the company's office at Vancouver after his return there, he had no doubt the registration could be completed without any difficulty. Both the appellant and Smith believed, no doubt, that the defect in the transfer was wholly due to inadvertence and could be remedied without the least difficulty. On the 6th of January, the appellant (having, as he says, learned that Smith had reached Vancouver) forwarded the documents to the company's office for their registration.

Up to this stage there seems to be no ground for attributing to the appellant any unreasonable delay. Neither does one find any basis for imputing to him an election to waive his right to rescind the contract. The appellant could not, I think, be held bound to accept the judgment of Smith on the question of handwriting; rather it would seem to have been his duty to put any such question to the test by forwarding the documents with an application for registration to the office of the company. His action in so doing was therefore not incompatible with a determination to stand upon his rights as against the respondents.

1908.

CASTLEMAN v. WAGHORN, GWYNN & CO.

Duff J.

A more serious question arises upon the second contention. The facts on which it is based are these. Smith having received the documents at Vancouver sent for John Boecher (who was a son of James Boecher and had attached his signature to the transfer as a witness); gave the documents to him; and he disappeared with them. Failing to recover the documents the company issued a duplicate certificate which the appellant offered to return to the respondents who refused it, offering, however, to return the purchase price on delivery to them of the original share certificate.

It is argued that this loss of the share certificate effected such a change in the conditions as to deprive the appellant of his right to rescind.

We can only conjecture why Smith handed the documents to Boecher evidence of the interview between them having been at the trial successfully objected to on behalf of the respondents. But assuming it to have been an act which if it had been done by the appellant would have resulted in a loss of his right of rescission, still I do not think that is the effect of Smith's act, because I do not think, in a fair view of the circumstances, that any responsibility for it can be attributed to the appellant. I cannot accept Mr. Ewart's suggestion that Smith was acting as the appellant's agent. I think the opposite view expressed during the hearing by the learned trial judge is that which best accords with the facts in evidence.

In the absence of any such agency what is the effect on the appellant's right of this loss of the share certificate? If the document had been stolen or destroyed either accidently or through the default of the company while at the company's office must the

appellant for that reason alone lose his rights? I think it is very clear that he would not; and the question before us is indistinguishable from that which such a case would raise. The contract was a contract for the sale of shares. As I have already said in my view one of its terms required the vendee to apply to have himself registered as the owner of the shares, involving the step of putting the documents which were lost in the hands of the company in order that the registration might be effected. The very thing that is to say that the appellant did which led to the loss of the documents was a thing required by the contract. The contract being affected with a vice entitling the vendee to rescind it, on what principle can it be said that, so long as the documents were dealt with as the contract required, the loss of them, from no default of the purchaser, should in any way affect the purchaser's rights? It is to be noted that here the shares themselves were the subjects of the sale; that the lost documents were evidentiary documents only; and the case is consequently not exactly the same as that in which a chattel is lost or injured in the hands of a purchaser who, by reason of a breach of condition, has a right to return it. Even in such a case, however, there is very high authority that the right to rescind the sale is not defeated by the loss of the chattel alone; so long, on the contrary, as the right to return remains in force the risk of loss when it arises without the purchaser's default lies with the vendor. That is the view expressed by Lord Bramwell (then Bramwell B.) in *Head* v. *Tattersall*(1), at pp. 12 and 13, and acted upon in *Chapman* v. *Withers*(2).

(1) L.R. 7 Ex. 7.

(2) 20 Q.B.D. 824.

1908

CASTLEMAN v. WAGHORN, GWYNN & Co.

Duff J.

I think, therefore, that the plaintiff is entitled to recover and the appeal should be allowed.

Appeal allowed with costs.

Solicitors for the appellant: *Livingston, Garrett & King.*

Solicitors for the respondents: *Russell & Russell.*