

agreement by A and X with X and C is clearly not an agreement by X with X and C. It will be seen, therefore, that there is essential to the court's conclusion the somewhat bald and unacknowledged assumption that s.72 simply cannot be construed as having expressly described every party to the covenants or agreements susceptible of validation by it.

However, the decision was a liberal and realistic one and can be justified on pragmatic grounds. Section 72 is remedial legislation designed to destroy an awkward common law rule which was allowed to "disfigure the law of a great mercantile nation".¹³ For this reason, the courts should be eager to apply the provision as generously as practicable. And in particular, its application should be extended, as a matter of clear legislative intent, to transactions involving two or more joint contracting parties on *both* sides of the contract. Such transactions are, significantly, more common than those described by the direct words of the section only¹⁴ — for example, the transfer of a mortgage on the appointment of new trustees where there is a continuing trustee, or (as here) an agreement between two partnerships with a common partner.

It is felt, with respect, that the opinion of the Full Court, that s.72 merely validates the covenant or agreement, is to be preferred to Glanville Williams' more extreme view that the section transforms an agreement between A and X and X and C into an agreement between A and C. Not only does the former construction commend itself from the practical viewpoint in that it avoids the problems concerning contribution outlined above — by regarding the legislation as only affecting procedural enforcement as between the parties without prejudice to questions of account between the common party and the co-promisee or co-covenantee. But it also springs more readily from the language of the section itself. For s.72 provides that the agreement shall be construed, not *as* an agreement made with the other or others, but in like manner *as if* the agreement had been made with the other or others.

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COMPANY LAW: PRE-EMPTIVE RIGHTS ARTICLE *LYLE & SCOTT v. SCOTT'S TRUSTEES*

Perhaps the most outstanding feature of a proprietary company lies in the fact that there must be some restriction placed on the right of members to transfer their shareholdings. Section 37(1) (a) of the Companies Act, 1936 (Act No. 37, 1936 (N.S.W.)), expressly requires that a proprietary company must restrict the freedom of transferring shares; it does not, however specify what the nature of the restriction should be. There is thus left to the person drafting the articles of a proposed company a considerable discretion as to what type, and what degree of restriction will be placed on the right to transfer shares in the company. By regulating the way in which shares will be transferred, the person drawing the articles can regulate the structure of the company; i.e. if there are a large number of restrictions the company will tend to be closely knit and conservative in membership, and conversely, if there are few restrictions, it will be rather more fluid both in its membership and in its policy. Private companies often consist of large family concerns or expanded partnerships forced to incorporate, and such companies by their very nature tend to be discriminating in their selection of members. Despite the limited number of members, it is not unusual for such companies to be large business concerns, and thus attractive targets for a takeover bidder, and frequently, in order to protect the conservative nucleus (usually the directors) from the loss of control to an outsider, a pre-emptive rights clause is inserted in the articles of the company.

¹³ G. Williams, *op. cit.* at 47.

¹⁴ I.e., by one person *alone* of the one part with another or others of the other part.

One form of the pre-emptive rights article is designed to compel any person desirous of transferring shares to an outsider, to give notice to the directors of the company, and, through the directors, to give the other members of the company a chance of exercising a right of "first purchase" in preference to the outsider. The aim of such a clause is to vest control in the existing members, since if they disapprove of the outside bidder, they can exercise their right of pre-emption. The purpose of this Note is to consider the nature and efficiency of such a pre-emptive rights article in the light of the decision of the House of Lords in *Lyle & Scott v. Scott's Trustees*.¹

The *Lyle & Scott Case* came to the House of Lords by way of appeal from the First Division of the Scots Court of Session. The facts were as follows: Mr. Hugh Fraser a millionaire draper and noted takeover bidder offered to purchase shares in Lyle & Scott Ltd., such offer being subject to acceptance by 75% of the shareholders. In return for the purchase price of the shares, the shareholders contracted to transfer the shares to Mr. Fraser at an indeterminate future time, and each member gave to Fraser's nominees a general proxy.² The articles of Lyle & Scott Ltd., however, contained a pre-emptive rights clause cast in the following terms:³

Art. 9. Subject to the provisions of cl.7, cl.8 and cl.12 no registered holder of more than one per centum of the issued ordinary share capital of the company shall, without consent of the directors, be entitled to transfer any ordinary share for a nominal consideration or by way of security, and no transfer of ordinary shares by such a shareholder shall take place for an onerous consideration so long as any other ordinary shareholder is willing to purchase the same at a price, which shall be ascertained by agreement between the intending transferor and the directors, and, failing agreement, at a price to be fixed by the auditor of the company for the time being. Any such ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing of the number of ordinary shares which he desires to transfer, and the price shall immediately be fixed as aforesaid.

It appears from the facts as noted by Lord Reid that Mr. Fraser next intended to call an extraordinary general meeting and at that meeting to pass a special resolution extinguishing the pre-emptive rights clause from its articles, thus leaving the 75% free to transfer their shares to Fraser as agreed. The whole purpose of Mr. Fraser's elaborate scheme was thus to avoid compliance with the pre-emptive rights article. Both the Scots Court and the House of Lords in considering whether such an avoidance procedure was successful, made a searching analysis of the pre-emptive rights article.

I. The Nature of the Pre-emptive Rights Article

Before considering the judgments of the House of Lords, it is necessary to take a brief look at the approach accepted by the Scots Court.⁴ The First Division of the Scots Court of Session (on appeal from the decision of the Lord Ordinary) first considered whether the agreement with Mr. Fraser constituted a breach of Article 9 of Lyle & Scott Ltd. The judges took the view that there had been a clear breach of the prohibitive part of the article. They next considered the nature of the remedy, and here they were faced with the following problem. Lyle & Scott Ltd. had sued for an interdict which would compel the vendors to follow out the procedure in Article 9 and thus offer their shares to the other members of the company. On the facts before them their Lordships

¹ *Lyle & Scott Ltd. v. Scott's Trustees* (1959) 2 All E.R. 661.

² An enlightening discussion of takeover techniques is given in R. W. Moon, *Business Mergers and Takeover Bids* (1959) c. viii (hereafter referred to as *Moon*), where various other takeover gambits of Mr. Fraser's are noted. There is also an interesting discussion of the effect of takeovers on the national economy in c. vii.

³ (1959) 2 All E.R. 662.

⁴ *Lyle & Scott Ltd. v. Scott's Trustees* (1958) S.C. 230.

were unwilling to grant such a remedy because they were of the opinion that the contract with Fraser was not such an action as would bring Article 9 into operation. Their Lordships further suggested that even if Article 9 were brought into operation and notice was given to the secretary, the interdict was an unsuitable remedy because the article gave the shareholder a privilege of withdrawing his notice whereas the interdict would have excluded such a privilege of withdrawal.

A good deal of emphasis was placed by the Scots Court on the need for an overt act in the form of notice to the secretary before the mechanism in Article 9 operated. It is submitted that the basis of the Scots decision lies in the following passages: Firstly, in the opinion of the Lord President—⁵

Some overt act on his (the shareholder's) part would be necessary, bringing the matter formally before the company or its secretary to evidence his desire and to communicate it to the persons interested. . . . It may be that even after such intimation has been made the seller has a right to revoke (see *Smith v. Wilson*). But the important point for present purposes is that no overt act has taken place such as could enable the company to require the defenders to follow out the procedure in the article. The furthest the defenders could be said to have gone is that they have indicated a desire to transfer but they have never taken the next and crucial step of intimating that desire to the company.

Secondly, in the opinion of Lord Sorn—⁶

But to my mind it is enough to say that the article carries no such compulsion with it as the argument presupposes. The article provides the way and the only way in which a shareholder can "transfer" his shares (whatever that means) but, in my opinion, it leaves it to the shareholder himself to decide whether or not to take action under it.

It appears from the above passages that the Scots judges regarded the actual giving of notice to the secretary as the type of situation which obliged the vendor to submit to the prescribed procedure. The giving of notice to the secretary was, they thought, the first stage at which the vendor was obliged to offer his shares to the other members, *via* the secretary. In the event of any member electing to accept the offer the vendor would then be contractually bound to sell to such member in preference to the outside bidder.

The Scots Court assumed that the interdict requested would compel the shareholder to follow through the procedure prescribed by the article, and thus defeat the election to withdraw which their Lordships thought the shareholder had under the article, at least until he had given notice to the company. On this view of the article their Lordships were faced with a dilemma since if they gave the remedy requested they would be compelling the vendor to offer his shares without the right to revoke his offer, which was more than the vendor was legally bound to do under the article. If on the other hand they refused an interdict the vendor though admittedly in breach of Article 9 would be able to avoid the consequences of such a breach and thus the pre-emptive rights clause would be legally worthless. Their Lordships chose the latter alternative and accordingly refused the interdict.

The House of Lords adopted a rather different approach. Viscount Simonds considered the twofold analysis of the Scots Court into the questions of breach, and remedy, to be "convenient" but "apt to obscure the vital question", which (he believed) was "whether Scott's trustees are to be deemed to be shareholders desirous of transferring their ordinary shares within Article 9".⁷ The House of Lords took a more purposive and practical view of the whole question in comparison with the Scots Court. Lord Reid considered the purpose of Article 9

⁵ *Id.* at 244.

⁶ *Id.* at 250.

⁷ (1959) 2 All E.R. at 664.

was "to prevent the sales of shares so long as other members of the company are willing to buy them at a fair and reasonable price".⁸ Lord Keith struck a practical note when he said,⁹ "Standing a completed and unrepudiated contract of sale and acceptance of the purchase money, the respondents cannot be heard to say that they are not desirous to transfer their shares because they choose to hold up completion of the transfer or wish to sell only to a particular person." The idea of a breach of Article 9 without a remedy was abhorrent to his Lordship, who stated¹⁰

There must reside in the courts some power to enforce observance of the article unless the rights of the shareholders are to be defeated, and the appropriate step at this stage is to ordain the respondents to give notice to the secretary of their desire to transfer the number of shares which they have contracted to sell to the purchaser.

Viscount Simonds reasoned along the following lines: The vendors admitted as a matter of fact that they had agreed to sell their shares and had secured the purchase price and therefore they held the shares as trustees for the purchaser. Since they were contractually bound to do everything possible to give title to the purchaser, it was not open to them to deny, that they were "desirous of transferring" their shareholding, and they remained "desirous of transferring" until the contract with Mr. Fraser was annulled by them. Because the vendors were "desirous of transferring" within Article 9 they must give notice to the secretary and give the shareholders an opportunity of exercising their right of first purchase.

After a close grammatical analysis of the word "transfer" as used in Articles 7, 8, and 9, Lord Reid concluded that the word "transfer" as used in Article 9 is sufficiently wide to include an agreement to transfer. Referring to the actions of the vendors his Lordship continued—¹¹

... I do not see that it matters whether or in what sense they were "overt". I would not hold a desire to transfer proved by some equivocal words or acts. But here it is impossible that the respondents could have done what they did unless they desired to transfer; there is no suggestion of any other reason why they should have contracted with Mr. Fraser.

His Lordship thus clarifies the criterion of an "overt act" which was adopted by the Scots Court, by saying that the type of "overt" act required to bring the machinery of the article into effect is one which *unequivocally* indicates a desire to transfer. Thus, while it is true that the giving of notice to the company is an unequivocal act which brings the machinery of the article into operation, to restrict the interpretation to this does not do justice to the scope of the article. The House of Lords decided the article reaches further back than the giving of notice and imposes obligations on the vendor at the "contract stage". Consequently as soon as such a contract to sell is concluded the purchaser is obliged to implement the procedure prescribed by the article.

It was argued before their Lordships that the phrase "desirous of transferring" meant "desirous of transferring in the present", and since no immediate transfer of the shares was possible the article did not apply. Lord Reid dismissed the suggestion of any such qualification as to time of transfer and made it clear that any member "desirous of transferring", whether at the present time or in the future, would be bound to comply with the article. As regards the actual working of the article his Lordship adopted the Scottish cases of *Smith v. Wilson*¹² and *Stevenson v. Wilson*¹³ as authority for the propositions that "any notice given by the respondents would not be irrevocable and secondly the

⁸ *Id.* at 667.

⁹ *Id.* at 673.

¹⁰ *Id.* at 673.

¹¹ *Id.* at 668.

¹² *Smith v. Wilson* (1901) 9 S.L.T. 137.

¹³ *Stevenson v. Wilson* (1907) S.C. 445.

respondents can if they choose annul their bargains with Mr. Fraser".¹⁴ These conclusions are significant since the vendor could by annulling the contract with Mr. Fraser declare that he is no longer "desirous of transferring", and he could therefore withdraw his notice and retain his shares. If the notice given by the respondents were made irrevocable by the article there could arise the anomalous situation in which the vendor had annulled his contract with the outside purchaser but since he could not withdraw the notice to the secretary he would be bound to sell his shares if other members desired to buy them, even though he was no longer "desirous of transferring". The remaining members of the House of Lords, Lords Tucker, Keith, and Somervell agreed in substance with Viscount Simonds and Lord Reid.

Their Lordships were thus of the opinion that the obligation to carry out the procedures in Article 9 might arise at the "contractual stage" before notice is given to the secretary. On the particular facts before them, the concluding of the bargain with Mr. Fraser, manifested (they thought) a "desire to transfer" which caused the obligation to proceed under Article 9. They did not, however, dispute the suggestion in the judgments of the Court of Session that the shareholder might withdraw at any time before he had entered into a concluded contract with the other shareholders, provided he had ceased to be "desirous of transferring". It was suggested that an acid test as to whether he had ceased to be desirous of transferring would be the return by him of the purchase moneys. In contrast to the opinion of the Court of Session they decided that the interdict should not be refused but they adapted it in order to comply with the article. Their Lordships decided to give to the appellant company a decree of specific implement requiring the respondents to give notice to the secretary of the company so long as the contract with Mr. Fraser remained in force.

Since the above decision is based on the content of the expression "desirous of transferring", rather than on the mere literal wording, it is clear that the decision would apply to other pre-emptive rights articles which were worded differently, such as, "any shareholder *intending* to transfer", "*proposing* to transfer" or even "*wishing* to transfer". Many articles of association adopt as the criterion a phrase such as "any member desirous of *selling* his shares shall notify the secretary, etc.". This type of clause refers to "selling" as the ultimate effect, rather than "transferring" and it would take the problem of analysis back one stage further. With such a clause the question becomes — What act will unequivocally indicate an intention to "*sell*"? In solving such a problem it may be that the courts would have to draw a finer distinction between the legal factum which would bring the article into operation and the mere abstract "wishing" or "intending" to sell which would not.

In the course of their judgments, their Lordships assumed that the vendor could annul the agreement with Fraser at any time, but nowhere did they expressly give the grounds which would permit such an annulment. Possibly they thought that since the vendor was bound to follow out the procedure in Article 9 in order effectively to transfer the shares to Fraser, and since compliance with the prescribed procedure *could* result in the vendor being unable to transfer to Fraser, then the possibility that the vendor could not transfer his shareholding made the contract voidable. According to the decision in the *Lyle & Scott Case*, as soon as the contract with Fraser was concluded, the vendor was obliged to give notice to the secretary and offer his shares for sale to the other members of the company, and in so doing there is the risk of the vendor not being able to perform his contract with Fraser. Their Lordships assumed that the contract could be annulled at *any* time and not merely in the event of the other members exercising their rights of pre-emption. Thus by inference the only ground of annulment seems to be the *possibility* that the vendor will be unable to perform his contract because of the provisions of Article 9, the sub-

¹⁴ (1959) 2 All E.R. at 669.

stance of which was known to both parties. Such a ground of annulment as is assumed in the decision is a very tenuous one, since it is based not on a supervening "impossibility of performance" but on the mere *chance* of such an impossibility. It may be that in this decision there is a special extension of the doctrine of "subsequent impossibility of performance". If this be so it is a very curious extension of that doctrine, since in cases of "subsequent impossibility" the vendor would be bound to do all he possibly could to give the purchaser a good title, whereas in this situation it is stated that the vendor can cancel the contract at any time without endeavouring to give the purchaser a good title via Article 9.

The article under consideration in *Lyle & Scott Ltd. v. Scott's Trustees* is commonly known as a pre-emptive rights article. From the very wording of this description there is the suggestion that the article has the effect of vesting some kind of contractual right of first purchase in the members, and there is the converse suggestion of a contractual duty on the part of the vendor to ensure that the other members have the opportunity of exercising their right of first purchase. It may be asked—If such a right-duty relationship exists between members *inter se* by force of Article 9, could the action in the *Lyle & Scott Case* have been brought by the members in their individual capacities rather than via the company? It is submitted that the action could have been brought by the members in their own right. The issue hinges on the construction of s.22(1) of the Companies Act, 1936, which reads:

Subject to the provisions of this Act the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

That subsection states in essence that the articles are a form of contract between the members *inter se*. The nature of such a "statutory" contract needs to be more closely defined in a practical way when one member wishes to take action against another because of a breach of an article of the company. Professor Gower is of the opinion that the "pre-emptive rights" type of article is especially suited to enforcement *inter se* rather than enforcement *via* the company, since such direct action by members would not involve the company in unnecessary litigation and expense.¹⁵ Additional support for the view of Professor Gower is to be found in the recent case of *Rayfield v. Hands*¹⁶ which involved an article in the following terms:¹⁷ "II. Every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value but subject to the above no member shall hold more than 1,000 shares in the capital of the company." Though such an article was different from the *Lyle & Scott* article in that it purported to compel the directors to *buy* any shares offered for sale by a member, it was analogous insofar as it purported to create rights and duties between members *inter se*. Mr. Justice Vaisey decided that the member intending to transfer his shares could sue in his own right in order to enforce the article and thus he could compel the director to purchase the shares. In the course of his judgment he said:¹⁸

Not one of the judges in the case to which I have already referred, *Dean v. Prince*, showed any signs of shock or surprise in the assumption that the made of a contract between directors being formed by the terms of the

¹⁵ L. C. B. Gower, *The Principles of Modern Company Law* (2 ed. 1957) 254; and see *Borland's Trustees v. Steel Bros.* (1901) Ch. 279, at 288, 290.

¹⁶ *Rayfield v. Hands and others* (1960) Ch. 1. This decision incidentally indicates the disastrous effect of a carelessly drafted pre-emptive rights mechanism. Articles 6 and 11 of the Articles of Field-Davis Ltd. had the effect of compelling the directors to purchase the shares and did not give the other members any opportunity of exercising their pre-emptive rights.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 9.

company's articles. I am encouraged, not I hope unreasonably, to find in this case a contract similarly formed between a member and member directors in relation to their holdings of the company's shares in its articles.

It is therefore submitted, in the light of the *Rayfield v. Hands* decision, that the pre-emptive rights article is such as to vest in the members of the company a right to sue in their own capacity for the implementation of the provisions of that article without calling on the company to proceed as plaintiff.

II. *The Effectiveness of the Pre-emptive Rights Article in Protecting the Company against a Takeover.*¹⁹

It may be asked—Given the *Lyle & Scott* fact situation, was there any other method by which Mr. Fraser could have achieved a legally effective takeover by circumventing the terms of Article 9?

One method which suggests itself is the following: the purchaser approaches the members and offers to buy the vote of each member, such an offer being subject to acceptance by at least 75% of the members of the company. If he secures a 75% acceptance the purchaser will hand over the purchase price in exchange for a general proxy in favour of his nominee, and a guarantee by each member that he will not revoke the proxy.

Once the purchaser has accomplished the above and he is in control of at least 75% of the voting power, he could then summon an extraordinary general meeting. Prior to the actual meeting the purchaser could form a company free of the restrictive Article 9. When the extraordinary general meeting is called the purchaser could, by means of his voting power, pass a special resolution effecting a liquidation under s.269 of the Companies Act 1936, thus causing the shareholders of *Lyle & Scott Ltd.* to become shareholders of the new "buffer" company he had formed. Since the "buffer" company was free of restrictions such as Article 9 the shareholders would then be free to transfer their shares to Mr. Fraser.

Such a procedure could be thought to have the following advantages;

1. By selling the voting rights and not the share itself it may be that the vendor could be said not to be "desirous of transferring *shares*" within the meaning of the article, and therefore such a contract would not fall within the range of Article 9. The vendor may thus be able to pass over to the purchaser control of the company without being subject to Article 9.

On the other hand, it may be argued that to sell the voting rights attaching to a share and not the share itself is really to sell an interest in the share. The question centres on the nature of a "share" in that if a "share" is a separate legal entity from the rights constituting it, then to sell one of those rights would not be to sell an *interest* in the share. If, however, it is not a separate entity, then to sell one of the constituent rights may be to sell an interest in that share and therefore such a transaction would be caught by Article 9.²⁰

2. In using a liquidation under s.269 the purchaser escapes the risk that the reorganization will be held to constitute a fraud on the minority.²¹ The alternative to using a s.269 liquidation and a "buffer" company would be to "cut out"

¹⁹ It is pointed out by Moon, p. 131, that such a restrictive clause would not in fact forestall a takeover, though it would in law. Moon suggests that if the company wishes to forestall a takeover it must adopt a fresh business policy.

²⁰ Lord Keith was of the opinion that "... a shareholder who has transferred, or pretended to transfer the beneficial interest in a share to a purchaser for value, is merely endeavouring by a subterfuge to escape from the pre-emptory provisions of the article. A share is of no value to anyone without the benefits it confers, and to sell or purport to sell its beneficial rights without the title to the shares is, in my opinion a plain breach of the provisions of Article 9." (1959) 2 All E.R. at 672. From this, it seems that Lord Keith would consider the sale of the voting right to be the sale of an interest in the share and thus such a sale would be caught by Article 9.

²¹ For the advantages of liquidation under s. 269 see D. G. Rice, "The Effectiveness of a Pre-emptive Rights Clause in Company's Articles" (1958) 23 *The Conveyancer* 42, noting that the article was written in the light of the Court of Session decision in favour of the vendor shareholders.

the pre-emptive rights article by a special resolution; but this entails the risk that such a special resolution would constitute a fraud on the minority.²²

The device would in any case be accompanied by other hazards. There would, for instance, be a difficulty in assessing damages if the vendors decided to break their contracts by revoking the proxies. It would be impossible to show damage commensurate with the loss actually suffered by the purchaser. For example, if only fifteen percent break their contracts, the purchaser will be deprived of control of the company. How is one to assess the value of such control in awarding damages to the purchaser? It is an almost impossible task. Thus, if the vendors break their contracts the purchaser will not be assured of recovering adequate damages. Moreover, insofar as there would be no agreement to transfer the shares, the vendors would be under no obligation to transfer, and though they have resigned their voting rights, they would still have the dividend rights. This second difficulty indicates the clumsy nature of such a procedure, and also stresses the need for an agreement to transfer. If, however, there is an agreement to transfer, the vendor would have to follow out the procedure prescribed in Article 9, and the device would fail in its objective.

The view of the pre-emptive rights article taken by the House of Lords in the *Lyle & Scott Case* would appear to include any attempt by a takeover bidder to avoid compliance with the requirements of the article. The *Lyle & Scott Case* is of value to the company lawyer and the student of company law, since it affords a detailed analysis by the House of Lords, of a very frequently used article, the pre-emptive rights article. On the analysis afforded by this case, the pre-emptive rights article emerges as an extremely effective way of preserving tight control over the membership of a proprietary company. The principal significance of the case, however, is that it demonstrates that the pre-emptive rights article gives a very strong protection to the directorate of a proprietary company, against the wiles of the voracious takeover bidder.

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REMEDIES OF MINORITY SHAREHOLDERS
SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. v.
MEYER AND ANOR.

One remedy available to minority shareholders against directors or majority shareholders is the petition for the winding-up of the company on the ground that "oppressive conduct" has made this "just and equitable". This, however, will be cold comfort if the oppressive conduct has depressed the value of the company's shares. Recognizing this, the English legislature has provided an alternative remedy in cases of oppression. Under s.210 of the (English) Companies Act, 1948 (11 & 12 Geo. 6, c.38), the court, if satisfied on petition on grounds of oppression that the facts would justify a winding-up order, but that this would unfairly prejudice the oppressed members, may make such order as it thinks fit. The order may provide for the regulation of the future conduct of the company's affairs, or for the purchase of some members' shares by others, or for other means of bringing the matters complained of to an end.¹

²² It is a controversial issue whether or not such a special resolution would constitute a fraud on the minority, due to the Court of Appeal decision in *Greenhalgh v. Arderne* (1951) Ch. 286, where the Master of the Rolls said, at 291: "A special resolution of this kind would be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give the former a benefit of which the latter were deprived." In this case the pre-emptive rights clause was varied by the majority and not extinguished, and such a variation was held not to constitute a fraud on the minority. A special resolution extinguishing the pre-emption article, however, could be said to be taking away from the minority rights which were vested in them by the articles. Thus it is submitted that a special resolution cancelling such an article altogether would constitute a fraud on the minority.

¹ "S.210: (1) Any member of a company who complains that the affairs of the company