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*Nov. 24, 25.
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*Feb. 3.

MARY H. HENDERSON, SUING ON BEHALF OF HERSELF AND ALL OTHER SHAREHOLDERS OF J. B. HENDERSON & CO. (PLAINTIFF).....APPELLANT;.....

AND

WILLIAM STRANG AND OTHERS (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

*Company—Payment for shares—Loan to shareholders—Action by shareholder.—Status.*

A company, with a capital of $100,000, was formed to take over the business of J. B. H. & Co., in Toronto. S., a merchant of Glasgow, Scot., subscribes for $51,000 worth of stock, it being agreed, as evidenced by a by-law of the company, that the money paid for it should be deposited with the firm of S. & Son, Glasgow, and used to finance the company's purchases in Europe. S. sent to Toronto his cheque for $51,000 and it was endorsed by the company and remitted to the Glasgow firm. Some years after J. B. H. started a new business, and his wife, a shareholder in the company, brought an action, on bahalf of all shareholders, to compel S. to pay the $51,000 to the company, and for a declaration that S., who had been president of the company since its organization, had never qualified as a director and all the acts of the company were, therefore, illegal and void.

*Held,* that the plaintiff, a minority shareholder, could not maintain the action against the will of the majority after acquiescence in and benefit from the operations of the company and the agreement as to the disposition of the cheque for $51,000.

*Held,* also, Davies, C. J. *dubitante* and Duff J. expressing no opinion, that the cheque for $51,000 accepted by the company as such

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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constituted a valid payment by S. for his 510 shares and its remittance to the firm of S. & Son was not a loan by the company of the amount to S., a shareholder, prohibited by sec. 29 of the Companies Act.

Judgment of the Appellate Division (45 Ont. L.R. 215) reversing that at the trial (43 Ont. L.R. 617) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the trial judge (2) in favour of the plaintiff and dismissing the action.

The facts of this case are stated in the above headnote.

*Hellmuth K.C.* and *Birmbaum* for the appellant.

*Nesbitt K.C.* and *Langmuir* for the respondents.

THE CHIEF JUSTICE.—At the close of the argument in this case I was not satisfied with the soundness of the judgment appealed from. Subsequent consideration of the facts has not removed my doubts, but as I am not clearly convinced that the judgment is unsound I will not dissent from the judgment now proposed, dismissing the appeal.

IDINGTON J.—The appellant suing as a shareholder, as she does, asking the court to interfere with the internal management of a corporate company's affairs, must clearly establish that what she complains of is either something done *ultra vires* the powers of the company or such an oppressive and unjust exercise of the powers of the majority shareholders for the promotion of an advantage to themselves to the peculiar detriment of the minority, or that what is complained of is fraudulent.

(1) 45 Ont. L.R. 215. (2) 43 Ont. L.R. 617.

Whether or not there may be (of which I am doubtful) possible cases of an exceptional character founded on grounds beyond those I specify, in which the court can find any jurisdiction for giving relief to a single shareholder suing as appellant, does not matter, for those put forward herein either rest upon some one of the grounds I specify or fail entirely.

The J. B. Henderson & Co., Limited, now in question, and in which appellant is a shareholder, was incorporated on the 23rd September, 1909, under and by virtue of the first part of the (Dominion) Companies Act, ch. 79 of the R.S.C., 1906, for the following purposes and objects:—

(a) To purchase, acquire and take over the business heretofore carried on at the said City of Toronto by the said James Black Henderson under the name, style and firm of J. B. Henderson & Co. as Commission Agents and Dry Goods Merchants, and the good will thereof and the stock-in-trade, furniture and effetcs of the same.

(b) To carry on the business, both wholesale and retail of general dry goods, merchants, drapers, haberdashers, milliners, dressmakers, tailors, furriers, lacemen, clothiershosiers, glovers and general outfitters.

(c) To acquire, purchase, hold, sell, dispose of, supply, manufacture and produce all manner and kind of goods, wares and merchandise dealt in or appertaining or incidental to the business or any part of the business aforesaid, and to carry on as aforesaid the business of commission agents in all the lines of goods hereinbefore mentioned.

(d) To acquire any business of the nature or character which the company is authorized to carry on and the good-will thereof.

(e) To act as agents for traders, dealers and manufacturers of any goods, wares or merchandise of the nature or description hereinbefore mentioned.

(f) To purchase, acquire, hold, lease and dispose of patent rights and licences and such motive and manufacturing powers or any interest therein as may be considered desirable or necessary for or in connection with the aforesaid objects of the Company.

(g) To pay out of the funds of the Company the costs of and incidental to the incorporation, promotion and organization of the Company. The operations of the Company are to be carried on throughout the Dominion of Canada and elsewhere.

The capital stock of the said company was to be $100,000, divided into one thousand shares of $100 each.

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The respondent, William Strang, a merchant in Glasgow, Scotland, subscribed for a single share on the 20th Nov., 1909, at Toronto.

The husband of the appellant, who was the James Black Henderson referred to above, subscribed on the 15th Sept., 1909, for $23,500, and she, next day, for $1,000.

Three other persons subscribed on said 15th Sept. for the respective sums of $5,000, $100, and $100.

No more was ever subscribed, except by said William Strang, who later subscribed for a sum which, with his first for one share, made a total of $51,000.

The stock in trade and goodwill of the Henderson business was taken over at the sum subscribed by him.

There were by-laws passed and directors elected constituting a Board consisting of the said William Strang, said J. B. Henderson, and one McJanet, who was an employee of the company, who had subscribed the said $5,000. Of these Strang was elected president and Henderson vice-president.

By-laws were duly adopted for carring on the business.

The foregoing outline presents all the leading features of the kind of the company which this was, and how it started about its business.

The said William Strang gave his cheque to the order of the company for the full amount of his stock in May, 1910. That cheque was duly acknowledged as payment for said shares and kept by said company in charge of its officers in Toronto and a stock certificate was issued by them on 25th August, 1910, to Strang for the full amount of five hundred and ten shares.

The cheque was then duly indorsed over by said

Henderson, as vice-president, to the order of William Strang & Co., a firm carrying on business in Glasgow.

If that is not payment then there might be something to complain of.

I agree with the learned trial judge and two of the learned judges in the Court of Appeal that it was payment.

And it was none the less so because the cheque was so indorsed over to the firm which agreed to hold themselves liable for the due application of the amount to meet the engagements of the company in Great Britain and elsewhere abroad, in order to facilitate, both by cash advances and credits, the purchases and other dealings of the company in carrying on its business.

Nor was it less a payment because those thus getting it in due course chose, instead of going through the form of presenting it and getting the cash, to adjust the matter by a debit and credit account in their ledger.

The said firm seems to have had not only ample means but also credit in the commercial world to accomplish all that was had in view by all concerned.

In the result this mode of handling the business was continued for six or seven years on the most friendly and satisfactory terms to all concerned.

The business as a result became (when the war stress is considered) a more prosperous concern than the firm of Henderson & Co. could have hoped for, but for the aid thus furnished.

Then there arose personal differences with Henderson, who, with two other persons, started in Toronto a business of their own.

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This suit seems to have been instituted by Henderson's wife to wreck the incorporated company and serve the ends of him and his new firm.

And, as part of the scheme for doing so, the pretension is set up not only that there never was a payment of stock but also that as an incident of so holding the courts appealed to are also bound to hold that Strang never was qualified to act as a director and hence all done by the board null and void.

With a holding that the cheque so indorsed over, as already stated, not to him but to his firm, was a complete payment, these pretensions all fall.

One more claim is made in that alternative, and it is that the court must order the payment by said firm of the money to the company.

Why? For what end? Evidently not even the solemn, formal mockery of handing it back to officers who are in the result virtually the nominees of the man attacked, and who is a majority shareholder in the company, but apparently the petty purpose of wasting money in law costs and exchange and embarrassing the management of the business.

It is claimed the money thus held subject to calls to answer the requirements of the business abroad and for no other purpose, was a loan to William Strang and not to the firm, who are, inconsistently enough, also sued for its recovery, and therefore *ultra vires* as being in breach of the section of the Companies Act (sec. 29) which provides that

> the Company shall in no case make any loan to any shareholder of the Company.

There was in no sense, such as comprehended in the statutory provision, a loan to William Strang, or indeed to any one else, but simply a mode adopted

of carrying on the business of the company in the most economical and advantageous way possible to all concerned. And to execute that purpose, evidenced thereby, a system was adopted of making good reciprocally to each party concerned therein on a fair and equitable basis by due allowances on either part in the way of interest, instead of dividends and remittances thereof and cross remittances of earnings from money on deposit.

To any one reading the long agreement providing for every contingency that is therein set forth, nothing but an honest business effort to deal justly and conformably to the law is manifest.

If there had been anything in the way of simulation, as a basis of fraud in violation of the enactment invoked, it would have developed, in the actual operation of the scheme for years of accounting, something which appellant could have put forward to demonstrate that as fact beyond peradevnture there was a basis furnished for the court to lay hold of and act upon to prevent a violation of the statutory law invoked.

In the numerous accounts kept, rendered and produced in evidence there is nothing pointed to of that sort such as would support such a contention.

Indeed counsel quite properly admitted there was no fraud, but insisted that the mere form was bad and hence *ultra vires*.

I submit we must ever attempt to grasp, if we can, the substance, and not pursue the mere shadowy forms as a basis of action.

The appellant having acted for many years upon this assumption of an honest observance of the law, and recognized the course adopted as such, can hardly

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be permitted now to turn round and say that those co-operating with her for years were doing something else and she innocent.

They are both in the same relative position towards each other whether good or bad, legal or illegal.

And if illegal she cannot be heard now to plead ignorance but must be held responsible for the position in which her husband, for example, has placed her. And that is to disqualify her from maintaining this action even if it had been well founded otherwise, as I hold it is not.

The appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed on the short ground that the appellant, by her conduct, has precluded herself from attacking the transaction she now seeks to impeach.

Assuming the transaction to be *ultra vires*, she could only maintain her status by shewing that the ends of justice required that she should be permitted to sue in her own name in opposition to the wishes of the majority of the shareholders.

Under the circumstances disclosed by the evidence I am forced to the conclusion that the appellant's claim has no foundation of substantial justice and that she has not made good her right to maintain the action in her own name.

ANGLIN J.—The material facts of this case, as I read the evidence, are accurately and succintly stated in the judgment of Mr. Justice Riddell. (1). For the reasons assigned by that learned judge, I am of the opinion that the shares allotted to Wm. Strang have been fully paid up and that for the sum of $51,000 in question the firm of Wm. Strang and Son, and not

(1) 45 Ont. L.R. 215 at p. 220.

Wm.. Strang as the holder of unpaid shares, is accountable to the J. B. Henderson Company. I cannot view all that took place—the forwarding of Wm. Strang's cheque to the company—the entry of payment in its books—the indorsement of the cheque over to it by Wm. Strang & Son—the solemn agreement executed by the members of that firm fixing the terms on which the $51,000 represented by the cheque should be held and dealt with by them—as the mere sham and attempted evasion of the statute which the learned Chief Justice of the Common Pleas seems to consider it. A very substantial change was effected in the rights and obligations both of the company and of the firm of Wm. Strang & Son sufficient to put the reality of the transaction beyond question. The company's rights under the agreement against Wm. Strang & Son in respect of the $51,000 are consistent only with that sum being its property held for its benefit and purposes, as defined in that document, and therefore inconsistent with the company not having received payment of that amount from Wm. Strang, or with his being still its debtor for the same sum in respect of unpaid shares.

Without expressing a concluded opinion upon it, I incline, with all the appellate judges, to the view that if the transaction between the company and Wm. Strang & Son should be regarded as a loan, it would not be in contravention of s. 29 (2) of the Company's Act, R.S.C., 1906, c. 79. But, for the reasons given by the learned Chief Justice of the Common Pleas, I concur in his view, which is also of Britton and Riddell JJ., (1) that that transaction was not a loan

(1) 45 Ont. L.R. 215, at p. 220.

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but a "deposit on special terms," as Mr. Justice Riddell puts it, and as such entirely outside the statutory prohibition.

I agree with the learned trial judge in his disposition of the grounds of claim which he has designated (b), (c), (d), and (f). (1)

I would merely add that, if this action might have been maintainable by the J. B. Henderson Company, the evidence warrants an inference, if not of actual participation at least of such acquiescence by the present plaintiff in the acts which she now impeaches that "the necessity for the court doing justice", (*Russell* v. *Wakefield Water Works Co.* (2); *Towers* v. *African Tug Co.*(3); *Fullerton* v. *Crawford;* (4) would appear not to require that she should be allowed as a shareholder, suing on behalf of herself and all other shareholders (other than the individual defendant) of the defendant company, to assert its rights.

I would dismiss the appeal.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—The two main questions here are the following:—

1. Did the respondent, William Strang, pay for the 510 shares which he agreed to take in J. B. Henderson & Co., Limited ?

2. Was the agreement signed on the 24th August, 1910, between J. B. Henderson & Co., Limited, and William Strang and Son, *ultra vires* of the company?

On the first question, the finding of the learned trial judge was that William Strang did pay for his shares, the learned judges of the Appellate Division

(1) 43 Ont, L.R. 617.
(2) L.R. 20 Eq. 474, 480.
(3) [1904] 1 Ch. 558.
(4) 59 Can. S.C.R. 314.

being equally divided as to this payment, although they all agreed that the judgment should be reversed.

The facts of the case are not at all complicated, although a great mass of evidence both documentary and by witnesses has been placed in the record. It appears that for some years Mr. James Black Henderson of Toronto was the Canadian purchasing and selling agent of the Scotch firm of William Strang & Son, of Glasgow, Scotland, composed of Mr. William Strang and four of his brothers. In the summer of 1909, Henderson was in rather poor health, and William Strang being in Toronto, it was decided to form a joint stock company to take over Henderson's business, under the name of J. B. Henderson & Co., Limited. William Strang desired to have a controlling interest in this company, which was natural as it was to handle his firm's goods, and upon its formation, with a capital of $100,000, he subscribed for 501 shares, representing $51,000, at par. Henderson, on the other hand, sold to the new company his stock-in-trade and good will for $23,500, taking in payment 235 fully paid shares. The other stock subscribers were W. G. McJanet, 50 shares or $5,000; Albert E. Weston, one share or $100; Robina Stark, one share or $100 and Mrs. J. B. Henderson (Henderson's wife, the present plaintiff) ten shares or $1,000.

All parties fully recognized that the authorized capital of the company was more than it required to carry on its business, and as its purchases of goods were almost entirely to be made in Europe, and principally from the firm of William Strang & Son, it was also evident and fully admitted by the interested parties that adequate financial arrangements would have to be made in Europe in order to buy goods there on the most advantageous terms.

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Several schemes were devised and discussed and finally it was agreed that the stock subscribed by all save William Strang would be issued as preference stock, entitled to a six per cent dividend, and that William Strang's stock would be issued as common stock. And as to William Strang's stock, inasmuch as he was advised that it would have to be paid, he agreed to send over to the company his cheque for $51,000, or its equivalent in sterling, it being understood that the company would indorse the cheque and remit it to William Strang & Son as a special deposit free from interest, where it would serve to finance purchases made by the company on the European market, the company paying interest at six per cent on all sums withdrawn by it, or advanced by William Strang & Sons on account of purchases made by the Company. William Strang was not to be entitled to interest on his $51,000, and no dividend was to be payable on his common stock until the six per cent. on the preference stock had been paid, and then the latter stock would rank equally with the common stock on any dividend that might be declared.

This arrangement was duly carried out and authorized by a by-law of the company and by a contract made by it with William Strang & Son. The question now is—and it must be remembered that this question is raised, not by a creditor of the company, but by a shareholder—whether what was done is equivalent to a payment by William Strang of the stock subscribed by him.

Had William Strang's cheque been cashed by the company, and had the latter immediately remitted the sum of $51,000 to William Strang & Son as a special deposit in accordance with the arrangement

made, it could not have been contended that William Strang had not paid for his stock, whatever opinion might be entertained with regard to the deposit of this sum with William Strang & Son. But by cashing William Strang's cheque and remitting the proceeds to William Strang & Son, the company would have incurred expenses for exchange and brokerage, and this expense it avoided and absolutely the same result was attained by indorsing over William Strang's cheque to William Strang & Son. There is no question whatever as to the absolute good faith of all the parties, and this being so, I cannot but think that William Strang paid for his stock as effectually as he would have done had his cheque been cashed by the company and the proceeds remitted to William Strang & Son. And, in my opinion, this conclusion is fully supported by the decision of the Judicial Committee in *Larocque* v. *Beauchemin*. (1)

I am therefore of opinion that William Strang paid for his shares.

The question whether the arrangement arrived at was *ultra vires* of the company should, in my judgment, be answered in the negative. I cannot look upon the deposit of William Strang's cheque with William Strang & Son as being a loan to a shareholder. It was what it purported to be, a mere deposit for the benefit of the company, in order to secure the most advantageous terms for its purchases on the European market. And moreover the firm of William Strang & Son was, by the law of Scotland, duly proved in this case, a legal entity entirely distinct from William Strang personally.

(1) [1897] A.C. 356.

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I also fail to see in such a deposit, although it was of a large part, even the greater part, of the company's capital, anything beyond the powers of the company. Two things must be remembered here. First there is no suggestion of bad faith or fraud, nor of any prejudice suffered by the creditors of the company or by its shareholders, all of whom agreed to the arrangement. Secondly, the firm of William Strang & Son is a legal entity distinct from William Strang personally. Had that firm been a corporation or a bank—and had it acted as banker as well as vendor in its relations with the company—I cannot imagine that it could be contended that by making a deposit of the sum paid by William Strang for his shares under such an arrangement, the company exceeded its powers. And inasmuch as the firm of William Strang & Son is an entity distinct from William Strang personally, in the absence of any suggestion of fraud, I cannot see that William Strang's interest in the firm—whatever it may be—affects the validity of the transaction any more than it would have affected it had this firm been a corporation or a bank in which William Strang had shares. The stipulation that the company should pay six per cent interest on any withdrawals out of the sum of $51,000 would have been very objectionable if the contract had been made with William Strang personally for it would have given Strang interest on his common stock if the company took possession of its own moneys, irrespective of the declaration of any dividend. But this stipulation was made with a third party, and the appellant does not suggest any intent to defraud creditors of the company or its shareholders.

The contention is however made in the appellant's factum that the agreement entered into was wholly for

the benefit of William Strang as majority shareholder, and that it was oppressive on the minority shareholders. I cannot view it as such. On the contrary, I think that the arrangement was most advantageous for the company, and, if any shareholders derived therefrom more benefit than others, it was the minority shareholders, whose stock was preference stock entitled to a dividend of six per cent before any distribution of profits and in such distribution or dividend the holders of the preference stock shared on the same basis as William Strang, holder of the common stock. It is obvious, moreover, that the company through this arrangement was enabled to purchase its goods on the European market on much better terms than if the settlement for each purchase had to be made separately by the acceptance and negotiation of drafts through the vendor's bank. After nine years only, on account of some trouble between Henderson and Strang, is the complaint made that this contract was *ultra vires*, and this complaint is by a shareholder who has benefited thereby and not by a creditor of the company. In my opinion, in view of the circumstances of the case, this appeal should not be entertained.

As a consequence, the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant:
*Watson, Smoke, Smith & Sinclair.*

Solicitors for the respondents:
*Osler, Hoskin & Harcourt.*