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*May 2.
*Oct. 8.

LORD CLAUD JOHN HAMILTON AND EDWARD LAWRENCE (PLAINTIFFS) ..... } APPELLANTS;

AND

SOPHIA GRANT AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Company—Judgment creditor--Action against shareholder--Transfer of shares—Evidence.

Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought action against H. as a shareholder in which they failed from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case that the shares once held by G. had been transferred to H., but were not registered in the company's books. On this evidence the court below gave judgment in favour of G.

Held, affirming such judgment, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.

Held, also, that although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit.

The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed intituled "An Act to consolidate and amend" the former company, but authorising additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the later Act came

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

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into force. The judgment against the company was recovered in 1895.

Held, that G. was never a shareholder of the company against whom such judgment was obtained.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs.

The facts of the case are sufficiently set out in the above head-note.

Cahan for the appellants. The evidence fully supports the finding of the trial judge that J. E. Dickie was an original shareholder for five hundred shares in the Stewiacke Valley & Lansdowne Railway Co. which were validly transferred to Donald Grant in September, 1887, in the form required by R. S. N. S. (5 ser.) ch. 53, sec. 22, and, though no entry thereof was made in the transfer-book Grant became the legal owner and holder of the shares; *Spackman* v. *Evans* (1) at page 238; *Nanney* v. *Morgan* (2); because all necessary conditions had been fulfilled to give him an absolute and unconditional right to have the transfer entered in the books of the company. *Roots* v. *Williamson* (3); *Moore* v. *Northwestern Bank* (4); *Powell* v. *London and Provincial Bank* (7), at page 799; and further, the resolution by the directors in September, 1887, approving and accepting the transfer to Grant is a sufficient entry on the books of the company.

If Grant did not become a legal shareholder, the plaintiffs are entitled to judgment against the estate of Dickie, as holder of the shares. Even admitting Holmes had an agreement or transfer from Grant, giving him an equitable right to the shares, nevertheless such

(1) L. R. 3, H. L. 171.
(2) 57 L. J. Ch. 311; 37 Ch. D. 346.
(3) 57 L. J. Ch. 995; 38 Ch. D. 485.
(4) 60 L. J. Ch. 627; [1891] 2 Ch. 599.
(5) [1893] 1 Ch. 610.

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equitable right did not constitute Holmes a legal shareholder as the company did not approve and accept him as a shareholder or, if in this company shareholders may transfer shares at will, unless and until such transfer had been brought to the notice of the company, as provided by secs. 22, 23, ch. 53, R. S. N. S. (5 ser.) by being filed with the directors. *Copeland* v. *North Eastern Railway Co.* (1); *The Queen* v. *General Cemetery Co.* (2).

This company created by statute is not a corporation at common law, and common law rules as to transfers of shares do not apply; see remarks by Bowen L.J. in *Baroness Wenlock* v. *River Dee Co.* (3), in the note at page 684. The statutory provisions with respect to sales and transfers of shares must be complied with in order to make an effectual transfer as against creditors. *In re Wrysgan Slate Quarrying Co., Humby's Case* (4). A person once a shareholder remains so unless he has in some lawful way got rid of his liability. See remarks by Gifford L. J. in *Re Patent Paper Mfg. Co., Addison's Case* (5), at p. 297; Buckley on Companies (7 ed.) at pp. 44, 148. There is no evidence that the alleged transfer from Grant to Holmes was accepted or received by the transferees or either of them, or filed with the directors, or even brought to their notice.

The contention that the company sued is not the company organized by ch. 155 of 1886, in which Grant and Dickie were shareholders, but another company incorporated by ch. 63, of 1890, is not open to the respondents, because the 1st and 2nd paragraphs of the claim are not specifically denied in the defence, and must be taken as admitted. It has no foundation, in fact, inasmuch as both statutes apply to one and the

(1) 6 E. & B. 277.
(2) 6 E. & B. 415.
(3) 36 Ch. D. 674.
(4) 5 Jur. N. S. 215; 28 L. J. Ch. 875.
(5) 5 Ch. App. 294.

same company:—the Stewiacke Valley and Lansdowne Ry. Co., incorporating Act, ch. 155 of 1886, was amended by ch. 84 of 1888, authorized by the company, and the Act, ch. 63 of 1890, was a consolidation of the original Act, and amendments. The contention that the plaintiffs have recovered no judgment against the S. V. and L. Ry. Co., because it had ceased to exist when the judgment was recovered is not now open to the defendants as the 1st paragraph of the claim is admitted. The defendants are estopped from raising any question in this action as to the validity of the judgment or the existence of the corporation. Lindley on Companies (5 ed.) pp. 283, 284; *Ray* v. *Blair* (1); *Casey* v. *Galli* (2).

As to the contention that ten per cent on the capital was not expended within three years, and that the corporate existence ceased under R. S. N. S. (5 ser.), ch. 53, s. 27 s.s. 6, "ten per cent *on* the capital" does not mean ten per cent *of* the capital. By sec. 2, ch. 155 of 1886, the capital was fixed at $160,000; by sec. 6, ch. 84 of 1888, the capital was increased to $400,000; by sec. 6, ch. 63 of 1890, the capital of $400,000 was confirmed, and the evidence is that $40,000 and over was expended before 31st, December 1889. Chapter 53 does not apply to this company when inconsistent with the special act; and sub-sec. 6 of sec. 27 is expressly varied by sec. 16 of ch. 155 of 1886. The words "null and void" there should be construed as "voidable;" and the charter could only be annulled in a direct proceeding by the Attorney-General. *New York and Long Island Bridge Co.* v. *Smith* (3); *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*, (4). The corporate existence was recognized after the alleged expiration of the charter by ch. 63 of 1890; ch. 87 of 1892; and even if the charter had expired it is no defence to a creditor's action such

(1) 12 U. C. C. P. 257.
(2) 94 U. S. Rep. 673.
(3) 148 N. Y. Rep. 540.
(4) 29 Can. S. C. R. 211

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as this. *Ray* v. *Blair* (1); *Edwards* v. *Kilkenney and G. S. & W. Railway Co.* (2); *City of Toronto & Lake Huron Railroad Co.* v. *Crookshank* (3), at p. 317.

The appellants are entitled to recover from the estate of Grant, or in the alternative from the estate of Dickie.

Mellish for the respondents, Grants. Grant's name was never entered in the books as shareholder, and the pretended transfer to him was void because a previous call had not been paid at the time. If he ever could be considered a shareholder, he ceased to be so in 1887, when he transferred to Holmes, who was then president of the company, received the transfer and handed it to the secretary whose duty it was to keep the records and make the proper entries. Holmes qualified upon these shares, and Grant is not shewn to have been at a meeting or taken any interest in the company. See *Page* v. *Austen* (4).

If Grant was a shareholder it was in the company incorporated by the Act of 1886, which for the reasons given by Townshend J. ceased to exist when the Act of 1890 was passed. The judgment was null and void, because that company had ceased to exist under sec. 27 (R. S. N. S., 5 ser., ch. 53) of the Railway Act, not having expended 10 per cent of its capital stock on the construction of the railway, (*a*) within three years after the passing of the Act of 1886, or (*b*) within three years after the passing of the Act of 1890. *Sturges* v. *Vanderbilt* (5); *In re Brooklyn, W. & N. R. Co.* (6); *In re Brooklyn, W. & N. R. Co.* (8).

Newcombe Q.C. for the other respondents, executors of J. E. Dickie. Mr. Justice Ritchie, at the trial, found

(1) 12 U. C. C. P. 257.
(2) 3 C. B. N. S. 787.
(3) 4 U. C. Q. B. 309.
(4) 10 Can. S. C. R. 132.
(5) 73 N. Y. 384.
(6) 72 N. Y. 245.
(7) 81 N. Y. 69.

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that in September, 1887, the late James E. Dickie made a valid and effectual transfer to Grant. The executors of Dickie rely upon the reasons of Townshend J. for the holding that Grant made a valid transfer in which Meagher J. concurred. If Grant made a valid transfer, *a fortiori*, Dickie did. We further rely upon the argument of Weatherbe J. that he who can be said to be "the holder of the said stock" is the person liable. Under the words of the statute the holder is liable for "the stock held by him." The question is not who has registered or delivered or of filing and registration but who holds the stock or in other words owns it. Dickie ceased to be the "holder of the stock" when he executed a transfer and delivered it both to Grant and to the company to be registered. He did everything in his power to divest himself of the stock. The minute of the resolution accepting Grant as a shareholder was a literal compliance with sec. 155. At the time of the transfer there was no legal call outstanding, all calls were satisfied, and sec. 20 of the N. S .Ry., Act, under which an alleged call was made, has no application between shareholders and creditors, but only as between shareholders and the company. The call in question was not legal because thirty days' notice was not given by publication, and the resolution did not appoint a place and time for payment as required by R. S. N. S. (5 ser.) ch. 53, sec. 20.

It is not open to the appellants as creditors of the company to take the objection that a call was unpaid at the time of the transfer from Dickie to Grant, the directors accepted Grant as a shareholder in place of Dickie; that ended the matter; the creditors cannot complain. *Ex parte Littledale* (1). Any irregularity was waived by the company and the transferee; the transferee was recognized and treated by the company

(1) 9 Ch. App. 257.

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as the holder of the shares; and both company and transferee acted upon the transfer as valid and effectual. The non-entry was only an irregularity and was waived. *Straffon's Executors' Case* (1); *Murray* v. *Bush* (2); *In re Manchester and Oldham Bank* (3); *Royal Bank of Indias' Case* (4); *Sheffield, etc. Railway Co.*, v. *Woodcock* (5).

For the reasons given by Townshend J. in the court below we contend that the company in which Dickie took stock ceased to exist and a new company was incorporated with the same name. It is against the new company and not the company of which Dickie was a member that the appellants recovered the judgment upon which this action was founded. The charter expired under sec. 9, ch. 78, R. S. N. S. (5 ser.), and nothing has been done under secs. 10 and 11 to revive it.

The judgment of the court was delivered by:

SEDGEWICK J.—I think this appeal should be dismissed for the reasons stated by Mr. Justice Townshend, in so far as they relate to the ownership of the shares in question. It appears to me that the evidence conclusively establishes that Mr. Holmes and his associates, and not the defendants Grant, were owners of the shares, the calls upon which this action seeks to enforce. It would seem that an action had been brought against him which failed in consequence of what the court thought to be insufficient proof of a transfer to him of the shares, but that defect in the present case was fully removed by the evidence of Mr. McGillivray, evidence upon which the trial judge acted and which the appellate court accepted to the fullest possible extent. At first blush it would seem that in

(1) 1 DeG. M. & G. 576.
(2) L. R. 6 H. L. 37.
(3) 54 L. J. Ch. 926.
(4) L. R. 7 Eq. 91.
(5) 7 M. & W. 574.

this case there is a failure of justice inasmuch as both the original shareholders, and the two subsequent transferees have escaped liability. It is rather, however, a failure of evidence to meet the exigencies of a particular case, a failure for which the plaintiff himself must, in the present case, be held responsible. His misfortune in not being able to prove his case in the first action must not affect the rights of the defendants in the second, or tempt a court of justice to sacrifice them on that account.

One other observation may be made. There was no express evidence that the transfer from Grant to Holmes was approved by the company, or that the latter's name was ever upon any list of shareholders. In my view, we must assume, under the special circumstances of this case that the transfer was approved, and that the list existed. Almost all the immediate parties connected with the transaction are dead, except Mr. Holmes, who appears to possess a very defective, if also a very convenient memory, but Mr. Holmes was the principal officer of the company; general meetings of the company without number were presided over by him as president of the company; for several years he was its principal executive officer, and is still, so far as I know. The only title which he had to interest himself in the affairs of the company or to act as director or president, or to execute the mortgages and bonds referred to in the evidence, was based and depended upon the transfer of Grant to him. In fact the plaintiff's rights to obtain his original judgment against the company were in effect based upon the assumption that Mr. Holmes was a shareholder, because it was by virtue of the company's contracts executed by him that their rights arose. Under the circumstances the maxim *omnia præsumuntur rite esse acta* applies.

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Sedgewick J.

I have also considered Mr. Justice Townshend's view in regard to the identity of the defendant company in the plaintiff's original action against it, and entirely agree with it. Neither Dickie nor Grant was ever a shareholder in the new company.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Harris, Henry & Cahan.*

Solicitor for the respondents, the Grants: *John McGillivray.*

Solicitors for the respondents, the Dickies: *Drysdale & McInnis*