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THE
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MANUFACTURING
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to it: but so far from their having adopted that line, the plaintiffs insisted on the continuance of the agreement and of this they have furnished the strongest testimony by their praying for a permanent injunction, and obtaining an *interim* order, restraining the defendants from underselling.

I therefore am of opinion that so far as contributions are concerned relief must be restricted to those that accrued before suit, and I further hold that no claim can be made in respect of the sale of frosted ice. The plaintiffs cannot recover the whole of each instalment, but only damages for the non-payment.

In the view I take it is unnecessary to discuss the effect of the transfer by Frasers to the limited Company and the development by the P. & O. Company of their ice business, as both are subsequent to the suit.

From the course which the case took before Russell, J., we have no evidence of these damages, so that unless the parties can come to some agreement an enquiry must be directed.

Attorneys for the appellants: *Messrs. Payne and Co.*

Attorneys for the respondents: *Messrs. Craigie, Lynch and Owen and Messrs. Smetham, Byrne and Noble.*

A. H. S. A.

PRIVY COUNCIL.

P. C.*

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Nov. 17, 18.

December 19.

BOMBAY-BURMA TRADING CORPORATION (PETITIONERS) v.
DORABJI CURSETJI SHROFF (OPPONENT).

[On appeal from the High Court of Judicature at Bombay.]

Company—Articles of Association—Proxy, qualification of—Meeting of shareholders to alter Memorandum of Association—Validity of votes given by proxy—Act XII of 1895.

By a power of attorney dated 14th October, 1881, some of the shareholders in the appellant Company appointed and authorized certain specified persons, "and all persons who at any time during the continuance of these powers of attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted and in the absence from Bombay" of

* *Present*:—LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE,
AND SIR ARTHUR WILSON.

all the said persons "then the person or persons for the time being holding the procuration of the said firm and managing the said business," to vote as proxy for them at meetings of the Company. Article 65 of the Articles of Association of the Company provided that "no person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company." At meetings in May and June, 1902, the right of proxy was exercised by a person who had become a shareholder in the Company in March, 1889, and was manager of the firm of Wallace & Co., and holding its procuration from 1st April, 1889, but who was neither a member of the firm nor a shareholder in the Company when the power of attorney was executed.

Held, by the Judicial Committee (reversing the decision of the High Court) that on the true construction of article 65 the proxy was not necessarily required to be a shareholder when the power of attorney was signed: the article was complied with by his being so qualified at the time when he was called upon to act as a proxy.

Held, also, that although the proxy was not expressly named in the power of attorney, he was sufficiently described in it for all business purposes, and the Articles of Association required nothing more.

APPEAL from an order (17th October, 1902) of the High Court at Bombay whereby a petition of the appellants presented under the Indian Companies (Memorandum of Association) Act XII of 1895 was dismissed.

The petition so dismissed was filed on 7th July, 1902, and prayed the Court to confirm certain alterations of the objects for which the appellant Company was established, which had been proposed to be effected by a special resolution alleged to have been passed and confirmed at meetings of the Company held, respectively, on 29th May and 19th June, 1902.

The High Court found [SIR LAWRENCE JENKINS, C. J., and and Mr. JUSTICE BATTY] that by reason of the invalidity of certain proxies the special resolution in question had not been validly passed, and on that ground dismissed the petition.

The facts of the case and the judgments of the High Court are fully reported in I. L. R. 27 Bom. 113.

On this appeal.

R. B. Haldane, K. C., E. L. Levett, K. C., and F. E. Armitstead, for the appellants, contended that the proxy was in fact a shareholder of the Company, at the time when he was appointed, by and in accordance with the terms of the power of attorney appointing him. He came within the description of persons

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mentioned in the power as being "a person for the time holding the procuration of the said firm and managing the said business." It was not necessary that he should be named in the power. The provisions of article 64 of the Articles of Association as to the form of the instrument appointing a proxy were not directory but only permissive, and there was nothing in the articles prohibiting the appointment of a person, to be ascertained at a future time, as proxy, provided that such person, when ascertained, was a shareholder of the Company. The appointment of such a person became effective only when he came into such a position as made him eligible for it; and at that time he was a shareholder. Article 65 of the Association has been wrongly construed by the High Court as making it imperative that the person appointed proxy must be a shareholder when the power was signed, but it was sufficient if he came into that position subsequently. The secretaries and managers of the Company constituted the firm, and they must always necessarily know what persons were qualified to act as proxies under and in accordance with the terms of the power: no inconvenience or difficulty therefore could arise. It was not a case where the person about to act as proxy could not be ascertained. The votes given by proxy were, it was submitted, valid and the resolution had therefore been duly carried by the necessary majority: the decision of the High Court to the contrary should be reversed.

Cohen, K. C., Jardine, K. C., and A. C. Clanson, for the respondents, contended that the proxy did not, at the date of the instrument appointing him, hold the necessary qualification for a proxy, namely, that of being a shareholder of the Company, and, therefore, his appointment was invalid under article 65 of the Articles of Association which required a person appointed a proxy to be a shareholder both at the date of his appointment and also at the time when he is called on to act under it. By article 66 he should have been appointed by name, and not having been expressly so named, he had not been validly appointed. The appointment of a number of unnamed and unascertained persons was not a compliance with the Articles of Association of the Company, and consequently by such proxy

were invalid. The High Court, it was submitted, was therefore right in holding that the resolution to alter the objects of the Company was not validly passed, and their decision should be upheld.

Haldane, K. C., replied.

1904, December 19th :—The judgment of their Lordships was delivered by—

LORD LINDLEY :—The question raised by this appeal is whether an objection taken to a proxy used at a meeting of the shareholders of the above-named Company can be sustained.

The Company was incorporated in 1863 under the Indian Companies Act, XIX of 1857, and in 1895 it was duly registered under the Indian Companies Act, 1882. It was formed to carry on trade in timber and petroleum in Burmah, Siam, and other places in the East, and by the Company's Memorandum of Association and by its articles it was in substance provided that the business of the Company should be carried on by the firm of Wallace & Co., Merchants, of Bombay, "of whatever member or members that firm may for the time being consist," or, if they declined to act, by other managers to be appointed by the Company.

As a matter of fact the Company was formed to take over a branch of the business of Wallace & Co., and this firm were the secretaries, treasurers and managers of the Company. There never were any others.

By the Company's Articles of Association voting by proxy was allowed. The articles relating to such voting and to the chairman of the Company were as follows :—

"LXII. Votes may be given either personally or by proxy.

"LXIII. The instrument appointing a proxy shall be in writing under the hand of the appointor; or if such appointor is a Corporation, under their common seal, and shall be attested by one or more witness or witnesses.

"LXIV. Every instrument appointing a proxy may be in the following form or as nearly therein as may be :—

"BOMBAY-BURMA TRADING CORPORATION, LIMITED.

"I, _____, of _____, in _____, being a shareholder in the Bombay-Burma Trading Corporation, Limited, and entitled to _____ vote (or _____ votes), hereby appoint _____, of _____, as my proxy to vote for me and on my behalf at the ordinary or extraordinary (as the case may be) general

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meeting of the Company, to be held on the day of , and at any adjournment thereof (or at any meeting of the Company that may be held in the year); (or and at all other general meetings of the said Company until I shall revoke this authority). As Witness my hand this day of Signed by the said in the presence of

“LXV. No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company.

“LXVI. No person shall be allowed to vote or act as a proxy at any meeting unless the instrument appointing him shall have been deposited at the registered office of the Company not less than forty-eight hours before the time for holding the meeting at which the person named in such instrument proposes to vote.

“LXVII. Unless the instrument appointing the proxy shall otherwise indicate, the proxy thereby appointed shall be deemed to be a continuing proxy, and shall be entitled to act as such until his appointment shall be revoked by instrument in writing, deposited at the registered office of the Company.”

* * * * *

“LXXI. The senior or only resident partner or representative for the time being of the firm, house, or co-partnership of Messrs. Wallace & Co., at Bombay shall, at his option, be and continue the Chairman of the Company and of the Board of Directors, notwithstanding any clause or regulation of the Company or in these presents to the contrary.”

In May and June, 1902, a special resolution was passed to alter the Memorandum of Association with a view to extend the business of the Company, and in July, 1902, the Company presented a petition to obtain the sanction of the Court to the alteration. The petition was opposed on the ground (amongst others) that the special resolution was not duly passed, and the Court being of this opinion, dismissed the petition without giving any decision on the merits.

The objection taken was that certain proxies held by the chairman and used by him at the meetings at which the special resolution was passed were not in proper form and were invalid. They were not in the form given in article 64, but they were in a form which had been in use for many years without objection.

Several proxies were objected to. It will be sufficient to refer to one which may be taken as a type of all.

The proxy objected to was dated the 14th October, 1881, and was duly executed by a lady of the Wallace family and properly attested. It was not a mere proxy but a long document and, in fact, a power of attorney not only to vote at meetings but to act

generally for the shareholder signing it in all matters connected with the Company and any other Company taking over its business. The authority extended to buying and selling shares and receiving dividends. The following extract contains the description of the persons authorised to Act:—

“ Know all men by these presents that I of do hereby nominate, constitute, and appoint Lewis Alex Wallace, Alexander Falconer Wallace, John Annan Bryce, Henry Adair Richardson, and Michael Russell Wyer, and all persons who at any time during the continuance of this power of attorney may be partners in the firm of Wallace & Co., of Bombay, howsoever that firm may be at any time constituted, and Frederick Liddell Steel, and William Robert Macdonell, assistants in the said firm, and in the absence from Bombay of all the said persons then the persons or person for the time holding the procuratorship of the said firm and managing the said business jointly and each of them severally to be my attorneys or attorney for me and on my behalf to represent me in all my relations as they now exist or as they may at any time during the continuance of this power of attorney exist with the Bombay-Burma Trading Corporation, Limited and to be my proxy to vote for me and on my behalf at any meeting or meetings of the said existing Corporation. during the continuance of this power and in respect of all shares which I may at any time hold alone or jointly with others in the said Corporation.”

The proxy was used by Mr. Macaulay, who was in the chair. He was then a managing partner of the firm of Wallace & Co., and was a shareholder in the corporation. But he was neither a member of the firm nor a shareholder in the corporation when the proxy was signed. Before the meetings his name was entered as usual in a register of proxies kept by the corporation as the person who would use the proxies at those meetings.

The objections taken to the proxy are (1) that Mr. Macaulay is not named in it; (2) that when it was signed he was neither a partner in the firm of Wallace & Co., nor a shareholder in the corporation.

The form given in the articles and the word “named” in article 63 are relied upon as showing that the person using the proxy must be named in it. No doubt it is convenient that that this should be done. Article 64, which gives the form, is, however, distinctly permissive only; and article 66 is addressed not to the form of the proxy but to its deposit in the office in time to make inquiries, if necessary. If in this case the officers of the corporation or any shareholder had objected that the proxy was so framed that the person intended to use it could not be ascertained, and if this were true, their Lordships are not

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prepared to say that the proxy might not have been rejected. But no such difficulty in fact existed, nor did any one say it did. The connection between the firm of Wallace & Co., and the corporation was such that the officers of the corporation knew perfectly well that Mr. Macaulay was qualified to act and that he was going to act; and any shareholder applying for information could have obtained it at the office without any difficulty. Mr. Macaulay's name was entered in the office register of proxies as the person who would use the proxy. Although not named in it, in the strict literal sense of the word "named," he was sufficiently described in the proxy for all business purposes, and in their Lordships' opinion the articles require nothing more.

The next objection is, in their Lordships' opinion, equally untenable. It is founded on article 65. But to construe this article as requiring the person appointed to be a shareholder when the proxy is signed is to put too narrow a construction on the words. If an unqualified person is named in the proxy the nomination is not an appointment in any effective sense; his nomination does not become an appointment until he is qualified. In order to act something more is required, he must be qualified not only when appointed but when he acts.

Articles 65, 66, and 67 only require that the appointment shall be complete and be in the office 48 hours before the meeting at which it is to be used, and that the qualification shall continue when the proxy is used. Their Lordships are of opinion that article 65 was complied with in this case.

Their Lordships, therefore, will humbly advise His Majesty to allow this appeal, and to discharge the order appealed from, and to remit the petition on which the order was made to the High Court of Judicature at Bombay, in order that the petition may be heard on the merits and that the costs of it may be dealt with by that Court. The costs of this appeal and of the motion made on the 4th February, 1904, must be borne by the respondent.

Appeal allowed.

Solicitors for the appellants: *Messrs. Budd, Johnson and Jecks.*

Solicitors for the respondent: *Messrs. Payne and Lattey.*

J. V. W.