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husband had sole ownership, this is the rational rule, not putting the wife or widow in a worse position than a stranger. We, therefore, confirm the decree of the District Court, with costs(1).

Decree confirmed.

(1) See also, in connection with this case, *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*, 10 Beng. L. R., 267.

ORIGINAL CIVIL.

Before Mr. Justice West and Mr. Justice Scott.

In re THE FLEMING SPINNING AND WEAVING COMPANY (LIMITED) IN LIQUIDATION.

1883 *Sept.* 7, 14.

JEHANGIR GUSTADJI AND NANABHAI RUSTOMJI RANINA (PETITIONERS AND RESPONDENTS).

v.

JOOSUB HAJI AHMED, APPELLANT.*

Company — Voluntary winding up — Transfer or sale of business — Special resolution — Dissentient member — Notice of dissent — requirements of notice — Powers of voluntary liquidator — Waiver — Arbitration — Failure to make award — Second arbitration — Indian Companies' Act X of 1866, *secs.* 116, 149, 175 *to* 179.

The F. S. & W. Company (Ld.) in the course of being wound up voluntarily proposed to transfer its business and property to another Company to be called the New F. S. & W. Company, and passed a special resolution on the 3rd July, confirmed on the 31st July, 1878, under section 175 of the Indian Companies' Act X of 1866, empowering the liquidators to carry out the transfer. J., a dissentient member of the old Company, sent on the 5th August, and, therefore, within the seven days provided by that section, a notice expressing his dissent from such resolution ; but the notice did not contain the requisition provided for by the latter part of that section, requiring the liquidators either to abstain for carrying the resolution into effect, or to purchase his interest in the Company. The liquidators, however, replied on the 23rd August by offering to purchase J.'s shares, which offer being refused, they and J. entered into an agreement on the 12th October, "in pursuance of the provisions in that behalf contained in the Indian Companies' Act X of 1866," for the reference of "the dispute as to the price to be paid to the said J. for his shares in the F. S. & W. Company (Ld.)" to two arbitrators and an umpire to be named by them. The agreement fixed a short date for the making of the award. The arbitration

* Suit No. 57 of 1881. Appeal No. 446.

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was entered on, but the time limited for the award having expired without any award being made, J. filed a suit, on the 28th of December, to recover the value of his shares. On the 1st March, 1879, the winding up of the F. S. & W. Company was ordered to be continued under the supervision of the Court, and J.'s suit was at the same time stayed, J. then endeavoured to have the arbitration revived. In this he was unsuccessful, the submission not having been filed in Court, and the arbitration being held to be already dead and past revival. The suit subsequently came on to be heard, and was dismissed, on the ground that section 175 of the Act made an arbitration and an award a condition precedent to any suit. J. then called on the liquidators to nominate an arbitrator, and enter on a fresh arbitration. This the liquidators doubted whether they could legally do, and therefore they now petitioned the Court for its order and direction in the matter. They submitted that J. had never acquired the rights of a dissentient shareholder under section 175 by reason of the insufficiency of his notice, and that, in any case, one arbitration having been already entered upon and determined, J. could not now call upon them to enter on a fresh arbitration.

Held, following *In re Union Bank of Kingston-upon-Hull*(1), that J.'s notice of dissent of the 5th August was in itself an insufficient notice under the provisions of section 175 of the Indian Companies' Act, 1866, inasmuch as it did not contain the requisition to the liquidators required by the latter part of that section, and that, consequently, it was open to the liquidators to have treated J. as disentitled to the rights of a dissentient shareholder under that section.

Held, further, that it was within the power of the liquidators to waive such informality in the notice on behalf of the Company, and that they had in fact done so, and that J. was consequently entitled to the rights of a dissentient shareholder under that section.

Held, further, that the rights of a dissentient shareholder, under that and the following sections, who had elected to have the value of his interest in the Company decided by arbitration, were not limited to a single reference to arbitration, and were not extinguished by the expiry, without an award being made, of the time fixed by such reference for making an award. That in such a case, unless otherwise disentitled, the dissentient shareholder was entitled to a second reference to arbitration for the purpose of arriving at a definite result by means of an award, which was the object contemplated by those sections of the Act.

THIS was an appeal from an order of Bayley, J., in Chambers disposing of a petition, dated the 24th day of August, 1881, by the liquidators of the Fleming Spinning and Weaving Company (Limited) in liquidation. The facts of the case are as follows :—

One Joosub Haji Ahmed was the registered holder of fifty shares in the Fleming Spinning and Weaving Company (Limited). By a special resolution passed at a meeting of the shareholders of the said Company, held on the 3rd day of July, 1878, and

(1) L. R., 13 Ch. D., 808.

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confirmed at a subsequent meeting held on the 31st day of July, 1878, it was resolved that the business and property of the Company (which is called hereinafter the old Company) should be transferred to a new Company to be called the New Fleming Spinning and Weaving Company, and that the old Company should be wound up voluntarily under the provisions of the Indian Companies' Act; and liquidators of the said Company were duly appointed. The new Company accordingly took over the business and property of the old Company on the 31st of July, 1878 and continued thenceforward to work the concern.

Joosub Haji Ahmed voted against the resolution passed at the meeting held on the 3rd July, and on the 8th July his attorneys, intending to conform with the requirements of section 175 (1) of the Companies' Act, sent the following notice of dissent to the liquidators :—"We now give you notice and inform you of our client's dissent from the special resolution passed at the said meeting" (of the 3rd July). A similar notice was sent on the 5th August after the special resolution of the 3rd July had been confirmed on the 31st July.

On the 23rd August, 1878, the liquidators through their solicitors sent to the solicitors of Joosub Haji Ahmed the following letter in reply :—

"Dear Sirs,—With reference to the notice of dissent from the special resolution passed to wind up the Fleming Spinning and Weaving Company (Limited), and which notice, dated the 8th day of July last, was addressed by you on behalf of your client

(1) Section 175.—. . . . . , subject to this proviso, that if any member of the Company being wound up, who has not voted in favour of the special resolution passed by the Company of which he is member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the Company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer: that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the Company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution.

above named to the liquidators of the Company, we are instructed by the liquidators to inform you that, in pursuance of sections 175 and 176 of the Indian Companies' Act, 1866, they will be prepared, during the space of a week from this date, to purchase the interest of your client in the fifty shares held by him in the Company at the price of Rs. 1,200 (Rupees twelve hundred) per share.

"Our clients will be glad if your client will make an early appointment to complete the purchase within the period above mentioned.—Yours, &c."

In a letter, dated the 13th September, 1878, Joosub Haji Ahmed declined the offer of the liquidators to purchase his shares for Rs. 1,200 a share, and requested that the question of the price of his said fifty shares should be referred to arbitration. The liquidators acceded to the request, and named their arbitrator. The plaintiff on his part nominated a second arbitrator. An agreement of reference was duly drawn up and executed on the 12th October, 1878.

This agreement after certain recitals continued as follows :—

"And whereas the said Joosub Haji Ahmed did not at either of the said meetings vote in favour of the said special resolution to wind up the said Fleming Spinning and Weaving Company (Limited), and did express to the said liquidators his dissent from such resolution within the time and in the manner required by section 175 of the Indian Companies' Act of 1866, and did require the said liquidators either to abstain from carrying the said resolution into effect, or to purchase the interest of the said Joosub Haji Ahmed in the shares held by him in the Company ; And whereas, in pursuance of such requisition and of the power vested in them in that behalf by the same section 175 of the said Act, the said liquidators have elected to purchase the interest of the said Joosub Haji Ahmed in his said shares ; And whereas the said parties hereto disagree as to the price to be paid for the purchase of the interest of the said Joosub Haji Ahmed in the said shares, and in pursuance of the provisions in that behalf contained in the said Indian Companies' Act X of 1866, the said liquidators at the request of the said Joosub Haji Ahmed have

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nominated and do hereby nominate and appoint Shapurji Barjorji Barucha of Bombay, Parsi inhabitant, as arbitrators on their behalf; and the said Joosub Haji Ahmed hath, at the request of the said liquidators, nominated and doth hereby nominate and appoint Tribhuvandas Lallubhai as arbitrator on his behalf; Now therefore these presents witness that they the said liquidators and he the said Joosub Haji Ahmed do hereby agree to refer the dispute as to the price to be paid by the said liquidators to the said Joosub Haji Ahmed for his shares in the Fleming Spinning and Weaving Company (Limited) to the award, order, final end and determination of the said Shapurji Burjorji and Tribhuvandas Lallubhai, and in case they shall not agree in making an award, then to the umpirage and determination of the umpire to be appointed by the said arbitrators in manner provided by the said Indain Companies' Act of 1866; And it is hereby further agreed between the parties hereto that the said arbitrators shall make and deliver their award on or before the 15th day of November next, and, in case the arbitrators disagree, that the said umpire shall make and deliver his award on or before the first day of December next."

The arbitrators before proceeding with the reference appointed Mr. Moorarji Tulsidas as their umpire.

The arbitrators not agreeing, it devolved on the umpire to make an award. The time for making the award was by consent extended to the 27th December, but no award was then or ever made.

On the 28th day of December, 1878, Joosub Haji Ahmed filed a suit (No 660 of 1878) against the old Company in liquidation and the new Company, claiming Rs. 75,000 as the equivalent of the value of his said fifty shares, and for an injunction restraining the old Company from executing any assignment of its assets and property to the new Company, and for an order setting apart in the meantime out of the assets of the old Company a sum sufficient to meet the plaintiff's claim.

On the 30th December, 1878, the solicitors of Joosub Haji Ahmed wrote to the liquidators of the old Company, inquiring

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whether they would consent to a month's further time being allowed to the umpire to make his award. Certain correspondence thereupon passed between the solicitors on either side on the subject of enlarging the time for making an award, but no definite determination was arrived at. On the 10th of February, 1879, however, the umpire himself wrote to the liquidators, stating that he had appointed a day to proceed with the reference. The liquidators through their solicitors replied on the 18th February that "having regard to the circumstances that Mr. Joosub Háji Ahmed has filed a suit in respect of the matter which was referred to arbitration, that a petition is pending to wind up the Company under the supervision of the Court, and that the time to make an award has expired, they think there are objections in the way of your proceeding with the reference." Accordingly, nothing further was then done towards proceeding with the arbitration.

On the 17th January, 1879, the new Company was ordered to be wound up.

On the 1st day of March, 1879, an order was made that the voluntary liquidation of the old Company should be continued subject to the supervision of the Court, and all further proceedings in the suit, No. 660 of 1878, were ordered to be stayed.

By an order made in the liquidation of the old Company on the 24th day of April, 1879, the Court sanctioned the special resolutions passed on the 3rd and confirmed on the 31st of July, 1878, for transferring the property, effects and assets of the old Company to the new Company, but subject to the condition that the sum of Rs. 90,000 be set apart out of the proceeds of the assets of the old Company to secure the interests of Joosub Háji Ahmed and another dissenting shareholder(1). The sum of Rs. 90,000 so directed to be set apart was accordingly deposited in the Bank of Bombay.

On the 24th day of June, 1879, the solicitors of Joosub Háji Ahmed again wrote to the liquidators of the old Company requesting them to consent, with the leave of the Court, to enlarge the time for the umpire to make his award, and such consent being refused, Joosub Haji Ahmed on the 11th day of July, 1879,

(1) See I. L. R., 3 Bom. 299.

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issued a judge's summons calling upon the old Company, their agents or attorneys, to show cause why they should not, with the leave of the Court, consent to enlarge the time for the umpire, Mr. Moorarji Tulsidas, to make his award ; or why, in the event of the Court being of opinion that such consent should not be given, leave should not be granted to the said Joosub Haji Ahmed to proceed with his suit, No. 660 of 1878.

The summons was heard before Green, J., on the 24th July, 1879, when the learned Judge refused the first part of the application, on the ground that he had no power to revive an arbitration after the time fixed for making the award had elapsed ; but he removed the stay of proceedings, and ordered that the said Joosub Haji Ahmed should be at liberty to take, or continue, such proceedings as he might be advised for the purpose of ascertaining the sum to be paid by the said two companies, or one of them, for the interest of the said Joosub Haji Ahmed in the said Fleming Spinning and Weaving Company, Limited.

Joosub Haji Ahmed then induced the arbitrators to appoint another umpire, and on the 11th August notice was given to the liquidators that the arbitration would be proceeded with before the new umpire so appointed ; the liquidators, however, protested against such proceedings as irregular and invalid, and the umpire accordingly refused to proceed further in the matter, unless with the sanction or under an order of the Court.

On the 1st of September, 1879, Joosub Haji Ahmed presented a petition to the Court, praying that the submission of the 12th October, 1878, might be allowed to be filed in Court, and that an order of reference might be made thereon ; but the petition was dismissed on the 8th of September by Green, J.

On the 27th July, 1880, the liquidators filed their written statement in Suit No 660 of 1878, in which they, for the first time, took the objection that the notice of dissent of the 6th August, 1878, was insufficient, and that Joosub Haji Ahmed was not, therefore, entitled to the rights of a dissentient shareholder under sections 175 and 176 of the Indian Companies' Act.

In July, 1881, the suit came on for hearing before Sir Charles Sargent. The liquidators of the old Company had previously

given an undertaking not to object to the suit on the ground that no arbitration, as provided by the Act, had as yet been held. The liquidators of the new Company, however, had given no such undertaking, and they raised the objection. Sir Charles Sargent held the objection to be a valid one, holding that arbitration and an award were made by the Act a condition precedent to any action by a dissentient shareholder for the value of his interest in the Company, and the suit was dismissed accordingly.

On the 22nd day of July, 1881, the attorneys of Joosub Haji Ahmed wrote to the liquidators of the old Company, informing them that the Suit No. 660 of 1878 had been dismissed for want of jurisdiction, on the ground that the price to be paid for the purchase of the interest of the said Joosub Haji Ahmed in the Company was not then ascertained by arbitration; that it, therefore, became necessary that such price should be settled by arbitration in the manner directed by the Companies' Act, 1866, and that, in accordance with the provisions of that Act, the said Joosub Haji Ahmed had appointed one Tribhuvandas Lallubhai as his arbitrator, and they called upon the liquidators to appoint an arbitrator on their behalf, unless they consented to the appointment of the said Tribhuvandas Lallubhai as sole arbitrator.

On the 2nd of August the liquidators through their attorneys replied to the above letter of the 22nd day of July, stating, amongst other things, that, after the proceedings which had been already had, they considered that Joosub Haji Ahmed was not now entitled to have another appointment of arbitrators, or a fresh arbitration, upon the matters referred to in his letter of the 22nd July, and that they, therefore, considered that Joosub Haji Ahmed had no right to call upon them to appoint an arbitrator. However, without waiving their rights, and without prejudice thereto, and under protest, they nominated Mr. Framji Sorabji Bharucha to act as arbitrator on their behalf, but only in the event of the Court deciding that Joosub Haji Ahmed was entitled to a fresh reference to arbitration. They at the same time gave notice to Joosub Haji Ahmed that, in the event of his attempting to proceed with such fresh arbitration, they would take such steps as they might be advised to prevent him from so doing.

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Some further correspondence took place in respect of this new arbitration, and, finally, the liquidators wrote and informed Joosub Haji Ahmed that they were about to apply to the Court to determine whether he, Joosub Haji Ahmed, was entitled to proceed with the said reference, and for an order restraining him and his arbitrator in the meantime from proceeding therewith.

On the 24th August, 1881, the liquidators filed a petition to the High Court in which they prayed that it might be determined by the Court whether, in the events which had happened, the said Joosub Haji Ahmed was now entitled to proceed with the alleged new reference to arbitration or with the reference agreed to on the 12th day of October, 1878; and, if the Court should be of opinion that the said Joosub Haji Ahmed was not entitled to proceed with either of the said references, that it might be determined by the Court whether, in the events which had happened, the said Joosub Haji Ahmed was now entitled to have the price of his fifty shares determined by arbitration in the manner provided by sections 177, 178 and 179 of the Indian Companies' Act, 1866, for determining the price to be paid for the purchase of the interest of any dissentient member; and they further prayed that all further proceedings under the said references, or either of them, might be stayed until the further order of the Court.

The petition was heard in Chambers before Bayley, J., on the 22nd of January, 1883, all parties being represented by counsel, and an order made that Joosub Haji Ahmed was not entitled to proceed with the alleged new reference to arbitration, or with the reference agreed to on the 12th October, 1878, nor was he entitled to have the price of his fifty shares in the old Company determined by arbitration in the manner provided by sections 177, 178 and 179 of the Indian Companies' Act; and all further proceedings under the second reference, or either of them, were ordered to be stayed,—Joosub Haji Ahmed being ordered to pay his own costs, the liquidators to get their costs as between attorney and client out of the sum of Rs. 90,000 deposited in the Bank of Bombay.

Joosub Haji Ahmed now appealed from the above order of Bayley, J.

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Farran (*Inverarity* with him) for Joosub Haji Ahmed.

Lang for the petitioners, the liquidators of the old Company.

Starling (by leave of the Court) appeared on behalf of the liquidators of the New Fleming Spinning and Weaving Company, who had not been served with a notice of the appeal.

Farran.—There are two questions. The first is, was the notice of dissent sent by Joosub insufficient, under section 175 of the Indian Companies' Act, by reason of its not expressly calling on the liquidators to exercise the option given them by that section? The second question is, whether, supposing the notice to be informal and insufficient, the liquidators did not by their subsequent conduct waive the informality, and are not now debarred from setting it up? The argument on the other side on the first point is based entirely on the decision, or rather the *dictum*, of Sir G. Jessel in the case of *In re the Union Bank of Kingston-upon-Hull* (1). The point itself was not in fact before the Master of the Rolls for decision: all he says on it, therefore, is purely *obiter dictum*, and not in any way binding on this Court. He does not say that the section by its language clearly requires such a notice, but merely that it would work inconveniently if a less comprehensive notice were given. Such a construction of the section cannot be so justified. It is, in fact, a disabling section. Our legal rights as member of a partnership are cut down and limited by the section: it must, therefore, be construed strictly, not against us, but against the Company. There is only one other authority on this point—*In re Anglo-Italian Bank and De Rosaz*(2). The notice in that case was not in exact accordance with the wording of the section, and yet it was held sufficient. That case, then, is in my favour. It shows that what alone has to be looked to, is, whether the subject of a notice—namely, to convey information—has been satisfied. According to that test, Joosub's notice was sufficient. The liquidators understood it as calling upon them to exercise their option under section 175; their reply to it, of the 23rd August, makes an offer for the purchase of Joosub's shares. Then follows a correspondence ending in the agreement of reference of the 12th October. The

(1) L. R., 13 Ch. D., 808. (2) L. R., 2 Q. B., 452.

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recitals of that agreement show that the liquidators considered the notice a regular one, and regarded Joosub as entitled in every way to all the rights of a dissentient shareholder under section 175 of the Act. And throughout the various proceedings and correspondence which followed, down to July, 1880, there is not a word or suggestion as to any informality or omission on Joosub's part. It is not till the written statement in the Suit No. 660 of 1878 is filed, in July 1880, that the objection is taken. The report of the decision of the Master of Rolls in *In re the Union Bank of Kingston-upon-Hull*(1) had shortly before that date reached Bombay; hence the objection. So, if it is possible for voluntary liquidators to waive such an informality as this (if it be one), no stronger case of waiver than this could be imagined, and the liquidators and the Company are estopped now from raising the point. Our position has, in consequence of their action, been greatly altered to our hurt. They led us to believe that they would buy our shares, and, consequently, we did not protect ourselves as otherwise we might have done. At that time we might have sold our shares in the market; now they are worthless. That raises the question—is it *ultra vires* of voluntary liquidators to waive such an informality as this on behalf of the Company? I submit it is not. There are no express authorities as to waiver by a liquidator, but there is ample authority in the case of a director. Why should the position of a liquidator differ from that of a director in this respect? Both are trustees as regards the shareholders—agents of the Company as regards outsiders. See remarks of Cairns, L. J., in *Ferguson* v. *Wilson*(2). *Vining's Case*(3) may be cited against me, but that case merely decided that a liquidator could not relieve a shareholder of his liability towards a creditor. A voluntary liquidator may do of his own motion all that an official liquidator could do with the sanction of the Court: Indian Companies' Act, sections 149, 116. A company can be estopped by the action of its officers: see Lindley on Partnership, Vol. I, p. 133; and *Murray* v. *Bush*(4).

I submit, therefore, the order of Bayley, J., was wrong, and the new arbitration ought to be allowed to proceed.

(1) L. R., 13 Ch. D., 808.
(2) L. R., 2 Ch. Ap. at p. 77.
(3) L. R., 6 Ch. Ap., 96.
(4) L. R., 6 H. L., 37.

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Lang for the petitioner.—The real question has not been touched by the argument on the other side. It is whether, there having been already one arbitration, a second arbitration can, under all the circumstances of the case, be insisted on by Joosub Haji Ahmed. There can be no question of estoppel on that point at least. As to whether or not the liquidators would have been estopped from going back from the first arbitration, that question is of no importance now, for that arbitration has failed, and is dead. The liquidators never did seek to go back from it. Because they agreed to that arbitration they are not now bound to agree to a second. The failure of the first arbitration was due to Joosub himself. Sections 177, 178 and 179 give a dissentient shareholder ample powers over the proceedings in arbitration, and if he uses them he cannot fail to bring the arbitration to an effective result. Joosub did not choose to make use of them, and so the arbitration failed. The fact is, he mistook his course, and sacrificed the arbitration to the suit. If he is now without remedy he has no one to blame but himself.

I contend, also, that he is not and never was, entitled to the rights of a dissentient shareholder under section 175 of the Act by reason of non-conformity with the requirments of that section. He may have, and no doubt has, other rights, but these he has forfeited by non-compliance with the necessary conditions. The section is really an enabling section in his favour, and must not, therefore, be strained on his account. It is an exception to the general powers given by the Act to the majority of the shareholders. Sir G. Jessel's construction of that section is plainly the reasonable one, and should guide this Court. The liquidators cannot tell, till they get a definite notice, what course the dissentient shareholder will pursue. He may intend simply to abandon his shares, or may intend that the liquidators shall realize the shares in the new Company to which he would be entitled, and pay over the proceeds to himself—see Lindley on Partnership, Vol. II, 1468. Or, he may intend there and then to sell his shares in the market to some one who is willing to take their equivalent in the shares of the new Company. All these considerations show how very inconvenient would be any other construction of this section than that put upon it by Sir G. Jessel. That decision is cited in the last edition of Buckley Companies'

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Act (1883), p. 355, without dissent of any sort. In *De Rosaz's* case(1) the notice did satisfy the requirements of this section (section 161 in the English Act), but went beyond them. That is a very different thing to a defective notice. Joosub was in default on the 8th August. The liquidators' letter of the 23rd August could not operate to purge that default, or estop them from afterwards setting it up. In any case, it could not so operate as against the Company; for it was *ultra vires* of the liquidators to give a dissentient shareholder any rights that were not strictly his under the Act. Voluntary liquidators are not at liberty to waive any thing. Liquidators are mere creatures of the Act; their origin and powers are alike statutory; they can do nothing but apply the machinery provided by the Act. On these various grounds, therefore, this appeal should be dismissed.

Starling for the liquidators of the new Company.—The old arbitration is non-existent; Green J.'s judgment decided that. It was an arbitration under the Act; it is dead, and cannot be revived. The Act makes no provision for the revival of it, or for a second arbitration. [WEST, J.—It makes no provision either way.] It professes to lay down a procedure; if an Act lays down a procedure, that procedure, and no other, can be followed—*The Vestry of St. Cancras* v. *Batterbury*(2). There is no provision for more than one arbitration. If all the provisions of the Act had been followed, and the submission been filed in Court, the Court would have had full jurisdiction over it, and no failure could have resulted. Again, the Act limits no time for making the award, and the agreement therefore need have fixed none, when there would not have been this difficulty. Parties must suffer for their own neglect and errors. If Joosub is now to stand on his rights as of the 5th August, 1878, the liquidators must be allowed to do the same. It is perfectly open to them, therefore, to take the objection they do to the notice. The New Indian Companies' Act, section 204, adopts the construction put on the similar section (175) of the old Act by Sir G. Jesse.l It provides that both parts of the notice shall be in writing, and given within seven days. Liquidators cannot waive anything as against the Company they represent—*In re The Empire Corporation*(3).

(1) L. R., 2 Q. B., 452. (2) 2 C. B. N. S., 477. (3) 20 L. T. N.S., 103.

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Farran in reply.—The agreement of the 12th October was not an agreement of reference under the Act, section 175. It was meant to be, but was not. It did not conform to the requirements of the section in many respects. It says: "The value of Joosub's shares" instead of "The value of his interest in the Company" Green, J., pointed out this informality when the motion was before him on the 24th April, 1879. Then it fixes a time for making the award, which the Act does not do. It was, therefore, merely a voluntary agreement outside of the Act. There was no delay or laches on our part. The suit, with the undertaking we had from the old Company and thought we had also from the new Company, was our right course. Consequently, we have now all the rights and equities we had in December, 1878. If the first arbitration was under the Act, still we are not debarred from a second. There is nothing to show that section 175 contemplates one arbitration, and no more; what it does contemplate is a result arrived at by arbitration. After Sir Charles Sargent's decision it is clear there is no other mode of relief open to us, in spite of the suggestion made Lindley, J., (1) that equivalent shares in the new Company might be realized on our account. [West, J., cited *Griffith* v. *Paget*(2) and Buckley on Companies' Acts (1883), p. 354.] *Higg's Case*(3) and *Martin's Case*(4), also cited by Mr. Buckley (p. 353), seem opposed to the view taken in *Griffith* v. *Paget*. If this relief was open to us, Sir Charles Sargent ought to have given it to us. Our suit was wide enough to embrace it. But the real question is, are our rights under section 175 gone? I submit they are not.

The judgment of the Court was delivered by

WEST, J.—We have considered the points in this case in the interval since it was first argued, and we think that no object would be gained by our reserving our judgment.

There are two general considerations which it is necessary to bear in mind in dealing with a question of this sort. The first is that in the construction of such an Act as this—an Act concerned with the creation and carrying on of joint stock companies, an institution which has an English origin, and takes

(1) Lindley on Partnership (1878), Vol. II, 1468.

(2) L. R., 5 Ch. D., 894. (3) 2 H. & M., 657.

(4) 2 H. & M., 669.

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its shape from English business ways and habits—we must be guided, as far as possible, by the current of English decisions. The second consideration is that, while adhering generally to the principles of construction laid down from time to time by English Courts of law on the various parts of these Acts, we should not forget that such enactments when introduced into this country have to be applied to a people for the most part unfamiliar with our business ways and experience, as well as with our language,—a consideration which makes it desirable that we should be careful not to clog the interpretation and application of these enactments with unnecessary refinements and technicalities which are not made imperative by the plain words of the Act. These Joint Stock Companies' Acts, following previous Acts, endeavour to embody in a convenient and comprehensive form such rules as previous experience had proved to be convenient. This accounts for the general and untechnical character of many of their provisions. It would be undesirable, we think, by any want of liberality in construction, to set in the way of those classes in this country whose interests are practically concerned with questions of company law, any shares and pitfalls that our care can prevent.

Applying these general principles to the construction of this section 175 with which we are now concerned, it would be impossible, we think, to refuse to follow the recent English decisions as to the requirements of a good notice under the latter part of that section. Such a notice, it has been held, must not only express the shareholder's dissent from a proposed conversion, but must go on to say what he desires the liquidators to do. It is obviously necessary that without any delay an intimation should be given to the liquidator of the claim which the dissentient shareholder intends to make upon the Company. In the present case the notice of the 5th August conveyed merely an expression of dissent from the resolutions previously arrived at; there was no express intimation in it that the dissenting shareholder would claim his proportion of the assets, and that steps should be taken with a view of paying to him the value of his shares. Probably Joosub was not aware, as most people were not then aware, of the importance of such a further intimation. Down to that time the

necessity was perhaps not clearly understood even in England. So little was it apprehended that in *De Rosaz's Case* (1) in the Court of Exchequer Chamber decided in 1869, it was possible for so cautious and experienced a Judge as Hannen, J., to express himself thus:—"Upon a shareholder expressing his dissent, it becomes the duty of the liquidators to elect which of two courses they will pursue: they must either abstain from carrying their resolution, or purchase the interest held by the dissentient member. I reserve, for the moment, the question how the price is to be arrived at, whether by agreement or by arbitration. If the liquidators have manifested their election to purchase the interest, then, as it appears to me, it is not open to them afterwards to withdraw from that election. When the election is made, a valid contract is entered into for the purchase and sale of the interest of the dissentient shareholder; and it is immaterial whether the price is ascertained by agreement, or by the mode substituted for agreement, namely, by arbitration." No doubt in that case the point we are now considering was not definitely raised; but it is impossible that Hannen, J., should have used such language if at that time the stringent requirements of the section, as afterwards interpreted by the Master of the Rolls, were generally received and understood by the profession and by the Bench.

In the present case the liquidators from the first seem to have understood the notice, not merely as a notice of dissent, but as an intimation also that the dissentient shareholder would require the value of his interest to be ascertained and paid to him. Now the purpose of a notice is to convey certain information to the mind of another. Suppose it proved that there existed a custom in Bombay by which such a notice as this was understood to convey the further intimation required by the section. The intimation would thus be tacitly incorporated in the notice of dissent; and is there anything in the Act, or outside of it, which should prevent a Court giving effect to such a custom so enlarging the literal sense of the notice? So here, we think, if the notice being thus intended, the liquidators did, as a matter of fact, so understand it, it is hard to say that that was not, for

(1) L. R., 4 Q. B., at p. 474.

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practical purposes, a sufficient intimation of the dissentient shareholder's intentions. The question is simply what he meant and what they understood him to mean. In this view it is that the general considerations we have already adverted to are of importance. The provisions of the Act are for business men, and business men as much as lawyers had to do with the framing of it. No particular form is prescribed: it is enough if the dissentient's wish is brought home to the liquidators' minds. That in this case the liquidators did understand the notice as indicating that the dissentient looked for a return of his money and so accepted it is quite clear, for their response to it is an offer of Rs. 1,200 a share. It was, therefore, as a matter of fact brought home to the minds of the liquidators that Joosub would require to be paid the value of his interest in the Company. It was done in a way to which they at the time assented; and that being so, we think that, if the liquidators were at liberty to exercise any discretion in the matter, the requirements of section 175 were sufficiently satisfied.

Then arises the question, was it open to the liquidators, was it within their powers, to act in this manner; to accept such a notice as sufficient, and thereupon to enter on a negotiation for a settlement with the dissentient shareholder, and, that failing, to proceed to a submission to arbitration? This is a question of some difficulty, and it is unfortunate that there are apparently no reported cases on it. We must, therefore, in dealing with it be guided by general principles and by a consideration of such sections of the Act as may throw light upon it. What is the position of a dissenting shareholder under the Act? He is entitled to his share in the assets. Certain powers are given to a majority of the shareholders over the rights of the minority, but these powers have reference to the central idea and purpose of the Company for the attainment of which it is incorporated. It is only in their domestic forum, within the limits of the Company as a company, that the majority can pretend to an authority over the individual members. They have no power to convert a dissentient shareholder into a shareholder of a new Company. A majority can put an end to the old Company;

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but if they do so, a dissenting shareholder is entitled to retire from the concern with as little loss as possible. To enable him to do this, a machinery is provided by the law. A liquidator is appointed for that as well as for other purposes. To him the shareholder so dissenting is bound to look ; the liquidator to him represents the Company, that is, he represents the private interests of the remaining shareholders in the partnership. He fills no public capacity, and represents no public interests ; he merely represents the private interests of individuals more or less numerous. Filling that character his duties are laid down by the Act. Section 149, sub-section 7, provides that every voluntary liquidator may, without the sanction of the Court, exercise all the powers given by the Act to official liquidators, and official liquidators with the sanction of the Court could, under section 116, sub-section 8, have entered into such an arrangement as this. *Primâ facie*, therefore, a voluntary liquidator has power to enter into an arrangement of this sort, and there is nothing, we think, in section 175 which prevents him from doing so. If a dissentient shareholder does not send a notice strictly in accordance with the requirements of Section 175 he may lose his right to insist on being bought out in the manner contemplated, but that does not necessarily preclude the liquidator from yielding to him what he has lost the right to insist on. If the liquidators, accepting a technically defective notice as sufficient, make an offer to buy his interest, the dissentient shareholder may accept it, and when he accepts it the liquidator must be held to it. In the words we have already quoted, " it is not open to them afterwards to withdraw from that election...a valid contract is entered into for the purchase and sale of the interest of the dissentient shareholder." We do not think there is anything in Sir G. Jessel's decision which is opposed to this. His decision laid down that a liquidator must have both the notices—the notice of dissent and the notice of claim—and that within seven days and very good reasons for so holding are given. Cases could be put, in which it would be of the greatest importance to the liquidator to know exactly what the dissentient shareholders will claim. The liquidator may hold the shareholder to that, and insist on it as his right ; but why should it not be equally

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open to him to refrain from doing so, and to enter into such an arrangement as the liquidators in this case entered into, first by their letter of 23rd August, and finally by the agreement of reference of the 12th October, 1878? No public interest suffers by it, and it is not the function of the liquidators to lay hold of every technical excuse for fleecing one member, or group of members, for the benefit of the others. They may do what an honourable set of partners would do, and certainly the latter would not say: "We knew what you meant; but as your notice was defective in form, we will stand on our right to ignore it." Such is not the purpose of the Act, which was meant to make common practices effective, to remove embarrassments not to create them.

The agreement of reference having been executed, the arbitration was duly entered on. Little, however, was done. There seems to have been some remissness on both sides, but not so much on either as to deserve the name of negligence. The time for making the award, which would otherwise have elapsed, was extended to the 27th December, 1878; but no award was made, and on that day the time expired. The next day, the 28th December, Joosub files his Suit No. 660 of 1878. On the 1st March, 1879, the private liquidation of the old Company is converted into liquidation under the supervision of the Court, and proceedings in the suit are accordingly stayed. On the 10th July, 1879, the application to Green, J., is made, to extend the time for making the award, or, in the alternative, to remove the stay of proceedings. The learned Judge, rightly as it seems to us, held that the time agreed on having already expired, the arbitration proceedings were dead and he had no power to revive them; but he removed the stay, and the proceedings in the suit consequently went on. After some time the suit came on for hearing. The old Company had given an undertaking not to take the objection that there was no cause of action, no arbitration having been had, and no award arrived at; but the new Company had given no such undertaking, and they raised that very point, and, as it proved, successfully. Sir Charles Sargent held that the suit could not be maintained—arbitration and an award having been made by

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the Act a condition precedent to the bringing of any suit. There having been no award made, he held that the necessary basis of the action was wanting. If Sir Charles Sargent was right in that opinion, and we do not doubt that he was—see *New River Company* v. *Mather*(1) and *Caledonian Railway Company* v. *Carmichael*(2)—it would be a very singular operation of the law that tells a man that he cannot sue till he has first fixed a value by arbitration, and at the same time tells him that one attempt at arbitration having already been made, though followed by no result, no other can ever be made. There having been no fraud and no gross negligence on his part, are we bound to hold that all remedy is gone by the failure of the former arbitration proceedings? There is nothing peculiar in the objects and the intended operation of the arbitration clauses of the Act. The ordinary principles apply to them. The reference to arbitration is to be like any other reference to arbitration, and the object plainly is to arrive, without litigation, and in a cheap and simple way, at a definite result in the shape of an award. Unless the Act expressly enjoins it, which it does not, there is no reason we think why, a first arbitration failing, a second should not be entered upon. The first arbitration may fail from a number of causes. The arbitrators may be crossing the harbour one day and be drowned; or the decision having been left to an umpire, the umpire may die on the day he was to have made an award. The arbitration may fail owing entirely to some mistake or neglect of the arbitrators. Is the dissentient shareholder without remedy in all these cases? He is, by virtue of Sir Charles Sargent's decision, if a second arbitration is impossible. We think that we are not driven to so monstrous a conclusion; the Act does not expressly provide for a second arbitration in these or any other cases, but it does not forbid it. Therefore general principles must be applied, and the cases show that a first arbitration having failed, the matters referred revert to their position before the reference. Hence a second arbitration may be, and indeed must be, entered on as the only possible way to a decision. In cases under the Act no doubt the second arbitration would have to be governed by the provisions of sections 178 and 179

(1) L. R., 10 C. P., 442. (2) L. R., 2 H. L. (Sc.) 56.

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that is not questioned. But, subject to these provisions, a second arbitration we think may be had, unless there are reasons in the particular case for refusing it. Sir Charles Sargent's judgment, we think, almost imposes on us the necessity of arriving at this conclusion The first arbitration under the reference of the 12th October, 1878, was, we think, an arbitration under the Act, in spite of the informalities attending it; but nevertheless we think the law has not forbidden a second arbitration. The right which that arbitration was to define in terms of money subsisted before it, and was not annihilated by its failure. It exists still, and only awaits precise ascertainment in the mode prescribed by the Act. Arbitration being made imperative, the parties are bound to take the requisite steps in order to prevent a complete failure of remedy.

We confirm the order of Bayley, J., in so far as it relates to the arbitration held under the reference of the 12th October, 1878; but as to the rest of the order, it must be modified in this sense, that the parties are to proceed with the new arbitration referred to in the petition. The third determination of the learned Judge, as to Joosub's not being entitled to have the price of his shares determined by arbitration, will thus become inoperative.

This order, it must be clearly understood, in no way affects the rights of creditors. Those rights may still be urged; such as they were before, they are now. The present decision only affects the relations of this shareholder and the company of which he is a member.

Costs of all parties here and below to come out of the fund. The liquidators' costs to be taxed as between attorney and client.

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