

ject-matter in litigation, for there the claimant was found entitled to the whole residue after payment of the annuities. This was an accurate description of the fund *in medio* in the present process. The reservation was no reservation of the successful claimant's right of property, but merely one as to who should be in the position to claim the annuities when they should come to be set free. Hypothetically the claimant in the former process had taken up the position adopted by Elphinstone Maitland. (2) There was also identity of person—Elphinstone (Maitland) was *de facto* in the same legal position as a claimant maintaining the very same interest in the previous process.

Authority—*Earl of Leven and Melville v. Cartwright*, June 12, 1861, 22 D. 1038.

At advising—

**LORD JUSTICE-CLERK**—I agree in the view which the Lord Ordinary has taken, and I do not see much difficulty in the case. The question arises thus—The bequest of the testatrix carried her property to the representatives of the family of Maitland of Freugh. When the previous multiplepointing was brought to divide the estate a claim was made by John Maitland, who was then representative of the family, for the residue in terms of the settlement. Counter claims were lodged by other parties, who were also her representatives, which were not successful. John Maitland's claim in the technical language of the multiplepointing was for payment of the residue. The residue was, however, under the settlement, burdened in the person of the executor with certain annuities. It is manifest that though John Maitland's right might be declared, it was impossible in the process to give decree for payment till the annuities fell in. That was the whole question which came to be decided by the Lord Ordinary, so far as his claim was concerned. The Lord Ordinary sustained his claim as the then existing head of the family to the whole residue. He did so in express terms, and I see nothing which in any degree can be said to limit this. He goes on to make qualifications with respect to payment, and with respect to payment of so much as was not required to meet the annuities he gives decree for the part retained. He reserves the question, when the money is set free, who will then be in the position which John Maitland had in regard to the amount then free. That is a qualification entirely subject to the finding that John Maitland was entitled to be preferred to the whole estate. I think it is impossible that this party who simply represents the position which Colonel John Maitland held in the former process should again raise the question of John Maitland's right to the whole residue.

**LORDS CRAIGHILL and RUTHERFURD CLARK** concurred.

**LORD YOUNG** was absent.

The Court adhered.

Counsel for Elphinstone Maitland—Sol.-Gen. Robertson, Q.C.—Rankine. Agents—J. & A. Forman & Thomson, W.S.

Counsel for Mrs Maitland—Graham Murray—Gillespie. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, January 6.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE PROPERTY INVESTMENT COMPANY OF SCOTLAND (LIMITED) *v.* DUNCAN.

*Public Company — Transfer — Rectification of Register — Companies Act 1862 (25 and 26 Vict. c. 89), sec. 35—“Unnecessary Delay.”*

“Unnecessary delay” by a company in dealing with a transfer of shares will not of itself give a person concerned in the transfer a right to have the register altered. He must, in order to have such a right, have been prejudiced by the delay to deal with the transfer.

Where a shareholder had it intimated to him that the directors declined to sanction his transfer, and remained on the register for a considerable time, after which, being sued for calls, he sought to have his name removed from the register, held that there had been “unnecessary delay” by the company in not dealing with his transfer at the first meeting after it had been intimated, but that having suffered no prejudice thereby, and having also acquiesced for a long time in the declinature to recognise the transfer, he was not entitled to have the register altered by deletion of his name.

The Property Investment Company of Scotland (Limited) was incorporated under the Companies Acts 1862 and 1867, and had its registered office in Edinburgh. The capital of the company was £240,000 divided into 24,000 shares of £10 each.

In April 1879 Alexander Duncan, Solicitor before the Supreme Courts, Leith, became proprietor by purchase of 50 shares of the said company, upon which £1 per share had been paid up.

In December 1883 Duncan tendered through his broker to the manager of the company a transfer of his shares to and in favour of his wife. By sec. 32 of the articles of association the directors of the company had power to decline to register any transfer in favour of any person whom they might consider it against the interests of the company to admit as a shareholder, and that without any cause expressed or assigned. The directors of the company refused to register the transfer by Duncan in favour of his wife. They did not intimate this refusal till 14th April 1884. Mr Duncan's name continued to stand on the register.

In March 1885 the company made a call of £1 per share, and again in September of the same year a further call of £1 per share. To the first demand Mr Duncan answered that he had sold his shares in December 1883, and had no concern with them. The second he did not notice at all.

Mrs Duncan died in September 1885.

In March 1886 the company raised the present action against Duncan, concluding for payment of £100, being the amount of the two calls. They averred that they duly intimated to him their refusal to register his transfer, and that he never objected to his name remaining on the register until application was made to him

for payment of the above-mentioned calls. They averred also that the alleged transfer was not a real and *bona fide* sale, but merely an attempt on the defender's part to avoid liability.

The defender averred that the shares were regularly sold by him to his wife in December 1883 at the market price of the day, and through the medium of a broker; that his wife had separate estate not subject to her husband's debts or deeds, and that the shares were purchased in *bona fide*. He also alleged that although the transfer was duly forwarded for registration in December 1883, it was not until April 1884 that he was informed that the transfer was rejected, and he averred that he had thus, by the defender's unnecessary delay in not dealing with his transfers at their first meeting, been precluded from re-disposing of his shares, and otherwise sustained loss.

The defender pleaded, *inter alia*—“(2) The pursuers not having dealt with the defender's transfer at their first ordinary business meeting held after 22d December 1883, or at least without unnecessary delay, and the defender having thereby sustained loss, he is not liable for payment of said calls.”

The proof showed that he had instructed his broker in December 1883 to sell the shares on the Exchange. They were standing very low then, and were not in demand, and the broker at first failed to sell them. Mrs Duncan, however, having a separate estate, bought them through the broker at 6d. per share, and the transfer was sent in for registration.

The Lord Ordinary decerned in terms of the conclusions of the libel.

“*Opinion.*—The defender was in the month of December 1883 proprietor of fifty of the shares of the pursuers' company. He determined to get rid of these shares in consequence of the price as quoted in the Stock Exchange lists rapidly falling. He instructed his broker George Denholm to sell them on the Exchange, but no purchaser could be found. The defender's wife, however, having separate estate, viz., an annuity of £150, bought them from the defender, who executed a transfer in her favour, which was sent in to the secretary of the company on the 22d of December 1883 for registration. The price paid was sixpence per share. The Lord Ordinary holds it to be proved that this was a real business transaction, and not a sham or pretended sale, and although it was a sale by a husband to a wife it was perfectly valid.

“The directors refused to register the transfer in favour of the defender's wife, and intimated this to his broker by a letter dated 14th April 1884 in the following terms:—‘The transfer by Alexander Duncan to Mrs Duncan was on Wednesday placed before my board, and I am to inform you that they have not sanctioned the registration of the transfer. I return you the certificate and transfer and the 2s. 6d. you sent me.’ This letter was duly communicated by the broker to the defender, and there the matter rested, so far as regards the company, for a whole year, the defender's name still remaining upon the register of shareholders. In the month of March 1885 a call was made of £1 per share on each shareholder, and another call of the same amount was made in September of the same year, and the defender is now sued for these calls. The only

intimation received by the company from the defender that he did not consider himself a shareholder was by a letter on the 27th April 1885 addressed by the defender to Peter Couper, the pursuer's manager, in the following terms:—‘I sold the shares referred to on the Stock Exchange on 22d December 1883, and the purchaser was assured by the broker on information that the transfer would be duly made. I have therefore nothing further to do with them.’ And his defence in the present action is, that not he but his now deceased wife was the shareholder, and that the case must be dealt with on the footing that the transfer was duly registered. The pursuers have assigned no reason for not registering the transfer, except that they consider it for the interest of their company not to make the registration, and they found upon the 32d section of their articles of association, which is as follows:—‘The board shall have power to decline registering any transfer in favour of any person whom they may consider it against the interest of the company to admit as a shareholder, and that without any cause expressed or assigned,’ and the 29th section provides that ‘the instrument of transfer of any share in the company shall be executed both by the transferrer and transferee, and the transferrer shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.’ Now, it is no objection to the action of the directors of the pursuers' company that they have assigned no reason for their declinature to register the transfer, for they have by their articles of association power to do so—See *in re Gresham Life Assurance Society, ex parte Penney*, 20th December 1872, L.R., 8 Chan. App. 446.

“But it is further said that the pursuers are barred from pleading that the transfer was not registered in favour of the transferee, and this by reason of their delay in disposing of the matter. The directors had no stated days of meeting; they only met when there was business to attend to. After the transfer was sent in there was a meeting of the directors in January 1884, at which consideration might have been had of the transfer, but the matter was overlooked, and as Mr Couper, the secretary, states, this was in consequence of the neglect of the clerk in not putting it among the *agenda* for that day. The next meeting of the directors took place on the 9th of April, when the resolution was come to not to register the transfer. Now, it is maintained by the defender that there was here such unnecessary delay as to entitle the defender to escape liability for the calls. The 35th section of the Companies Act 1862 does provide a remedy against unnecessary delay in the registration of transfers. It provides that the person aggrieved may, by summary petition to the Court of Session, apply for an order of the Court that the register may be rectified. This course was not adopted by the defender, who allowed his name to remain upon the register for a whole year without any intimation being given to the company that he considered the refusal to register the transfer as a grievance. There have been many decisions in England holding that unnecessary delay will entitle a party to have his name removed from the register—*In re Joint-Stock Discount Company, Fyfe's case*, July 9, 1869, L.R., 4 Chan. App. 768; *In re Joint-Stock Discount Company*,

*Nation's case*, December 10, 1866, L.R., 3 Eq. 77; *In re Stranton Iron and Steel Company*, July 26, 1873, L.R., 16 Eq. 559; *In re Hercules Insurance Company*, *Lowe's case*, January 27, 1870, L.R., 9 Eq. 589. But these cases do not go the length of justifying the broad statement made by Mr Buckley in his Treatise on the Companies Acts at p. 117, where he says—'A transfer to which no objection is or can be made on the part of the company ought to be confirmed by the directors at the first meeting at which in the ordinary course of business it can be confirmed, and thereupon registered. If not so confirmed at the first meeting at which in the ordinary course of business it can be done, there is unnecessary delay within the meaning of the section.' This is by far too general and comprehensive, and does not take into account the special circumstances that may exist, such, as in this case, long acquiescence by the defender in his name being retained upon the register after he had got distinct notice that registration of the transfer was refused. His remedy was then by petition to the Court, which he did not adopt, and the redress he now seeks of resisting payment of calls while he is upon the register as a shareholder is not the remedy which the statute gives him. This may be added, that no special damage was sustained by the defender in consequence of the delay in dealing with the transfer. The shares were unsaleable in January equally as in April 1884, and the depression in the property market makes them unsaleable still."

After the decision of the cause by the Lord Ordinary the defender presented a petition for the rectification of the register of the company by the deletion therefrom of his name. The grounds stated by him in support of the prayer of the petition were those stated in his defence to the action, and the answers lodged by the company were to the same effect as their averments in the action.

Section 35 of the Companies Act 1862 provides that "if the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may . . . as respects companies registered in Scotland, by summary petition to the Court of Session . . . apply for an order of Court that the register be rectified; and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for rectification of the register. . . The Court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register" . . .

The defender reclaimed against the interlocutor of the Lord Ordinary. The reclaiming-note and the petition and answers were heard together.

Argued for the claimer—While the company had by their articles of association the undoubted right to refuse a transfer, yet this rejection must be made timeously. In the present case there had been unnecessary delay, and thus the com-

pany had lost their right, and the defender was entitled to have his name removed from the register.

Authorities—The cases cited in the opinion of the Lord Ordinary.

Counsel for the respondents were not called upon.

At advising—

**LORD PRESIDENT**—This is an action by The Property Investment Company of Scotland against Alexander Duncan for payment of two calls of £1 each on the shares standing in his name in their books. The interlocutor now reclaimed against was pronounced in July 1886, and thereafter on 19th August the claimer presented a petition under sec. 35 of the Companies Act 1862 for the rectification of the register by having his name deleted therefrom. The argument which has been addressed to us on the reclaiming note is applicable, and is to be held as applying to both cases, which may thus be disposed of together. As I am of opinion that the judgment of the Lord Ordinary is right, it follows that the petition falls to be refused.

It appears that Duncan, the defender, had in December 1883 executed a transfer of these shares in favour of his wife, and that he had duly presented it to the directors for the purposes of registration. This transfer was not dealt with by the board until the month of April following, and it has been urged that such a lapse of time in disposing of the proposed transfer constituted unnecessary delay within the meaning of sec. 35.

I think there was unnecessary delay, and that this transfer ought undoubtedly to have been dealt with at the first meeting after it was presented, but what we have specially to deal with here is, what is to be the effect of this delay. Now, under the 35th section of the Act of 1862, all that the transferrer gets in the case of unnecessary delay is a right to present a petition to the Court, and it is to be observed that unnecessary delay does not of itself supply sufficient grounds for a claim to have the register rectified.

If the directors had good reasons for not registering any transfer, then the mere circumstance that there was delay in dealing with such a transfer would not give the transferrer the right to get his name removed from the register.

There may be many good reasons why a transfer should not be registered, as, for example, where the directors came to be of opinion that it would not be for the good of the company that it should be done. Such a reason would be the terms of the articles of association in the present case be sufficient, for article 32 provides—[*His Lordship here read sec. 32 above quoted*].

Now, it is not necessary for us to inquire into why it was that the directors thought it undesirable to register this transfer, but we can nevertheless form a surmise.

The transfer was by a husband to his wife, and the directors had no means of being assured that the transferee had sufficient separate estate to meet the calls which might be made on the shares. In such a state of matters the directors had a good reason for refusing to register this transfer—at any rate their right and title to refuse to register was good and sufficient. If the petitioner could have shown us that he had been prejudiced by the delay—as, for example, if he

had shown that had the directors' refusal been timeously intimated to him he could have produced an unobjectionable transference—then a good deal might have been said for his claim to have the register altered, but nothing of that kind could be urged, for it appears that the shares were all but valueless, or at any rate that there was no sale for them in the public market.

It may be observed with reference to the English authorities which were cited, that they all deal with cases where the application was made after the liquidation of the companies had commenced, and that makes an important distinction between them and the present case. There has undoubtedly been unnecessary delay in dealing with the transfer in the present case, but I think the claimer has failed to show that he has suffered any prejudice by the delay which has occurred. In that state of matters I am for adhering to the interlocutor of the Lord Ordinary, and I am also for refusing the prayer of the petition.

LORD MURE concurred.

LORD SHAND—The transfer here was dealt with and rejected by the directors in April 1884, and intimation of the rejection was made to the broker who had been employed to carry through the transfer. It was not, however, until the lapse of about a year, and when a call had been made upon the shares, that Duncan claimed that effect should be given to his transfer in favour of his wife. The Lord Ordinary is of opinion that, whatever were the claimer's rights, he is barred by his acquiescence for so long a time from pleading the long delay on the part of the directors in dealing with his application, and I am disposed to come to the same conclusion. If the claimer thought himself aggrieved by the delay of the directors to deal with his transfer, he ought to have pressed his claims under the provisions of sec. 35 of the Act of 1862. That, however, does not touch the question which we have now to consider, namely, whether the claimer was, in consequence of the delay in dealing with his transfer, entitled to have the register rectified by the deletion of his name.

It is quite clear that the directors had, in their option, a right of rejection, and it seems to me equally clear that in the present case there was good cause for exercising it. In order to prevail, what the claimer here would require to show would be, that owing to the unnecessary delay of the directors in dealing with his transfer he had suffered prejudice. I think your Lordship has said enough to make it clear that nothing of that kind has occurred.

Upon these grounds I concur with your Lordship that we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM—I agree with Mr Buckley when he says—"A transfer to which no objection is or can be made on the part of the company, ought to be confirmed by the directors at the first meeting at which in the ordinary course of business it can be confirmed, and thereupon registered. If not so confirmed at the first meeting at which in the ordinary course of business it can be done, there is unnecessary delay within the meaning of the section." But then the only

result of this "unnecessary delay" is to bring parties under the provisions of sec. 35, and to enable the party aggrieved to petition the Court for the rectification of the register. The Court will only order a rectification of the register if it is satisfied that the justice of the case demands this, and in coming to a conclusion upon this matter the Court is entitled to take into account all facts and circumstances down to the date of the disposal of the case.

I agree with what your Lordships have said both as to the claimer's acquiescence in the decision of the directors and also in regard to his not having shown that he has suffered any prejudice by the undue delay which occurred in having his transfer dealt with, and on the whole matter I concur in the result arrived at by your Lordships.

The Court adhered to the Lord Ordinary's interlocutor, and also refused the prayer of the petition.

Counsel for Pursuer—Gloag—G. W. Burnet.  
Agents—Watt & Anderson, S.S.C.

Counsel for Defenders—Scott—Jameson.  
Agent—Alexander Duncan, S.S.C.

Thursday, January 6.

## SECOND DIVISION.

MACLEOD AND ANOTHER *v.* DAVIDSON AND ANOTHER.

*Process—Expenses—Taxation—Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. c. 77), secs. 3 and 4.*

In an action of interdict against certain crofters in the island of Skye, the pursuer served the summonses personally on the various defenders by a Sheriff's officer sent from Inverness. In taxing the account of expenses of the pursuer, who was successful, the Auditor only allowed the expense of transmitting the summons by registered letter in terms of the Citation Amendment Act 1882. The pursuer objected, on the ground that as there was no postal delivery in the district, and all the Sheriff's officers in Skye had resigned their commissions, he had adopted the only method of service practicable in the circumstances. The Court *sustained* the objection.

In this case (decided November 17, 1886, reported *supra*, p. 69), which was a petition for interdict brought in the Sheriff Court of Inverness, Elgin, and Nairn at Portree, the Auditor of Court in taxing the account of expenses of the pursuers, who were successful in the action, disallowed an item of £31, 14s. 6d. charged under date 27th November 1884 for service on the defenders, by a Sheriff officer from Inverness, of the petition and deliverance thereon granting interim interdict. Of this sum he only allowed a sum of £1, 18s. 10d. as the fees for service by registered letter in terms of the Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. c. 77), which provides as follows—"Section 3. In any civil action or proceed-