

LORD KINNEAR—I agree.

LORD PEARSON—I am of the same opinion.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's findings that John Campbell did not in certain specified matters act as the pursuer's agent, found that in said matters he did so act, and with these variations adhered.

Counsel for Pursuer (Reclaimer)—Hunter, K.C.—MacRobert. Agents—Carmichael & Miller, W.S.

Counsel for Defenders (Respondents)—Wilson, K.C.—Cullen, K.C.—Macmillan. Agent—Norman M. Macpherson, S.S.C.

Saturday, June 5.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE UNIVERSAL CORPORATION,
LIMITED v. HUGHES.

Company—Calls—Calls from "Time to Time"—Question whether Two Calls of 2s. 6d. each Resolved on at Same Meeting were Separate, or One Call for 5s.

The articles of association of a company, limited by shares, provided, *inter alia*, Art. 9.—“The directors may from time to time make such calls as they may think fit upon the members in respect of all moneys remaining for the time being unpaid on their shares, provided that no call shall exceed two shillings and sixpence per share. . . . A call shall be deemed to have been made when the resolution of the board of directors authorising such call was passed.”

At a meeting of directors on 10th December 1907 consecutive resolutions were passed and minuted—“That a call of 2/6 per share . . . be made, payable on the 1st January 1908 . . .” and “that a final call of 2/6 per share . . . be made, payable on the 31st March . . .” Following upon these resolutions two letters were sent out, headed respectively, “Fifth call” and “Sixth (final) call.” Each bore the same date, 17th December 1907, and gave notice of the fifth and the final call. In defence to an action for payment of these calls the defender argued that the calls were *ultra vires*, in respect of (i) not being made “from time to time,” (ii) being truly not separate calls but one call for 5s.

Held that the calls were separate and valid.

The Universal Corporation, Limited, Broad Street House, London, raised an action in the Sheriff Court at Glasgow, against George Hughes, spirit merchant, Glasgow, “for payment of (First) the sum of £50 sterling, ‘being the fifth call of 2s. 6d. per share upon 400 shares of £1

each of the pursuers’ said company, the Universal Corporation, Limited, in which company the defender is a registered holder of 400 shares,’ together with interest thereon . . . and (Second) the sum of £50 sterling, ‘being the sixth and final call of 2s. 6d. per share upon said 400 shares of £1 each of the pursuers’ said company,’ together with interest thereon. . . .”

The articles of association of the pursuers, who were a company limited by shares, provided, *inter alia*—“9. The directors may from time to time make such calls as they may think fit upon the members in respect of all moneys for the time being remaining unpaid on their shares, provided that no call shall exceed two shillings and sixpence per share, and every member shall pay the amount of calls so made to the persons and at the times and places appointed by the directors, which said persons, times, and places shall be notified in the notice of call to be sent to the member. A call shall be deemed to have been made when the resolution of the board of directors authorising such call was passed. The joint holders of a share shall be jointly and severally liable to the payment of all calls in respect thereof.”

At a meeting of directors duly convened and held on 10th December 1907, the following resolutions were passed and minuted:—“It was resolved that a call of 2s. 6d. per share on the ordinary shares be made, payable on the 1st January 1908, at the Clydesdale Bank, Ltd.

“It was resolved that a Final Call of 2s. 6d. per share on the ordinary shares be made, payable on the 31st March 1908, at the Clydesdale Bank, Ltd.

“A draft of a circular to the shareholders was submitted and approved, and ordered to be issued with the notice of the above calls.”

Following upon these resolutions, notices, as the pursuers averred, were sent out by the secretary of the company to the defender in the following terms:—

“THE UNIVERSAL CORPORATION, LIMITED.

“FIFTH CALL, TWO SHILLINGS AND SIXPENCE PER SHARE.

“Payable 1st January 1908.

“No.

Broad Street House,

“New Broad Street, London, E.C.

“17th December 1907.

“Sir (or Madam)—I beg to give you notice that the directors of the company have made a call of 2s. 6d. per share upon all the members holding ordinary shares upon which only 15s. per share has been paid; and it was determined that such call should be paid on the 1st day of January 1908 to the Clydesdale Bank, Limited, 30 Lombard Street, E.C. . . .”

“THE UNIVERSAL CORPORATION, LIMITED.

“SIXTH (FINAL) CALL, TWO SHILLINGS AND SIXPENCE PER SHARE.

“Payable 31st March 1908.

“No.

Broad Street House,

“New Broad Street, London, E.C.

“17th December 1907.

“Sir (or Madam)—I beg to give you notice that the directors of the company have

made a final call of 2s. 6d. per share upon all the members holding ordinary shares upon which the sum of 17s. 6d. per share has been called, the payment of which and of the call due on the 1st January 1908 will make such shares fully paid; and it was determined that such call should be paid on the 31st day of March 1908 to the Clydesdale Bank, Limited, 30 Lombard Street, E.C. . . .”

The defender denied that such notices had been sent, or at any rate that he had received them.

The pursuers pleaded—“(1) The company having, in virtue of their powers, validly imposed calls on their members, and the defender, though a registered member of the company, having without just cause refused or delayed to make payment of said calls, decree should be granted in terms of the prayer of the petition, with interest on the said calls, and expenses as craved. (2) The defences are irrelevant.”

The defender pleaded, *inter alia*—“(1) The action is irrelevant. (2) The alleged resolutions of the directors being invalid, the defender should be assoilzied, with expenses. (3) The alleged calls not having been validly made, and no notice thereof having been sent to the defender, the defender should be assoilzied, with expenses.”

On 3rd August 1908 the Sheriff-Substitute (GLEGG) pronounced this interlocutor—“Repels the second plea-in-law for the pursuers; Sustains the first plea-in-law for the defender *quoad* the second conclusion of the petition, and dismisses the action in so far as laid under that conclusion; *quoad ultra* allows the defender a proof of his averments, and to the pursuers a conjunct probation.”

Note—[After quoting article 9]—“Here the directors made two calls of 2s. 6d. each on 10th December 1907—the first call to be paid on 1st January 1908 and the second on 31st March 1908. Though the dates of payment are different, it seems clear, according to the articles of association, that the ‘calls’ were both made at the same time. Since the articles of association only give power to make calls from time to time, it cannot be said that these calls are made in accordance with their powers. What was done was at one time to make a call to the extent of 5s., and although the half-crowns were to be paid at different times, this does not mean that the calls were made on different dates.

“With regard to the defence that the defender had no notice of the calls, that seems to me a good defence, but it is for the defender to prove it. The pursuers are required by article 9 to notify the members of the calls, and the maxim *omnia presumuntur rite et solemniter acta esse* applies, therefore it is for the defender to prove that he was not notified. . . .”

The pursuers appealed to the Sheriff (MILLER), who on 3rd December adhered.

Note—(After quoting article 9)—“The provision that no call shall exceed 2s. 6d. per share is made in favour of prospective shareholders, so that not too great a

burden should be laid upon them at one time, and in order that they might have due notice of the call. The directors in this case, on Tuesday 10th December 1907, passed two resolutions—(1) it was resolved that a call of 2s. 6d. per share on the ordinary shares be made, payable on 1st January 1908 at the Clydesdale Bank, Limited; (2) it was resolved that a final call of 2s. 6d. per share on the ordinary shares be made, payable on 1st May 1908 at the Clydesdale Bank, Limited. In accordance with these calls the defender is now sued for the sums due in respect of his holding in the company. I think that the articles of association provide that the calls themselves should be made from time to time, and not that the payments should be demanded from time to time. In this case the calls were made by the directors on the same day, and are consecutive resolutions passed at the same meeting of the board of directors. I think, therefore, that the calls are not made from time to time, and so far as the second call is concerned it was outwith the power of the directors to make. Three cases were referred to—*Laurie v. Lees*, 7 App. Cas. 19; *Bryant v. Arthur*, 11 A. & E. 17; and *Coldfield Grammar School*, 7 App. Cas. 91. I think these cases are quite different from the present. In the principal one, viz., *Laurie v. Lees*, the question was whether an order granted by the Lord Chancellor to a commissioner on Sir Henry Meux’s estate, giving power to the commissioner to execute leases on behalf of the lunatic, was *ultra vires* of the Lord Chancellor, as a separate order was not given for the lease of each public-house. It was said that the Court conferred power on the Lord Chancellor to make orders from time to time for these purposes, and that that could not apply to a compendious order such as had been given; and Lord Penzance says that the construction asked for by the appellants would be of a most inconvenient character and should not be adopted, ‘because the words from time to time are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction.’ The other cases go upon the same lines and are quite different from the present case. The words here are introduced for the purpose of protecting the shareholders from a demand for an unexpected amount.

“The defender maintained that he should be assoilzied from the action, on the ground that if the second call was bad so also was the first. I do not agree with that view, because it is the second call that is *ultra vires*, and not the first.

“I agree with the learned Sheriff-Substitute that a proof should be allowed on the question of notice, and on the whole matter I think that the appeal should be dismissed.”

The pursuers appealed to the Court of Session, and argued—The interpretation put upon from “time to time” in *Laurie v. Lees*, 1881, 7 App. Cas. 19, was perfectly

applicable to the words as used in article 9. Their purpose was to enable the uncalled capital to be called up gradually, and to make it clear that one call did not exhaust the directors' power. In any case the first call was good. (2) Though the resolutions for the calls had been passed on the same day, and the notices sent out on the same day, that did not make the calls equivalent to one call of 5s. There was an interval of three months between the dates when they were payable.

Argued for the defender and respondent—The whole resolution was bad. (1) The Sheriff's interpretation of "from time to time" was right. (2) But even if these words had been omitted, the calls would have been invalid. The date of the call was the date of the resolution; both resolutions were passed at the same meeting. Two simultaneous calls of 2s. 6d. were really equivalent to one of 5s. The liability attached to the shares from the date of the resolution—*In re The China Steamship and Labuan Coal Company, Limited* (Daves' case), 1869, 38 L.J. Ch. 512. Reference was also made to Palmer's Company Precedents, 10th Ed. p. 542. [The Lord President referred to the Companies Act 1862, table A, article 4, the Companies Act 1908, table A, article 12, with reference to the use of the words "from time to time," and to the period between payment of the calls.]

LORD PRESIDENT—This is an action by a company for calls due by the defender. The defence is, first, that the calls were improperly made, and secondly, that no notice was given of them. The calls were made at a meeting of directors on the 10th of December 1907, and the minute of that meeting bears, "It was resolved that a call of two and sixpence per share on the ordinary shares be made, payable on the first January 1908. . . . It was resolved that a final call of two and sixpence per share on the ordinary shares be made payable on the thirty-first March 1908." Following upon the resolutions so taken and minuted, there were two documents sent out, headed respectively:—"Fifth call, two shillings and sixpence per share," and "Sixth (final) call, two shillings and sixpence per share." I need not read them, because it is enough to say that they are each in the same terms, bear the same date of sending out, and state that notice is given that there is a call of two and sixpence, to be paid in the first case on the 1st January and in the second case on the 31st of March. Now the article of association which deals with the matter of calls, and which comes in place of article 12 of table A, is article 9, and is in these terms—"The directors may from time to time make such calls as they may think fit in respect of all moneys for the time being remaining unpaid on their shares, provided that no call shall exceed two shillings and sixpence per share. . . . A call shall be deemed to have been made when the resolution of the board of directors authorising such call was passed"; and there are other provisions which are immaterial.

The learned Sheriffs have assailed the defender upon the ground that the call was bad, in respect that the two calls for half a crown each were not made "from time to time," because they were made upon the same day. I think that is an entire misreading of the words "from time to time." The genesis of the use of these words is pretty clear. We find it in section 4 of the original table A appended to the Companies Act of 1862, which reads—"The directors may from time to time make such calls upon the members as they may think fit, provided that twenty-one days' notice at least is given of each call"; and the words reappear again in the amended table A under the Act of 1908, which provides that "The directors may from time to time make a call, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at least within one month from the last call." I agree with the comment upon the expression "time to time" which was made by Lord Penzance in the case that is referred to by the learned Sheriff. I think it is quite clear that these words as used in this article are not limiting words in any way, but are descriptive words. The framer of the article obviously intended to provide against its being supposed that the directors had power to make only one call, and that that call must exhaust the whole uncalled capital, or otherwise the balance could not be called up. The directors might require the money gradually, and therefore the operation of making a call was stated to be an operation which might recur "from time to time." Really, the intention, according to the natural use of language, is obvious. I think the expression "from time to time" merely means that the making of a call is an operation which the directors may perform, not once and for all, but from time to time as they wish; and to argue that the effect of the expression is to prevent the operation being repeated in the course of the same day is, I think, to put a meaning on the language which it will not bear.

That disposes of the case so far as it is dealt with by the learned Sheriff, but Mr Watson has submitted an argument which I think has a good deal more weight than the argument upon "from time to time." That argument is founded upon the terms of this particular article 9, and it is to the effect that inasmuch as it is provided that no call shall exceed two and sixpence per share, and further, as it is undoubted law, and indeed is expressed in this very article, that a call is made when the resolution of the directors authorising such call is passed, therefore taking the resolution as given in the minute the call made is truly a call of five shillings, because, as Mr Watson argues, after that minute was passed there was fixed upon the shareholders a liability of five shillings, and accordingly that is an infringement of the article limiting the calls to two and sixpence. I think that that is a stronger argument than the one based upon "from time to time," but I do not think it is

sound. Admittedly there is no provision—if we have got rid of the argument on “from time to time”—that more calls than one may not be made on the same day; the only provision is that no call shall exceed two and sixpence. The whole point therefore comes to be—Are these separate calls or are they not?

I think they are separate calls, because although the liability is affirmed upon the same day the sum is not made payable upon the same day. The meaning of the proviso “no call shall exceed two and sixpence per share” is, I think, to protect the shareholder from having a demand made upon him at the one moment for more than two and sixpence per share. Supposing, for instance, that what had been done was this, that the two calls had been made returnable on the same day, then I think it would have been quite fair to argue that by the mere device of putting the two calls in two envelopes instead of one and calling them two half-crowns instead of five shillings, you could not escape from the limitation, because in that case the shareholder would have been faced with a demand for more than two and sixpence. But that is not the present case. It is quite true that the shareholder's liability to pay is affirmed and fixed on the one day, but the demand that is made upon him is a demand for half a crown on the 1st of January and nothing more, and the other demand is for another half-crown on the 31st of March. Accordingly I think that what was done upon that day was to make two perfectly separate calls, and each of those calls was only for two and sixpence, and therefore they do not infringe the provision in the articles. There might have been of course a provision in the ordinary way, such as that which I have quoted from article 12 of table A as it now stands, providing that a certain space of time shall elapse between one call and another. Here there was no such provision, and therefore I think one call might have been made to succeed another with the greatest celerity. As a matter of fact, the period which was given here is the quite sufficient period of three months, two months more than that given by table A, and consequently there is absolutely no inequity in what has been done. The justice of the case is obviously in favour of the pursuers, because it is quite evident that even upon the argument submitted against them, if they had simply taken the device of passing the resolution calling the second half-crown the very next day after the first call was made, no objection could have been taken.

I think, therefore, that the call was quite properly made and that the interlocutors of the Sheriffs ought to be recalled. The case, of course, must go back to the Sheriff, because the defender here alleges that he never got the notices. If he can prove that the notices were not sent to him, then that raises a perfectly different question. That is a question which depends upon disputed facts.

LORD KINNEAR—I quite agree. I cannot attach importance to the learned Sheriff's argument upon the words “from time to time.” I think these words are perfectly natural and proper for the purpose of making clear a provision that to my mind would have been almost equally clear otherwise; because I think the intention of the clause enabling the directors to make calls is, that they shall be able to make calls until they have exhausted the whole amount unpaid upon the share, but that no one call shall exceed half-a-crown. That necessarily means that they are not to exercise the power of making the calls once for all, and then be told that their function is at an end, but that they may make calls once and again until the whole amount is called up—in other words, they may do it “from time to time.” That appears to me to be the whole effect of the introduction of the words “from time to time” in the first branch of this clause. But then I think the other argument which was maintained raises a totally different question. It comes to this, that the true question which we have to consider is, whether the directors in this case have made one call or two calls. They have made in form two calls, each for half-a-crown per share, but it is said that that is in effect only making one call for five shillings, because their resolution to call two separate sums of half-a-crown was passed at one meeting. The argument, I think, really came to this, that that resolution fixed the liability of the shareholders for future calls at five shillings and not at half-a-crown. I agree that the resolution to call fixed the liability of the shareholder to pay the call, but then I think it fixed not one liability but two different liabilities, a liability to pay half-a-crown on the 1st of January and a liability to pay another half-crown upon the 31st of March. These are, to my mind, two distinct and separate demands upon the shareholder, and when a company resolves that it will call up one sum upon the 1st of January and another sum upon the 31st of March, it appears to me not to make one but two separate demands, and therefore I think the call as made is within the meaning of the words of the article. Therefore I agree with your Lordship.

LORD GUTHRIE—I think the company here were not entitled to make any call exceeding two shillings and sixpence per share. I do not think they did so either in form or in substance; and therefore I concur with your Lordships.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court sustained the appeal, recalled the interlocutors of the Sheriff and Sheriff-Substitute, dated 3rd December 1908 and 3rd August 1908 respectively; remitted the cause to the Sheriff to allow the defender a proof of his averments as to want of notice, and to the pursuers a conjunct probation; and found the pursuers entitled to expenses in the Court of Session and in the Sheriff Court since closing of the record on 15th July 1908.

Counsel for the Pursuers (Appellants)—
Hunter, K.C.—Fleming. Agents—Graham,
Johnston, & Fleming, W.S.

Counsel for the Defender (Respondent)—
Hon. Wm. Watson. Agents—Simpson &
Marwick, W.S.

Tuesday, June 22.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

WILSON v. LAING.

Master and Servant — Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—“Accident Arising out of the Employment.”

A domestic servant while engaged in the performance of her duties was struck on the eye by a child's ball playfully thrown at her by a fellow-servant, the child's nurse, with the result that she almost completely lost the sight of the eye.

Held that the accident was not an accident arising out of the employment within the meaning of section 1 (1) of the Workmen's Compensation Act 1906.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in the Sheriff Court at Edinburgh, in which Helen Wilson claimed compensation from the Rev. George Laing, the Sheriff-Substitute (GUY) refused compensation, and at the request of the claimant stated a case for appeal.

The facts set forth were:—“The appellant was on 4th July 1908 in the employment of the respondent as housemaid at 17 Buckingham Terrace, Edinburgh. Prior to her employment with the respondent the appellant had suffered from defective eyes, and had had to undergo several surgical operations connected with them, the result of these operations being that the left eye had become practically blind, while the right eye, though weak, was a serviceable eye, and on said date enabled the appellant to perform her duties efficiently. On said date the appellant, in the course of her duties, was just leaving the drawing-room flat to ascend the stair to the nursery flat, preceded by her fellow-servant Nurse Emelie Fairlie, when she was struck on her right eye by an india-rubber toy air-ball. Said ball had been playfully thrown by the said Emelie Fairlie over her left shoulder in the direction of the appellant, whom she knew to be following her upon the stair. She threw the ball with the intention of striking the appellant on the back. She threw it for fun and did not think it would harm the appellant. The said ball was not accidentally dropped or let fall. As the result of the blow from said ball the appellant's right eye was so injured that she has almost completely lost her eyesight, and is wholly incapacitated for her work as a domestic servant.”

On these facts the Sheriff-Substitute found that the accident to the appellant,

though arising in the course of her employment, did not arise out of her employment.

The question of law for the opinion of the Court was—“Whether the accident to the appellant arose out of her employment within the meaning of the Workmen's Compensation Act 1906?”

Argued for the appellant—The accident occurred in the course of the employment. It occurred while the appellant was engaged in the performance of her duties, and was thus properly described as arising out of her employment—*Challis v. London and South-Western Railway*, [1905] 2 K.B. 154; *M'Intyre v. Rodger & Company*, December 1, 1903, 6 F. 176, 41 S.L.R. 107, *distinguishing Falconer v. London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK—I have no doubt whatever that the Sheriff has come to a right decision. Whatever may be the effect of the cases quoted to us, I do not see how it could be said that the Sheriff was wrong in holding that the accident did not arise out of the appellant's employment. It is a very far-fetched idea that because this happened in a house where there were children and children's toys, therefore the risk of accidents happening through a toy being thrown by one servant at another was one of the risks incident to the appellant's employment. The girl who threw the ball with the intention of striking the appellant was certainly acting outside the scope of her employment when she did so, and the accident certainly did not arise out of the appellant's employment.

LORD ARDWALL—I think this case is expressly governed by the decision in *Burley v. Baird & Company, Limited*, 1908, S.C. 545, 45 S.L.R. 416, and I do not think it necessary to add anything to what was there said.

LORD DUNDAS—I agree. I do not think that we require the aid of any authorities to enable us to decide this case in the manner your Lordships propose.

LORD LOW concurred.

The Court answered the question of law in the negative.

Counsel for the Appellant — Morison, K.C. — A. A. Fraser. Agent — George F. Welsh, Solicitor.

Counsel for the Respondent—Macphail—W. A. Fleming. Agents — Melville & Lindsay, W.S.