DISSERTATION

ON

THE LITIGATION BETWEEN

GREENHALGH AND THE MALLARD FAMILY - [1941 - 1950]

AND

ITS INFLUENCE ON COMPANY LAW IN ENGLAND, AUSTRALIA AND SOUTH AFRICA

by

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SUMMARY

Greenhalgh instituted seven actions against the Mallard Family and its company, Arderne Cinemas Limited, between July 1941 and November 1950. Five of these were taken on appeal. The five reported judgments (one action and four appeals) have influenced company law (and the laws of evidence, contract and procedure) not only in England, but also in Australia and South Africa, particularly with regard to the conflict between the rights of majority and minority shareholders.

The influence of the litigation is considered by reference to decided cases, text book and journal articles in the three jurisdictions.

GREENHALGH v THE MALLARDS

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DEDICATION

I dedicate this dissertation to my friend Jennifer Ann and thank her for her support, patience and forbearance. I also thank my brother-in-law, Julian Block, in Sydney, Australia for his interest in and contribution to this work by supplying some of the Australian text book sources and cases. Finally, my most sincere and heartfelt thanks to Harriet Ward, my secretary, for all her hard work in typing the manuscript.

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CHAPTER I

INTRODUCTION

On 1 July 1941 Mr Greenhalgh issued a writ against his co-shareholders in the Arderne Cinema Company, and thus began a series of cases which ended with a Court of Appeal Judgment handed down on 10 November 1950.

During the almost ten year period of the litigation, seven actions were brought by Mr Greenhalgh, five of which were taken on appeal.

Mason[1] writing in the *Australian Law Journal* said of the litigation "It thus represents something of an epic of litigious heroism" while Professor Sealy[2] in a note in the *Cambridge Law Journal* dealing with the *Clemens* case[3] in referring to "....a seemingly wide choice of remedies.... available to a minority through the courts..." remarks that "... many of them have a sorry history as the ghost of Mr Zuccani ...., Mr Sidebottom...., Mr Greenhalgh.... and the many other unsuccessful litigants who haunt the pages of the text books could plainly testify." The first two references are to *Allen v Gold Reefs of West Africa* [1900] 1 Ch.656 and *Shuttleworth v Cox Bros. & Co. (Maidenhead)* [1927] 2 K.B. 9, of which more later and the third, of course, to Mr Greenhalgh of the Arderne Cinema company. D D Prentice[4] in a *Law Quarterly Review* article entitled 'Restraints on the Exercise of Majority Shareholder Power' begins with the words: "The plight of Mr Greenhalgh is known to all students of company law and his fate has been held up as a salutary warning to all minority shareholders who have the temerity to do battle with the big battalions." Gower in *Principles of Modern Company Law* 4 ed (1979), referring to the last appeal, says "This last case, however, was merely the culmination of a long battle in the courts which is such an admirable illustration of the vulnerability of a minority shareholder that it is worthwhile summarising the whole story."[5]

For ease of reference *Greenhalgh v Mallard* [1943] 2 All E.R. 234 (CA) will be referred to as "*Greenhalgh (1943)*", *Greenhalgh v Arderne Cinemas Limited and Mallard* [1945] 2 All E.R. 719 (Ch.D) will be referred to as "*Greenhalgh (1945)*", *Greenhalgh v Arderne Cinemas Limited and Mallard* [1946] 1 All E.R. 512 (CA) will be referred to as "*Greenhalgh (1946)*", *Greenhalgh v Mallard* [1947] 2 All E.R. 257 (CA) will be referred to

as "*Greenhalgh (1947)*" and finally *Greenhalgh v Arderne Cinemas Limited* [1950] 2 All E.R. 1120 (CA); [1951] Ch. 286 will be referred to as "*Greenhalgh (1950)*".

The principles decided upon in four of the five reported judgments (one action and four appeals) impact upon the rights of shareholders dealing, as they did, firstly (*Greenhalgh (1943)*) with limitations on transmission of shares and whether provisions which bind a shareholder also bind his purchaser, secondly, (*Greenhalgh (1945)* and *Greenhalgh (1946)*) with the nature of class rights and the difference between actions which affect those rights as a matter of business as opposed to varying them, and thirdly (*Greenhalgh (1950)*) with the concept of "a fraud on the minority" and the nature of the obligation of majority shareholders to act "*bona fide* in the interests of the company as a whole." *Greenhalgh (1947)*, which arose from an alleged conspiracy, dealt with issues of "*res iudicata*" and frivolous and vexatious actions.

All of the reported judgments have been either the subject matter of or have been commented upon in numerous journal articles are dealt with by the text book authors, and, of greater importance, have been referred with approval and have been treated as judicial authority by the courts in England, South Africa and Australia, and it is the intention "to summarise the whole story" by setting out the facts and judgments in the epic and long battle between Greenhalgh and the Mallard Family, and then to examine with reference to decided cases, journal articles and other legal writings what comment the cases have evoked and what influence the judgments have had not only in England, but also in South Africa and Australia.

The facts of and findings in all of the reported judgments will be dealt with in a single chapter, followed by a chapter dealing with the four cases reported between the years 1943 and 1947, a chapter dealing with what has become the most important and far reaching judgment, that is *Greenhalgh (1950)* with, ultimately, a short conclusion regarding the significance of all the judgments, and in particular, of the last appeal and the possible establishment of a general principle regarding fiduciary duties between shareholders in general and between majority and minority shareholders in particular.

Although the subject matter of this dissertation relates in the main to disputes between shareholders and to the protection of the rights of minority shareholders it has not been possible, nor is it intended, to deal with the minority shareholder statutory protections provided for in the companies legislation in the United Kingdom, South Africa and

Australia nor with the very real weapon in the hands of minority shareholders constituted by the winding up of a company on the just and equitable ground nor with the specifics of the exception to the rule in *Foss v Harbottle*[6] based on fraud on a minority. It is also not been possible to deal with directors fiduciary duties and their obligation to act *bona fide* in the interests of the company as a whole, although it is clear that the principles set out in *Greenhalgh (1950)* are of equal application in both of the latter two instances.

Footnotes : Chapter I

1 (1972) 46 Australian LJ 67

2 [1976] Cambridge LJ 235

3 Clemens v Clemens Bros Ltd [1976] 2 All E.R.268

4 (1976) 92 LQR 502

5 Gower's Principles of Modern Company Law 4 ed (1979) at 624

6 (1843) 2 Hare 461

CHAPTER II

THE LITIGATION

Arderne Cinemas Limited ("the company") was incorporated as a private company in 1936 with an authorised capital of twenty six thousand pounds divided into 21 000 preference shares of ten shillings each and 31 000 ordinary shares of ten shillings each.

By March 1941 26 295 of the ordinary shares had been issued, leaving 4 705 ordinary shares in reserve. The preference shares, however, played no role at all in the litigation which was to follow.

At that time the company had an overdraft with its bankers secured by a first mortgage over the cinema property, and owed approximately eleven thousand pounds to one Harold Brooke to whom debentures had been issued and who held the security of a second mortgage over the cinema property. Mr Greenhalgh was then approached by the company's solicitor who negotiated with him for a loan to be made to the company to be used to discharge the indebtedness of Mr Brooke.

In terms of an agreement dated 28 March 1941, Greenhalgh undertook to subscribe for debentures in the company in an amount of eleven thousand pounds. The 4 705 authorised but unissued ten shilling shares would be sub-divided into 23 525 shares of two shillings each to be known as "the 1941 two shilling shares" and Greenhalgh agreed to subscribe for 19 213 of those shares. The balance of 4 312 shares were allotted to three directors of the company, Mr Joseph Mallard, Mrs Quinlan and a Mr Hallam.

A collateral agreement was concluded between Messrs Greenhalgh, Mallard and Hallam and Mrs Quinlan in terms of which the Mallard Group would vote its 11 750 ten shilling shares and 4312 1941 two shilling shares with Greenhalgh's 19 213 shares to support Greenhalgh. Greenhalgh could then rely on 35 275 votes out of a total of 49 820 thus turning his 38,5% interest into an effective 70,80% of the ordinary votes. Greenhalgh, in turn, was obliged to use his votes to re-elect the three as directors as and when they retired on rotation.

The effect of the agreement was that Greenhalgh controlled sufficient votes to carry an ordinary resolution but not a special resolution.

No sooner were the agreements concluded than the Messrs Mallard and Hallam and Mrs Quinlan argued that they were not bound by the March 1941 collateral agreement because it bound them to vote with Greenhalgh, not only at shareholders meetings but also at directors meetings. This, they said, was in conflict with their fiduciary duties as directors and that the agreement, being indivisible, was void. The resulting dispute led to an action started on 1 July 1941, and on 3 October 1941 Morton J, in an unreported judgment held that while the collateral agreement could indeed not bind the three in their capacity as directors, it was binding upon them as shareholders, and they were accordingly obliged to vote with Greenhalgh.

The Mallard Group, in reaction to the judgment then sold all their shares, bar 100 each, to existing members of the company free of the voting obligation and Greenhalgh commenced his second action on 17 November 1941 which came before Uthwatt J. It was argued, on behalf of Greenhalgh, firstly, that the relevant article precluded sales to both outsiders and existing members "... so long as any member of the company may be willing to purchase such shares..."[7], and that because the shares had not been offered to all existing members, the transfer was invalid and, secondly, that the sale of the shares constituted a breach of the March 1941 collateral agreement because the three directors had "... put it out of their power to ... vote with and support the Appellant ...."[8] and, thirdly, the burden of the collateral agreement continued to bind the shares in the hands of any person who subsequently acquired them with notice to that effect.

The judgment by Uthwatt J, delivered on 28 January 1943, held that the restriction in the articles did not apply to sales to existing members and that the voting obligation "... did not run with the shares and that the transferees held those shares free from an obligation arising under the collateral agreement" (quoted from Vaisey J in *Greenhalgh (1945)*). The matter then came before the Court of Appeal and is reported as *Greenhalgh v Mallard* [1943] 2 ALL E.R.234. Lord Greene, M.R., with Luxmoore and Goddard, L.JJ. concurring held that:

> ".... a share , being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.", and

> "... the right of transfer remains unimpaired, save to the extent that with reasonable clearness it has been taken away or cut down. Here I find that not merely has that right not been taken away, but the language (rather obscure though it is) does not cut it down."[9]

The remaining two arguments were dealt with together and the finding was:

> "The obligation under the contract is an obligation which, in my opinion, endures so long, and so long only, as the contracting party has power to use his vote. Therefore, to sell the shares cannot be said to be a breach of contract." and that
>
> "... the restrictive covenant could only affect the shares in the hands of the purchaser if the contract on its true construction were to endure for a period covering the time when they were in the hands of that purchaser. If the obligation comes to an end when the shares are sold, there can be no restrictive covenant affecting them in the purchaser's hands." and
>
> "I think it is plain that the obligation is only to vote in respect of whatever shares the three directors might have or from time to time acquire."[10]

The appeal thus failed, and was dismissed with costs, with Lord Greene however remarking "I come to this conclusion with some regret as I cannot help feeling that the appellant has been shabbily treated."[11]

Thus Greenhalgh, having succeeded in the first action before Morton J, failed in the second trial and its appeal and was to be defeated again and again in the course of the further five trial actions and their appeals until eventually, it seems, his considerable legal energy failed him.

The third judgment, like the first was unreported and arose from a claim by Greenhalgh against the company for the issue of the debentures and in the words of Vaisey J in *Greenhalgh (1945)*:

> "... was necessitated not by any general refusal of the company to carry out its duty in that regard, but rather by disputes as to the precise form of the debenture, it being one of the more glaring defects of this very unsatisfactory document that the usual and common form provision, for the precise drafting of the debenture to be entrusted to some expert, was omitted."[12]

Although this is not clear from any of the later judgments, the debentures appear, eventually, to have been issued after which the next action, *Greenhalgh (1945)* heard by Vaisey J and its appeal, *Greenhalgh (1946)*, presided over once again by the Master of the Rolls, Lord Greene and Morton and Somervell L. JJ. took place, both of which are reported. The cases deal with the distinction between the rights of a shareholder being

affected as a matter of business and being varied, or affected as a matter of law, and arose from the adoption at an extraordinary general meeting of a resolution that the 26 295 ordinary shares of ten shillings each be sub-divided into two shilling shares ranking *pari passu* in all respects with the 23 525 "1941 two shilling shares".

A brief history of the resolution is that Mrs Mallard (the second defendant) requisitioned a meeting of members for the purposes of the sub-division resolution after which the directors duly convened the meeting to take place on 25 November 1941. However, the second action had commenced some eight days earlier and because of this and arising from certain undertakings given by the parties, the meeting was adjourned for eighteen months. The extraordinary general meeting took place on 12 March 1943 when it was resolved, by a small majority, that the sub-division take place. The result of the resolution was that the 26 295 votes attaching to the ten shilling shares now became 131 475 votes and, in the words of Vaisey J, its effect:

> ".... was to take away from the plaintiff the remaining prop which supported the control which had been given him by the agreement of Mar., 1941, because it was perfectly obvious that the votes carried by the 1941 2*s*. ordinary shares would be completely swamped by the very larger number of votes carried by the 1943 2*s*.ordinary shares."[13]

Greenhalgh argued that the sub-division was void because, firstly, it amounted to a breach of the March 1941 agreement and secondly that it altered the rights attaching to the 1941 two shilling shares without the consent of the owners of the shares necessary in terms of the articles. The relationship between Greenhalgh and the Mallards had in the meantime worsened, because when the writ in the action was issued on 22 May 1944 yet another general meeting requisition had been made for the purpose of increasing the capital of the company. Certain interlocutory relief was sought on 23 May 1944, but had been refused by Cohen J on 13 June 1944, after which the general meeting took place.

Both the court *a quo* and the Appeal Bench considered whether the ten shilling shares formed one class and the 1941 two shilling shares another class. After referring in his judgment to the "*locus classicus*" *Sovereign Life Assurance Co v Dodd* [1892] 2 Q.B.573, Vaisey J considered that ".... in any question which arose as to voting rights .... the ten shilling shares formed one class and the 1941 two shilling ordinary shares formed another class ..." and continued:

> "I think I am justified in saying that in this case the 10*s* ordinary shares and the 1941 2*s*. ordinary shares may be one class of shares for some purposes and two distinct classes of shares for other purposes, and I incline to the view that they are two distinct classes of shares for the purpose for which I am now considering them." The Judge then referred to article 3 and continued "In order to bring the case within that clause, it has to be established not only that the 1941 2*s*. ordinary shares constitute a class of shares, but that their rights have been or have been purported to be varied."[14]

Vaisey J considered that, by analogy, where preference and ordinary shares have one vote each, the rights of the preference shareholders are not varied when additional ordinary shares are issued (the rights of the preference shareholders would be materially affected but not varied), and then concluded that in the instant case the particular method of affecting the rights did not vary them within the meaning of the article. The judgment with regard to the second argument relating to breach of contract was dismissed because there was no express term of the written agreement "....infringed by what has been done"[15]. Finally, the Judge was "... not without regret ...."[16] in finding that the plaintiff was wrong in his assumptions arising from the March 1941 agreement, namely that the parties to the March 1941 agreement were obliged to vote with him and that his shareholding would give him a permanent measure of control of the affairs of the company. The Court of Appeal in *Greenhalgh (1946)* upheld the judgment of Vaisey J. Lord Greene commenced his judgment by saying :

> "The events which have led up to this particular controversy are well summarised in the judgment of Vaisey J. It is not necessary to go over them again. Many of them have already been dealt with in judgments in previous litigation between the parties. The appellant, I think, deserves some measure of sympathy because, with great determination, he has fought for what he conceives to be his rights, and it has landed him in a series of unsuccessful actions."[17]

The Master of the Rolls continued by setting out the two grounds of the appellant, Greenhalgh's,case. Greenhalgh's Counsel had formulated an undertaking which he argued was to be implied in the agreement and the Master of the Rolls could conclude only that he was quite unable to be convinced that any such clause could be implied. The court then dealt with the second argument regarding variation of class rights and the provisions of article 3 of Table A read with article 54 of Table A and section 50 of the then Companies Act and the Judge asked himself the following question :

> "What are the rights in respect of voting attached to that class within the meaning of art. 3 of Table A which are to be unalterable save with the necessary consents of holders? The only right of voting which is attached in terms to the shares of that class is the right to have one vote per share *pari passu* with the ordinary shares of the company for the time being issued. That right has not been taken

> away. Of course, if it had been attempted to reduce that voting right....but ... the right to have one vote per share is left undisturbed."[18]

The conclusion was:

> "Instead of Greenhalgh finding himself in a position of control, he finds himself in a position where the control has gone, and to that extent the rights of the 1941 2*s*. shareholders are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were - a right to have one vote per share *pari passu* with the ordinary shares for the time being issued which include the new 2*s*. ordinary shares resulting from the subdivision. In the result, the appeal must be dismissed with costs."[19]

Morton and Somervell LL. J concurred, and thus the 12 March 1943 resolution was held to be valid and effectual.

Two further actions followed, the trial cases of which were unreported. However, both were the subject matter of appeals and the appeal in the second action is reported as *Greenhalgh (1947)*. Little can be gleaned from the appeal judgment as to the facts and outcome of the first case, except that it was heard before Uthwatt J and related to a claim of conspiracy. In the Court of Appeal, Somervell L.J says of that action:

> "That case came on before Uthwatt, J., who decided against the plaintiff, and I need only read one sentence from his judgment. The case was put on the basis that this was an unlawful conspiracy to injure the plaintiff, and the learned judge, referring to *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* [1942] 1 All E.R. 142M said he had 'no hesitation in finding that the predominant purpose was not to damage the plaintiff or his property.' That disposed of the case as it had been presented to him. The plaintiff appealed from that judgment, and the appeal was dismissed."[20]

The statement of claim in the second action dealt with the same transaction and relied on no further facts but alleged, this time, that the "means" was unlawful whereas, in the earlier case, the complaint was aimed at "the end". The judge, having considered the facts, says:

> "In other words, a conspiracy may give rise to a claim for damages if either the end or the means, or both, are wrongful, but, in my opinion, a plaintiff who believes he has a cause of action in conspiracy must make up his mind whether he is going to rely on one or other or both of these allegations - whether he is going to say that the purpose was unlawful, but he does not suggest that the means are unlawful, or that the means were unlawful, but he does not suggest that the purpose was unlawful; or that both are unlawful. But if he has chosen to rely on, and put his case in, one of those ways, he cannot, in my view, thereafter bring the same transactions before the court and say that he is relying on a new cause of action."[21]

Cassels J, in the court a quo ordered, in effect, that the statement of claim be struck out and, with the appeal having been allowed by Somervell L.J, with Evershed L.J., concurring Mr Greenhalgh was, yet again, unsuccessful.

The seventh action, was heard by Roxburgh J. who gave judgment against Greenhalgh on July 5 1950. In the appeal, *Greenhalgh (1950)*, Sir Raymond Evershed M.R. commenced his judgment with the following words :

> "This action is one of considerable complexity, not the less so because it is, as I understand, the last (at the moment) of a series of actions which have concerned the affairs of the first defendant, Arderne Cinemas Ltd., and represent engagements in an unfortunate warfare which has continued for a long time between Mr Greenhalgh, the plaintiff, and those who support him, on the one hand, and Mr Mallard, the second defendant, and those who support him, on the other."[22]

The further erosion of the rights of the unfortunate Mr Greenhalgh resulted from the adoption of a special resolution on 30 June 1948. The background to this resolution was that in an agreement dated 4 June 1948 between the second defendant, Joseph Mallard and a Mr Sol Sheckman, Mallard, having recited that he owned or controlled 85 815 ordinary two shilling shares in Arderne Cinemas Limited and that Tegarn Cinemas, Limited owned a further 50 000 partly paid shares in the company, sold the 85 815 shares to Sheckman. The same day the Tegarn company was sold to Mr Sheckman so that he became, thereby, indirectly, the owner of a further 50 000 shares. On 7 June 1948 a notice of meeting was sent to the shareholders recording that the purpose of the meeting was the adoption of a resolution reading "That the articles of association of the company be altered by adding at the end of art. 10 the following additional clause : 'Notwithstanding the foregoing provisions of this article any member may with the sanction of an ordinary resolution passed at any general meeting of the company transfer his shares or any of them to any person named in such resolution as the proposed transferee, and the directors shall be bound to register any transfer which has been so sanctioned.'"[23]

The meeting also gave notice of the intention to propose an ordinary resolution sanctioning a transfer of shares to Sheckman at a price of six shillings each.

The two resolutions were duly adopted. At the meeting Mallard disclosed the fact that Sheckman was to acquire the shares in question and he also informed the meeting that

he was to receive five thousand pounds as compensation for his loss of office as a director. Mallard however failed to disclose both that the payment would come, not from Sheckman, but from the company itself and that Sheckman had also acquired the Tegarn company and, thus, the additional 50 000 shares and votes. Greenhalgh issued his writ in the matter the day after the two resolutions were adopted and Roxburgh J. in the court a quo apparently "... found as a fact that the scheme enshrined in the agreements.... was a scheme to commit a fraud on the minority" but did say "I do not think that either Mr Sheckman or Mr Mallard, in dealing with this matter as they did, were guilty of anything in the nature of deliberate dishonesty."[24] The Master of the Rolls, Sir Raymond Evershed continues in his judgment on appeal:

> "It is to be observed that there is here no question in the judge's mind of dishonesty. Technically, he is saying, the making of the 5 000 pounds payable out of the company's assets amounted to a fraud on the minority because it was a deprivation of an interest the minority had in the assets."[25], and
>
> ".... but for the reasons I have stated, I do not think it is possible to impeach this resolution by reliance on the 5 000 pounds, or the part that it played at all in the hands of the defendant Mallard, on the one hand, or of the three actual beneficiaries, on the other."[26]

The Master of the Rolls then considered the cases to which he had been referred by Counsel for Greenhalgh namely *Sidebottom*, *Dafen* and *Shuttleworth* but, surprisingly, the court was not referred to *Allen* after which the, by now, famous and almost hackneyed lines followed

> "Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that '*bona fide* for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, 'the company as a whole,' does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think the thing can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived. When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down. It is, therefore, not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal is for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, *prima facie*, if

> the corporators think it is a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution because they are considering the position of themselves as individual persons."[27]

The judgment continued to deal with two additional grounds for impeaching the resolution, namely that it went further than was necessary to give effect to the particular sale of shares and, secondly, that it prejudiced Greenhalgh and the minority shareholders by depriving them of their pre-emptive rights under the articles. However, the Master of the Rolls found that there was only a relaxation of stringent restrictions on transfer falling far short of a "*Dafen* type"[28] expropriation. With regard to the second argument he considered that "When a man comes into a company, he is not entitled to assume that the articles of association will ... always be in a particular form" and "so long as the proposed alteration does not unfairly discriminate in the way I have already indicated, I do not think it is an objection, provided the resolution is *bona fide* passed, that the right to tender for the majority holding of shares would be lost by the lifting of the restriction."[29] Evershed M. R. was then unable notwithstanding the "unfortunate secrecy and all the rest of it" on the part of Mallard to find that bad faith "in the true sense of the term"[30] could be imputed to him and found no ground for impeaching the resolution. He dismissed the appeal, and Asquith and Jenkins LL.J concurred.

Thus the litigation which had covered a time span of only some seven months short of ten years came to an end and it now remains to consider the effect of *Greenhalgh (1945)*, *Greenhalgh (1946)* and *Greenhalgh (1950)* on company law in general and the protection of minority shareholders in particular and, for the sake of completion, the effect of *Greenhalgh (1947)* on the law of evidence relating to a plea of *res iudicata*.

Footnotes : Chapter II

[7] quoted by Lord Greene M.R. in Greenhalgh (1943) at page 236
[8] ibid 238
[9] ibid 237
[10] ibid 239
[11] ibid 240
[12] Greenhalgh (1945) 722
[13] ibid
[14] ibid 723
[15] ibid 724
[16] ibid
[17] Greenhalgh (1946) 513
[18] ibid 516
[19] ibid 518
[20] Greenhalgh (1947) 257
[21] ibid
[22] Greenhalgh (1950) 1121
[23] ibid 1120
[24] ibid 1124 and 1125
[25] ibid 1125
[26] ibid 1126
[27] ibid
[28] Dafen Tinplate Co. Ltd v Llanelly Steel Co. [1920] 2 Ch. 124
[29] Greenhalgh (1950) 1127
[30] ibid 1128

CHAPTER III

THE EARLIER CASES

In this, the third chapter, the four earlier cases, *Greenhalgh (1943)*, Greenhalgh [1945], its appeal Greenhalgh [1946] and *Greenhalgh (1947)* will be considered.

1. GREENHALGH v MALLARD [1943] 2ALL E.R. 234 (CA)

Introduction

It will be recalled from the previous chapter that the restrictions in the articles were found not to be of application to sales between existing members and that the restrictions on sale provided for in the March 1941 collateral agreement between Greenhalgh, Mallard, Hallam and Mrs Quinn were, furthermore, not binding at all on existing members who acquired the shares from the contracting parties. That decision arose as much from the poor drafting in the collateral agreement as it did from pure principles of law because, clearly, if, as Lord Greene, M.R. put it, "language of sufficient clarity" had been used ".... the right of transfer .... inherent in property of this kind ... (could have been) ... taken away or cut down."[31] The restriction was, further, found to have applied only while shares were held by the contracting directors and shareholders, and thus did not bind purchasers.

English Company Law Text Books

It is intended to examine certain of the standard works on English company law to establish the degree to which *Greenhalgh (1943)* has become an authority for the principles decided in it.

Gower in *Principles of Modern Company Law* 4ed (1979) states that company shares, being on the face of it, freely transferable ".....constitutes one of the great advantages of an incorporated company ...."[32] and this echoes the Master of the Rolls who in *Greenhalgh (1943)* said at page 237:

> ".... but in the case of the restrictions of transfer of shares I think it is right for the court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles."

While, generally speaking, it is a canon of company law that the transfer of shares in public companies must of necessity be unrestricted, the articles of association of private companies and agreements between shareholders in private companies often contain restrictions on transfer and, indeed, must do so in order to comply with the company statutes in South Africa (Section 20 (1) (a)) and Australia (Section 116). Gower[33] refers further with regard to restrictions in the articles to re Smith & Fawcett[34] Ltd and *Greenhalgh (1943)* in support of the conclusion that "... the extent of the restriction (on transferability) is solely a matter of construction of the regulations", but that the *prima facie* right of shareholders to transfer to transferees of their choice is not to be limited by "..... uncertain language or doubtful implications ....". It is also clear from the judgment of Lord Greene in *Greenhalgh (1943)* that an agreement between shareholders will bind only the parties to it while they hold the shares in question and Gower op cit dealing with protection of shareholder rights in a shareholders agreement quotes *Greenhalgh (1943)* as his authority for the proposition that:

> "It is therefore possible, for example, to insert provisions in the articles requiring that certain specified actions require the unanimous approval of the members, or of the directors, and to combine that with an agreement among the shareholders not to vote for any proposed amendment to those provisions in the articles. Such an agreement will bind only the parties to it ....."[35]

Pennington's *Company Law* 6ed (1990)[36] in his chapter on private companies, in dealing with restrictions on transfer of shares and the principle that shares are freely transferable, cites *Greenhalgh (1943)* as authority for the view that ".... restrictions on their transfer are construed strictly, and so when a restriction is capable of two meanings, the less restrictive interpretation will be adopted by the court."

A similar approach is found in other English text books. Reference is made to *Buckley* on the *Companies Acts* 14ed (1981) where with reference to, *inter alia, Re Smith, Knight & Co*[38] and *Greenhalgh (1943)* it is said:

> "In the absence of restrictions in the articles, or by agreement with the company outside the articles, the shareholders may transfer their shares without any consent and the directors have no discretionary power to refuse to register a transfer *bona fide* made."[37]

Gore-Brown on Companies 43ed, dealing with pre-emption clauses and having said "pre-emption clauses constitute valid restrictions upon the transfer of shares." continues that they are enforceable against individual members by the company and, it seems, by the persons upon whom the rights of pre-emption are bestowed, at least if they are members of the company. *Greenhalgh (1943)* is cited as authority for the proposition:

> "a pre-emption clause will be strictly construed; in particular, the court will be reluctant to hold that such a clause fetters the right of a member to transfer his shares to another member at any price that may be agreed upon between them."[39]

Farrar's Company Law 2ed (1988)[40] in a chapter entitled 'Supplementing the Statutory Constitution' deals, *inter alia*, with "an agreement between all the shareholders *inter se*" and having recorded that such agreements supplement the articles and relate to voting, management, share purchases and the voluntarily winding up of the company states, that "in addition they may be held to be limited in terms of time to a reasonable time or the length of time the shares are held"[41] and refers to *Greenhalgh (1943)* as his authority.

The editors of *Palmer's Company Law* 25ed (1992)[42], in dealing with the right to transfer unlisted shares refer at paragraph 6.602 to a quotation from the judgment of Lord Blackburn in Re *Bahia and San Fransico Railway Company*[43] "....when joint stock companies were established the great object was that the shares should be capable of being easily transferred." They then proceed to make the point that it is not necessary to look to the articles for the power to transfer but that they must be looked to for restrictions, if any, on transfer. They conclude, with reference to *Greenhalgh (1943)*, "thus a member has a right to transfer his shares to another person unless this right is clearly taken away by the articles."[44]

Palmer, furthermore, in paragraph 6.611[45] after reference, *inter alia*, to the judgments in *Tett*[46] and *Curtis*[47] deals with pre-emptive rights of existing shareholders and limitations upon the sale to outsiders without first offering the subject shares to other members. It is concluded, with reference to *Greenhalgh (1943)*, that a sale to existing members does not trigger pre-emptive provisions:

> "where the pre-emption clause provides, as is normally the case, that a share may be transferred to any member but shall not be transferred to a person who is not a member so long as any member is willing to purchase the same at fair value, the transfer between members is completely unrestricted and such transfer does not bring into operation the provisions of the pre-emptive clause."[48]

Halsbury's Laws of England[49] cites *Greenhalgh (1943)* as the authority for the proposition that shares, being personal property, are *prima facie* transferable[50].

Paragraph 331 in Volume 9 of Halsbury refers to *Greenhalgh (1943)* in support of a "general rule .... that a contract cannot impose burdens on anybody who is not a party to it."[51]

Greenhalgh (1943) does of course deal, essentially, with issues of the law of contract and, not surprisingly, the judgment is referred to and commented in some of the leading English law text books on the law of contract. An example is *Chitty on Contracts* 25ed (1983)[52] where there is a reference to *Greenhalgh (1943)* in a chapter headed "Attempts to impose liabilities on strangers" where the authors refer to the principle established in the judgment of Knight Bruce LJ in *De Mattos v Gibson* as applied in *Strathcona* and eventually rejected in *Port Line*.

Treitel in *The Law of Contract* 3ed (1970)[53] deals with the enforcing of restrictions on purchasers of goods who acquired with knowledge of the restrictions and reference is made to *Strathcona* having ".... provoked much adverse criticism ...."[54] in the *Greenhalgh (1943)* judgment but the "criticism" by Lord Greene MR in *Greenhalgh (1943)* at page 239 is nothing if not gentle where he suggests that ".... some of the observations made in relation to constructive trustees and the running of restrictive covenants ..... were regarded by the profession as novel if not revolutionary" and "If and when the matters discussed in .... *Strathcona*[55] .... have to be considered by this or any court, it will be necessary to give them a very close examination." Reference is then made to the refusal of Diplock J in *Port Line Limited*[56] to follow *Strathcona*. *Greenhalgh (1943)* is referred to in the *Port Line* judgment and Diplock J deriving some support for his critical view on the *De Mattos*[57] and *Strathcona* principles in the judgment of Lord Greene, says:

> "In Greenhalgh v Mallard, Lord Greene M R in a judgment concurred in Luxmore L J and Goddard L J was clearly of the opinion that it (*De Mattos*) was wrongly decided, although it is only fair to add that as recently as 1952 Denning L J gave it a not unfriendly passing glance in *Bendall v McWhirter*."[58]

Treitel concludes that while the *Port Line* case rejects the *De Mattos* principle "It does not decide that a third party can always disregard a contract concerning a chattle."[59]

English Case Law

Only two references have been found to *Greenhalgh (1943)* in the English Law Reports, where it was approved in one and distinguished in the other.

In *Tett v Phoenix Property and Investment Co Limited*,[60] an appeal from a judgment of Vinelott J the Court of Appeal was required to deal with three principal questions, the first of which was whether certain of the articles of Phoenix on their true construction imposed a valid and enforceable condition which had to be satisfied before the executor of a deceased member of the company would have the right to transfer shares to a non-member. Slade LJ, citing *Greenhalgh (1943)* approached the construction of the article ".... from the stand point that a shareholder *prima facie* has a transferable right of property in his shares and that can only be taken away from him by an express prohibition in the articles of association"[61] and Robert Goff LJ, early in his judgment, referred to Counsel for the Plaintiff having submitted that the articles in question did not impose such a valid and enforceable restriction and quoted from Lord Greene MR in *Greenhalgh (1943)* in his "language of suffient clarity" test. The judgment of the court was that the articles did indeed contain a sufficiently clear express restriction to cut down the right of a shareholder to transfer his shares.

In the earlier *Champagne Perrier-Joet SA v H H Finch Limited*[62] case *Greenhalgh (1943)* was cited by Counsel for the Plaintiff and was considered by Walton J in his judgment but while the "expressions" in that case and a later judgment referred to by the court were "taken for granted", it was "not the situation with which I have to deal [being one] in which the more natural answer would be to favour the restrictions applying than the other way"[63], and the case was distinguished.

English Journal Articles

It is not only the authors of company law text books who quote *Greenhalgh (1943)* with approval - the judgment has also received recognition in a number of English law journals.

An early reference is found the *Modern Law Review* where Glanville-Williams[64] in a note on *Greenhalgh (1943)* says that it was fortunate that the court of appeal:

> "....did not have to pronounce upon the decision in Lord *Strathcona*[65], for had they done so they would apparently have disapproved of it and so have helped to deprive English law of a hopeful line of development".

The writer is critical of the critics of the Lord *Strathcona* judgment and is supportive of its supporters.

Greenhalgh (1943) is also the subject matter of a case note in the *Law Quarterly Review*[66] stating *inter alia* that:

> "this case is one more illustration of the rule that the Court cannot read into a contract a clause which is not there, even though it may feel that such a term would have made the agreement a fairer one." and "undoubtedly (the) result is hard on the Plaintiff but the law cannot help those who enter into indefinite agreements which fail to provide for contingencies which should have been guarded against by express provisions."

Changes in the law contained in the 1948 Companies Act in the United Kingdom led to an article 'Some Aspects of the Law Relating to Company Control' by Geoffrey Hornsey in the *Modern Law Review*[67]. Having dealt with some financial implications of control and amendments relating to voting, Hornsey says "Other interesting aspects of the law relating to control are illustrated by a recent series of cases. These arose out of an arrangement whereby one Greenhalgh, on lending to a company ...."[68]. The facts and findings in *Greenhalgh (1943)*, *Greenhalgh (1946)* and, briefly, *Greenhalgh (1947)* are then related and commented upon.

Murray A Pickering, also writing in the *Law Quarterly Review*[69], in an article entitled 'Shareholders Voting Rights and Company Control' (which, incidentally, refers also to the 1946 and 1950 appeal court judgments) deals in a section sub-headed 'Inter-Member Control' with, *inter alia*, voting agreements. He reminds us (with reference to *Pender v Lushington*[70]) that a member's right to vote has been recognised in English law as a "proprietary legal right." He goes on to say that voting agreements are governed by the general law of contract, that parties will be bound by the expressed provisions in their agreements but that ".... additional provisions will not usually be

implied."[71] Pickering then refers to the facts and findings in *Greenhalgh (1943)* which he summarises as:

> "(the court) refused to imply as a term of the contract any provision that the parties to it would not put an end to the existing state of affairs, and it would apply restrictive covenants to personality. The main question as to the obligations imposed under the contract was dealt with as one of construction and, as under it there was no indication of any restraint on the power of the directors to sell their shares, their duty to vote with the Plaintiff endured only in respect of whatever shares they might from time to time possess."[72]

Pickering then proceeds to deal with the *Greenhalgh (1946)* judgment and the conclusion is:

> "possibly through the Greenhalgh litigation the courts fell short of providing reasonable protection for shareholders' rights but the moral to be drawn from these cases with regard to voting agreements seems to be that to be certain and effective they should provide expressly for all foreseeable eventualities and contingencies."[73]

A more recent article which mentions *Greenhalgh (1943)* is that entitled 'Share Transfer Problems in the Private Company' by Brenda Hannigan in *The Company Lawyer*[74]. Ms Hannigan commences her analysis from the starting point in the *Re Smith, Knight & Co*[75] case that the *prima facie* right of a shareholder is that to transfer his shares and that it is the Articles which would impose any restriction on that right. She goes on to conclude, with reference to Re *Smith & Fawcett Limited*[76] and *Greenhalgh (1943)* that:

> "In considering each stage and construing the relevant provision, two particular guide lines should be be borne in mind. First, the courts have to give effect to the specific restriction on transfer contained in the articles but they will not extend that restriction by implying some additional provision which is alleged has been omitted, nor will they remedy a defect caused by inept drafting. Secondly, and related to that, the courts adopt a restrictive interpretation of such restriction as is included, for the *prima facie* right to transfer shares 'is not be cut down by uncertain language or doubtful implications. The right if it is to be cut down must be cut down with satisfactory clarity'."[77]

Reference is also made to the more recent appeal court decision in the *Tett*[78] case where, in a footnote, Hannigan records that:

> "*Tett* was a case where the articles failed to include a notification provision in a pre-emption scheme and the court of appeal decided in the circumstances to imply such a term on standard contractual principles to give business efficacy to the scheme.... It is interesting that the court took this line given their usual reluctance to liberally construe restrictions on transfer."[79]

She concludes that the reason is that the restriction was clear (unlike in *Greenhalgh (1943)*) but that it simply lacked the "necessary machinery to give it business efficacy."

Australian Text Books and Journal Articles

Greenhalgh (1943) has also received mention in Australian company law text books and in journals published in Australia.

Lipton and Herzberg *Understanding Company Law* 3ed 1988)[80] in their chapter dealing with transfer of shares, in a sub-section relating to restrictions on transfer of shares, make mention of two conflicting legal principles in the Australian law, being on the one hand "... the owner of property, including a shareholder, is presumed to have the right to transfer personal property ..." and on the other that "The code recognises in Section 34 that a company may restrict the transfer of its shares and in the vast majority of companies, which are proprietary companies, there must be a restriction on transferability."[81] The writers go on to say that the restrictions most often encountered are, firstly, the discretion of directors to refuse to register a transfer and, second, pre-emptive rights granted to existing shareholders. The principle is then enunciated that:

> "As shareholders are presumed to have a *prima facie* right to transfer their shares any restriction contained in the articles must be clear and unambiguous. A restriction will not be implied in a particular case and where possible, the restriction will be construed narrowly rather than broadly."[82]

That is of course the identical principle to that referred to above in English law and, not surprisingly, the writers refer as their authority to *Greenhalgh (1943)* and the previously quoted extract from the judgment of Lord Greene MR at page 237 is quoted with approval.

The *Strathcona* case[83] and the judgment in *Port Line Limited v Ben Line Steamers Limited*[84] are the subject matter of an article entitled 'The Strathcona Case' in the *Sydney Law Review*[85] by MacCormack. In discussing the attempts made to extract a principle from the *Strathcona* case with regard to restrictive covenants the author says:

> "Lord Greene in Greenhalgh v Mallard took a rather disapproving view of the 'novel' and 'revolutionary' principle expressed by Knight Bruce LJ and thought that both *De Mattos* v Gibson (1858) 4 De G & J 276 and the *Strathcona* case (1926) AC 108 would need very close examination if matters raised by them ever came up for decision."[86]

Australian Case Law

It is not only Australian journals which recognise *Greenhalgh (1943)* as authority, it has also recently been applied in an Australian case *Adelaide Building Co (Pty) Limited (In Liquidation) v ABC Investments (Pty) Limited*[87]. The judgment is one by the Full Court of the Supreme Court of South Australia heard by King CJ and Legoe and Cox JJ. King CJ in his judgment with Cox JJ concurring held with regard to a restriction on the transfer of shares arising from foreclosure under an instrument of security that:

> "Transferability is an inherent attribute of a share in a company and restrictions upon it ought not to be given a greater scope and operation than necessary (Greenhalgh v Mallard). This applies, in my opinion, to transfer by way of security no less than to transfer by way of sale or gift."[88]

Legoe in his dissenting judgment also relied on *Greenhalgh (1947)*, finding that the restriction in the articles applied only to a member and that "in (his) judgment the articles should be strictly construed in this regard as per Lord Greene in Greenhalgh v Mallard ...." (The *ratio* was that the provisions of the relevant articles related only to a transfer by a member while the order of the court to foreclose was not a transfer by a member - it is interesting to note that in a recent Transkei General Division judgment *van den Berg v Transkei Development Corporation* 1991 (4) S.A. 78 (TkGD) White J held that a restriction on transfer of shares in the articles of association of the company concerned was applicable to judicial sales).

Although it is neither an English nor an Australian case, brief reference is made to a New Zealand court of appeal judgment in *Curtis v J J Curtis & Co Limited* [1986] BCLC 86, CA (NZ) where *Greenhalgh (1943)* was referred to with approval by Cook J. *Greenhalgh (1943)* was also relied upon by Ongley J in the court *a quo*, and the Defendant was interdicted from selling shares to persons other than existing members without complying with the relevant provisions in the articles.

South African Case Law

Greenhalgh (1943) has, moreover, been referred to and approved in South African Supreme Court judgments in the Witwatersrand Local Division and in the Durban and Coastal Local Division and in an appeal in neighbouring Zimbabwe. It was also referred to in Counsel's heads of argument in a fourth case, but not relied upon in the judgment.

The earlier case, an application for an interdict, is *United Trusts (Proprietary) Limited and Others v South African Milling Company and Others*[89] which, interestingly, approved two of the principles arising from the Greenhalgh saga, both that in *Greenhalgh (1943)* and the more complex issues in *Greenhalgh (1950)*. This dispute arose because two shareholders in Quinn & Co (Pty) Limited, a baking company, Messrs Fisher & MacFarlane, who had undertaken to vote their shares as to one half in the manner required by Plaintiff and as to the other half in the manner required by a third shareholder, Maurice Posner, sold their shares to Defendant, a competitor of Quinn. One Jaffee, who had a substantial interest in United, alleged that United had a first right to purchase the shares and advised Fisher MacFarlane and Posner that if the transaction was proceeded with or an attempt made to register transfer of the shares an interdict would be applied for. Thereafter United ascertained that the shares had already been transferred and that new management procedures were about to be introduced leading to the launching of the application for an interdict restraining Defendant from exercising any rights as shareholder. This case will be referred to again in the next chapter, relying, as it did, on the judgment in *Greenhalgh (1950)* but there is a reference to *Greenhalgh (1943)* where Kuper J says:

> "This case, incidentally, was the last in a series of seven cases brought by Greenhalgh against the other shareholders of the Arderne Cinemas. In one case (reported under the name of Greenhalgh v Mallard [1943] (2) AER at page 234) shareholders who had undertaken to vote in the manner directed by another shareholder - namely shareholders in the position of Fisher and MacFarlane - were held entitled to sell their shares and so bring the personal contract to vote in a particular matter to an end. It was probably for the reasons stated in that case that Mr Colman (Counsel for the Applicant) did not challenge the right of Fisher and MacFarlane to sell their shares."[90]

The later case, *Mendonides v Mendonides*[91] is one where the articles of the family company, ABC Bakery (Pty) Ltd provided, in article 34:

> "a share may be transferred to any member of the company, or with the previous approval in writing of the directors, to any other person, but save with such approval no share shall be transferred to any person who is not a member of the company unless the same shall have been first offered for sale in the manner hereafter provided."

Articles 35 to 39 then set out the procedures to the followed in offering shares for sale. The Applicant and his mother and brother, the Respondents, were the only shareholders in ABC Bakery (Pty) Limited. The Respondents advised the Applicant of their intention to dispose of their shares to an outsider, one Bozas and sought at a directors meeting the approval contemplated in article 34. The dispute which then arose revolved both around the wording of article 34 and its related articles 35 to 39 and the right of the Respondents, as directors, to vote in the matter in which they had an interest. The court (Bizzell AJ) found for the Respondents on the interpretation of article 34 and rejected the construction sought to be placed upon it by the Applicant. In the course of his judgment the Judge said:

> "Both counsel submitted that the ordinary rules of construction apply to memoranda and articles of association just as much as to any other kind of document (*Palmer's* Company Precedents, Part I, 17th ed. at p. 369) and relied upon the remarks to be found in Greenhalgh v. Mallard, 1943 (2) A.E.R. (C.A.) at p. 237 B-C. The Master of the Rolls in that case said:
>
> > '.... in the case of the restriction of transfer of shares I think it is right for the Court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.'
> >
> > It is not clear to me that this generalisation (if it were intended as such) provides the proper starting point here in view of the provisions of sec. 104 (a) of the Companies Act, 46 of 1926, and the fact that the present articles, beyond any doubt, do contain restrictions on the right to transfer its shares. However that may be, I believe that I must construe the articles in accordance with the rules generally applicable to the construction of written documents and that the expressed intention must be sought for and given full effect. If the language is clear and unambiguous full effect must be given to it and it must be taken to express the intention."[92]

Commercial Grain Producers Association v Tobacco Sales Limited[93] is a judgment in the Zimbabwe Appeal Court decided by Baron, Georges J and Beck JJ.A on an appeal from a judgment by Squires J. The appeal judgment was delivered by Beck JA and is somewhat cryptic insofar as the facts are concerned. Applicant, Respondent and two

agricultural associations were the holders of the entire issued capital of Agriculture Investments (Pvt) Ltd ("AI"). Appellant granted to Respondent an option to acquire Appellant's shares and the Respondent sought the authority of the court for the shares to be transferred into its name after AI had been placed in liquidation. Counsel for the Applicant advanced several submissions in support of the argument that the option was unenforceable, all of which were rejected by the court *a quo* and the appeal court. A third submission was that related to the provisions of the share transmission article in the articles of association. The argument was that a sale, even to a member, had to comply with the transfer notice provisions in article 8(b). The court however held that the article did not apply to transfers to existing members and that those transfers were governed solely by the provisions in article 8(a), compliance with which rendered both the grant of the option and its exercise as valid and lawful as between existing members. Beck JA said:

> "The mere circumstance that the underlying reason for such provisions could apply as well to a proposed transfer of shares to a member as to a non-member cannot properly be used to extend, by implication, a restriction upon ordinary rights of ownership beyond that which is clearly imposed by the language of the article in question. It must be emphasised that -
>
> > '... in the case of the restriction of transfer of shares I think it is right for the Court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.' (Per Lord Greene MR in *Greenhalgh v Mallard and Others* [1943] 2 All ER 234 at 237B-C.)"[94] and
> >
> > "In *Greenhalgh v Mallard (supra)*, and in the South African case of *Greenacre and Others v Falkirk Iron Co Ltd and Others* 1953 (4) SA 289 (N), the relevant portion of the articles of association bore a very close similarity to clause 8 of the articles in the instant case. In conformity with the approach outlined by Lord Greene, arguments similar to that which Mr *Masterson* addressed to us were rejected by the English Court of Appeal in the first-mentioned of these cases, and by Holmes J (as he was then) in the second. I am satisfied that the argument falls to be rejected in the instant case as well, for similar reasons."[95]

The judgment by Holmes J (as he then was) in the *Greenacre* case[96] is remarkable if only because no authorities whatsoever are referred to in the course of that judgment in which it was held, *inter alia*, on facts very similar to those in *Mendonldes*[97], that restrictions in the articles of association of a South African subsidiary of the Respondent restricted only transfers from members to non-members and did not apply in a transfer

from a member to another member. LR Caney, Q.C. appeared for the Applicants and in his heads of argument submitted that *Delavenne v Broadhurst* 1931 (1) Ch. 234 and *Greenhalz* (sic) *v Mallard* [1943] 2 ALL ER 234 (CA) ".... are distinguishable".[98]

South African Journal Articles

Greenhalgh (1943) has also received mention in South African legal journal articles.

The *United Trust* judgment is the subject of two *South African Law Journal* articles[99], but inasmuch as both articles deal with the "fraud on the minority" aspects of the judgment they will be dealt with in Chapter 4.

Mendonides is the subject matter of a 'Recent Cases' note by HR Hahlo in The *South African Law Journal*[100] where it is not the aspect of contractual restrictions on transfer *per se* which is dealt with, but rather what Hahlo refers to as "a novel point" being the question whether a director can vote on a resolution for the transfer of shares from himself to a non-member in a case where shares may not be transferred by a member to a non-member without the approval in writing of the directors. The issue raised and matters discussed by Hahlo relate to those aspects of the case dealing with directors contracts with the company.

Finally, Andrew Borrowdale, writing in the *South African Law Journal*[101] in an article 'Shares and the Elusive meaning of Transfer' analyses the dichotomy between the registered title to shares and the beneficial ownership of those shares and cites *Greenhalgh (1943)*. Borrowdale refers to the attributing of a broad meaning to transfer in the judgments in *Lyle*[102] and *Safeguard*[103] and quotes the dictum of Lord Greene MR at page 237 in *Greenhalgh (1943)* as being usually cited as authority for a narrow approach in construing restrictions on transfer. He concludes:

> "Whether a South African Court will adopt the narrow meaning of 'transfer' is unclear. Since the distinction between legal and equitable titles is unknown in South African law, it is arguable that 'transfer' may be equated with delivery which takes place before registration. In (*United Trust*) Kuper J indicated, without deciding the point, that 'transfer' probably included transfer of the beneficial interest, a construction based partly on the consideration that the narrower meaning would render a restriction upon transfer empowering the directors to reject a transferee of whom they did not approve in effective."[104]

Finally he says:

> "The distinction between transfer of registered and unregistered title in shares is obviously an inherent characteristic of South African company law, and on the basis that restrictions on transfer should be strictly construed it is submitted that the approach of the English courts should be followed."[105]

Borrowdale is the author of a second article 'The Directors Power to Refuse Registration of Shares' in the Tydskrif vir Suid Afrikaanse Reg[106] where he says "The starting point is a restrictive interpretation of what constitutes a proper purpose in respect of the power to refuse registration. This surely follows from the requirement that the power itself be restrictively construed"[107], and his authority is *Greenhalgh (1943)* and Lord Greene's "taken away or cut down" statement at page 237 of the judgment.

South African Company Law Text Books

The standard works on South African company law indicate an acceptance of *Greenhalgh (1943)* as authority in our law.

In its commentary on article 10 in Table A, Henochsberg *On the Companies Act* 4ed (1985)[108] records that in terms of Section 91, shares are movable property and are transferable as provided for in the Companies Act, 1973 and the company's articles. Having quoted[109] from the judgment of Ogilvie Thompson AJ in *Estate Milne v Donohoe Investments (Pty) Ltd* [1967] (2) SA 359 (AD) at page 370 that such *prima facie* right to transfer must be read with any restrictions in the articles and at page 237 in the *Greenhalgh (1943)* judgment is referred to and it is, on that page, that Lord Greene, M.R. says

> If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention", and ".... the right of transfer remains unimpaired, save to the extent that with reasonable clearness it has been taken away or cut down."

Cilliers & Benade in *Company Law*[110] dealing with transfer of shares say "Provisions in the articles limiting the right of transfer are restrictively interpreted; unless expressly provided otherwise, the limitations apply only to transfers to non-members"[111] and quote Re Smith & Fawcett Ltd [1942] 1 All ER 542 (CA) and *Greenhalgh (1943)and Greenhalgh (1943)* is quoted in Hahlo - 'Company Law Through the Cases'[112] where,

after a brief summary of the facts, extracts from Lord Greene's judgment are quoted.

Finally, the contributors to *The Law of South Africa*, volume 4 also refer to *Greenhalgh (1943)* as authority for the conclusion "The *prima facie* right of a member to deal freely with his shares must of course yield to contrary provisions ascertained on a correct construction of the articles."[113]

2. GREENHALGH v ARDERNE CINEMAS LIMITED and MALLARD [1945] 2 ALL E.R. 719 (Ch) Confirmed, and reported on appeal as *Greenhalgh v Arderne Cinemas Limited and Mallard* [1946] 1 All ER 512 (CA)

Introduction

While *Greenhalgh (1943)* was decided very much on its own facts, *Greenhalgh (1946)* was a decision of much broader application, relating as it did to a matter of principle regarding an alleged variation of class rights. It will be recalled that Lord Greene held that the resolution sub-dividing the shares while it certainly affected Mr Greenhalgh's rights as a matter of business did not vary them because the only voting right attached to the class of shares was that of one vote per share *pari passu* with the other ordinary shares, which right remained and was not affected. The secondary matter decided upon was that no implied term could be read into the contract to the effect that the company would be precluded from acting in any way which would interfere with Mr Greenhalgh's voting control because such was only possible in very exceptional and absolutely clear cases.

English Case Law

The judgments of the court *a quo* and on appeal have been the subject matter of judicial consideration, text book references and journal articles, with the first judicial consideration taking place almost simultaneously in two cases heard in England in December 1952 and February 1953, both on appeal from Danckwerts J with both appeal court judgments being delivered by the Master of the Rolls, Sir Raymond Evershed. The cases are *White v Bristol Aeroplane Co. Ltd* [1953] 1 All E.R. 40 and Re *John Smith's Tadcaster Brewery Co Limited* [1953] Ch. 308.

In the matter of *White* the facts were that the company intended to create new preference shares ranking *pari passu* with existing preference shares and new ordinary shares ranking *pari passu* with existing ordinary shares. It was held by a bench comprising Sir Raymond Evershed MR and Denning and Romer L.JJ. that while the proposed new share issues might, or indeed would affect the enjoyment by preference shareholders of their rights, their rights as such would not be affected and thus it was not necessary to call a separate meeting of the preference shareholders as provided for in the articles of association. The Master of the Rolls referred in some detail to the facts in *Greenhalgh (1946)* quoted two extracts from Lord Greene's judgment and concluded:

> "I cannot attach such importance to the use by Lord Greene, M.R., of the word 'affected' as to lead me to conclude that the authority of the *Greenhalgh* case depends entirely on the circumstance that in the relevant clause the only word which had to be construed was 'varied'. I agree that Lord Greene, M.R., used the word 'affected', but I draw attention to the fact that the distinction was not between 'affected' and 'varied', but between 'affected as a matter of business' and 'varied as a matter of law.'" and "I have no doubt, as I have already indicated, that, on a sufficient analysis what is suggested in the present case will 'affect' the preference stockholders 'as a matter of business', but we are concerned with the question whether the rights of the preference stockholders are 'affected', not as a matter of business, but according to the meaning of the articles when construed according to the rules of construction and as a matter of law."[114]

The facts in *Tadcaster* were not dissimilar because there the directors of the company, the capital of which consisted of cumulative preference shares and ordinary shares, proposed to increase the capital of the company by the creation of additional ordinary shares for distribution to the ordinary shareholders. An amount standing to the credit of the company's reserves was to be utilised to pay up the new ordinary shares. The court found that notwithstanding that the proposed share issue would strengthen the position of ordinary shareholders against the preference shareholders, the proposed new issue of shares did not affect their rights within the meaning of the relevant article, and that the rights or privileges of the preference shareholders were not thus "affected" as to entitle them to a separate meeting. The judgment, as might be expected, refers to the Master of the Rolls own judgment in *White* and he says, at 522 "It is to be noted that in the Bristol Aeroplane Co case this Court decided that the word 'affect' in articles of this kind is not to be given so broad a sense as to mean or cover any 'affecting' in a business sense." Sir Raymond Evershed, M.R also agreed with his brother Jenkins, L.J that the word "affected" ought rather to be construed by reference to three words which follow, namely "..... modified, dealt with or abrogated ...."[115]

None of the three judgments is entirely satisfactory for the "affected" shareholders but as Gower op cit[116] points out: "The courts have, however, reduced the extent of (the protection of class rights) by putting a restrictive interpretation on the meaning of the words 'abrogated or varied'.....". He goes on to say, with reference to *Greenhalgh (1946)* and the *White and Tadcaster* cases that "A sub-division or increase of one class of shares is not deemed to vary the rights of the other notwithstanding that the result is to alter the voting equilibrium of the classes."[117] He then comes to the conclusion that it would be prudent to include broader restrictions in the articles of association saying:

> "It seems, therefore, that if a clause is effectively to prevent class rights from being 'affected as a matter of business' - which one would have supposed is what businessmen would want - it is necessary to find a formula which will expressly operate in any event which affects any class of shareholders (as opposed to the rights attached to the shares) or the enjoyment of their rights (as opposed to the rights themselves). This seems less than satisfactory."[118]

Pennington, op cit[119], too, is critical of the decisions in *White and Tadcaster* and the cases which preceded them and, referring to *Greenhalgh (1946)* he says that the decision:

> ".... restricted the operation of a clause in a company's memorandum or articles requiring class consents to alterations of rights far more severely than the cases just mentioned (*White and Tadcaster*) and the Court there held that class rights are altered only if the literal form in which they appear is altered."[120] He concludes "These decisions placed a premium on an ingenuity which can devise an alteration in the substance of class rights without varying them literally. It is still open to the House of Lords to review all these cases, and it is to be hoped that when it does, it will prefer the far fairer criterion of variation in substance which the court of appeal adopted in the two cases dealt with at the beginning of this Section".[121]

Buckley, op cit[122] summarises the law with reference to *Greenhalgh (1946)* as follows: "The rights attached to one class of shares will not necessarily be 'varied' within the meaning of such an article as this by operations effected upon other classes of shares, although they are materially affected thereby", while Gore Brown, op cit[123] commences a paragraph headed 'The Meaning of 'Varying' or 'Abrogating' Class Rights' by saying "It is easy to discern that a class right is being 'varied' or 'abrogated' when the proposed alteration directly conflicts with and purports to override the particular provision under which the right arises". The editors continue "This is not to say that variation or abrogation of a class right belonging to a particular class cannot arise in some other way, e.g. through a variation of the literal terms of the class rights of another class, or through some measure not on its face involving class rights at all." Citing

Greenhalgh (1946) as authority it is then then said "It would seem, for example, that a resolution raising the voting power of one class of shares from one vote to ten votes per shares alters the class rights not only of that particular class, but of all other classes carrying voting rights." The conclusion is that there has been a general tendency of the courts to say that the the rights attached to a class have not been varied or abrogated or even affected or dealt with by a resolution which alters the literal terms of the class rights of another class and several examples are then quoted.

Farrar, op cit records that the courts adopt a restrictive construction of variation of rights clauses and criticises this as "an over simple policy which has lead to a distinction which lends no credit to the sagacity of the courts."[124] He goes on to highlight the distinction drawn by the courts between shareholders rights and the value or enjoyment by shareholders of those rights and, with reference to *Greenhalgh (1946)* he says that the subdivision of shares in question although it altered control of the company was found not to have varied Greenhalgh's rights. Farrar goes on to refer to *White* and the "similar restrictive approach .... to the word 'abrogated' and even 'affected'" and quotes from the Master of the Rolls in that case "..... there is to my mind a distinction, and a sensible distinction between an affecting of the rights and an affecting of the enjoyment of the rights, ..."[125] Farrar deals later with the dilution of shareholdings by a new issue of shares or, with reference to *Greenhalgh (1946)*, to a dilution caused by the subdivision of an existing class of shares.

Palmer's Company Law[126] in dealing with modification of class rights says:

> "The courts have shown a disinclination to construe a modification of rights article as requiring the separate consent of the classes not directly affected; they are inclined to hold that the article does not apply where the consequential affect is merely of commercial, and not of a legal, character", and "only an express and unambiguous wording of that article, which it is possible to devise, would compel the courts to construe the articles as requiring the separate consent of each class which is consequentially affected."[127]

The authors then "illustrate these propositions" by reference to *Greenhalgh (1946)*, *White* and *Tadcaster* and, having referred to the Master of the Rolls' observation in *White* relating to "affected as a matter of business" and "varied as a matter of law" as postulated by Lord Greene in the Greenhalgh case, *Palmer* concludes "Some doubt may respectfully be expressed as to the correctness of the decision .... as it does not appear to conform with the intention of the parties, when using the word 'affected' nor

with the normal meaning of that word."[128]

Greenhalgh (1946) is referred to in Halsbury's *Laws of England* op cit[129] where the editors, having referred to the leading cases, regard it as authority for the proposition:

> ".... there is no variation of the rights of the holders of existing sub-divided shares, where the company, in accordance with its articles, sub-divides shares, all sub-divided shares having the same voting rights, with the result that the holders of the existing sub-divided shares lose their power of enforcing control".

Sealey in *Cases and Materials on Company Law* 4ed[130] says: "The rights of a class of shareholders are not altered, or even 'affected' by a change in the company's structure (or in the rights attached to other shares) which affects merely the enjoyment of such rights" and cites *Greenhalgh (1946)*[130].

English Journal Articles

A number of journal articles have been found in which there is mention of the *Greenhalgh (1946)* judgment and the distinction drawn in it between "affected as a matter of business" and "affected or varied as a matter of law" and the issue of whether or not the sub-division of shares constituted a breach of contract.

Prentice in a *Law Quarterly Review*[131] case note entitled 'Restraints on the Exercise of Majority Shareholder Power' refers to the very different result in *Greenhalgh (1946)* compared to that in *Clemens v Clemens Bros Ltd*[132], and this article is more fully referred to at page 69 dealing with *Greenhalgh (1950)*.

A second *Law Quarterly Review* article 'Shareholders Voting Rights and Company Control' is by Murray A Pickering[133] in which he deals with a broad spectrum of matters relating to voting rights including what he calls "inter-member control arrangements" being the voting agreement, the voting trust and the irrevocable proxy. In dealing with the voting agreement he says "The parties will be bound by the express terms of their agreement and additional provisions will not usually be implied."[134] He refers to the facts in *Greenhalgh (1943)* and the rejection of Greenhalgh's arguments and then refers to the "later litigation involving the same parties" namely *Greenhalgh (1946)* and the effective control deprivation suffered by Greenhalgh as a result of the sub-division. Pickering deals only with the implied term argument and Lord Greene's statement:[135]

> "If it had been the intention of the parties that (Greenhalgh's) position should be secured in a manner which would be effective in law, there were various devices by which that result could have been achieved, but those methods were not incorporated in the bargain which the parties made." Pickering concludes that "Possibly throughout the Greenhalgh litigation the courts fell short of providing reasonable protection for shareholders rights but the moral to be drawn from these cases with regard to voting agreements seems to be that to be certain and effective they should provide expressly for all foreseeable eventualities and contingencies."[136]

A further article of interest and relevance is that by D G Rice in the *Journal of Business Law*[137] entitled 'Class Rights and their Variation in Company Law'. Rice begins by saying "One of the most intriguing yet rarely considered subjects of company law as far as legal literature is concerned is the meaning of class rights and their variation."[138] He proceeds to analyse the nature of a class right and what constitutes those rights and to isolate those rights which are fundamental to the character of a share and those which are not and then submits that the rights which are fundamental fall into four groups, namely rights as to dividends, rights on winding up, voting rights and rights to the protection of class rights and, in developing his argument he refers to *Greenhalgh (1945)* and [1946], *White and Tadcaster* and concludes that:

> ".... although rights which are enjoyed by a particular class, but not expressly conferred on it, are not invariably class rights, they are so on some occasions."[139] He also says that ".... if the articles of association contain a clause providing that class rights may only be varied by an extraordinary resolution of the members of the class in question, the right of protection thereby conferred will constitute a class right and any attempt to alter the clause will amount to an attempt to vary a class right."[140]

He poses the question what is meant by an alteration or variation of class rights and, recognises that this problem has caused some difficulty, he submits that it ".... can easily be resolved if we are careful to distinguish between a variation of the class right itself and the variation of the enjoyment of the class right"[141] and, having made that distinction clearer by an illustration, he considers the cases including *Greenhalgh (1946)* and refers to the fact that "Both the court of the first instance and the court of appeal held that there had been no variation of Greenhalgh's rights."[142] He says, that the rights of Greenhalgh had in no way been modified but that there had been an alteration to the enjoyment of his rights to control the company ".... but that was irrelevant. Greenhalgh had no right to the control of the company. As far as control was concerned, the only right that Greenhalgh had was one vote for each two shilling share, a right he still enjoyed *pari passu* with all other shareholders of the same

class."[143] Having referred to the observation of Lord Greene at page 516 of his judgment set out more fully above at page 10 his conclusion is:

> "We see, then, that in considering what constitutes a variation of class rights, the problem does not consist in deciding whether a variation has or has not taken place, but in determining whether what has been varied is the class right itself, and not merely the enjoyment of it."[144]

The remainder of this very lucid article deals with the semantics involved and whether or not "affected" and "varied" are synonymous or whether "affected" is to be given a wider interpretation. Both *White and Tadcaster* held, effectively, that there was no distinction between the two terms. *White*'s case, says Rice, decided that "affected" was not to receive a wide interpretation and that it was synonymous with "varied" and that, on the strength of the Greenhalgh finding the distinction to be drawn was not that between "affected" and "varied" but between "affected or varied as a matter of business" and "affected or varied as a matter of law", with the latter only constituting a legal variation of a class right.

The 1977 volume of the *Journal of Business Law* saw a passing reference to *Greenhalgh (1946)* in an article by Nigel A Bastin[145] entitled 'The Enforcement of a Member's Rights' where it is cited as authority for the general proposition "... that a member has a right to have the affairs of the company conducted in accordance with the articles" being entitled, *inter alia*, "to sue to protect his class rights."[146]

Finally, in an article entitled 'Compulsory Acquisition of Shares' dealing with the compulsory acquisition of shares and the replacement of Sections 428-430 of the Companies Act 1985 (Section 209 of the 1948 Act) D L Morgan also writing in *Journal of Business Law*[147] in a sub-paragraph headed 'Classes of Shares' questions what constitutes a separate class of shares and refers to *Greenhalgh (1945)* as authority that it has been held that shares may form one class for some purposes, but two or more separate classes for other purposes and to Vaisey J having said at page 723 in the judgment of the court *a quo* that "... you cannot put people... into the same class if their claims or rights are not capable of being ascertained by a common system of valuation". A criterion, Morgan says, which will entail fully paid shares and partly paid shares as being separate classes, especially those partly paid shares issued under an employee's share scheme. This is, of course, a distinction no longer found in South African company law.

Australian Company Law Text Books and Journal Articles

Australia has also recognised the semantic distinctions and conclusions arrived at in *Greenhalgh (1946)* and here reference is made both to text books and to a journal article.

In *Ford's Principles of Corporations Law* 6ed (1992) the question is posed "When there is a reference to a 'class of shares' what is meant ?"[148] and there is then a reference to *Greenhalgh (1945)* in support of the statement that shares may form one class for one purpose but two or more separate classes for other purposes. The same work[149] deals with variation of rights of members and, in particular, what rights are protected. Ford[150] then refers to *White* and *Greenhalgh (1946)* as examples where it was held that "a variation" did not take place because of a narrow definition of that term.

Lipton and Herzberg, op cit in a section sub-headed 'What is a Variation of Class Rights'[151] refer to the nature of a variation of class rights having been considered in *Greenhalgh (1946)* and tho the narrow interpretation given by the court in that case having also been applied in *White*.

Baxt's article in *The Australian Law Journal*[152] entitled 'The Variation of Class Rights' deals with conflicting judgments in two Australian cases *Fischer v Easthaven, Limited* [1964] N.S.W.R. 261 and *Crumpton v Morrine Hall Pty Limited* [1965] N.S.W.R. 240. After dealing with, *inter alia*, the judgments in *Peter's American Delicacy*[153] and *Australian Fixed Trusts*[154] and the views of Gower op cit 2ed[155] and the editors of *Palmer* op cit 20ed[156] regarding variation of class rights, Baxt concludes with the question "what is a separate class of shares and says ".... for the accepted statement of what is a class see Vaisey J in *Greenhalgh v Arderne Cinemas Ltd* [1945] 2 All E.R. 719 (Ch) at 723."[157] It is there that Vaisey J said ".... that, although the word 'class' is not a word of technical art, you cannot put people, whether they be shareholders or policyholders, into the same class if their claims or rights 'are not capable of being ascertained by' a 'common system of valuation.'"

No Australian cases were found which refer to *Greenhalgh (1946)*.

South African Case Law

Only one reference to *Greenhalgh (1946)* has been found in the South African Law Reports, that being the minority judgment of Trollip JA in *Utopia Vakansie-Oorde BPK v Du Plessis* [1974] (3) SALR 148(AD). Utopia was a developer and manager of holiday resorts, the shareholders of which in December 1971 resolved to increase the ordinary share capital and to amend the articles of association in certain respects. It was common cause that the purpose of the increase in the ordinary share capital was to guarantee control in the hands of the ordinary shareholders and to prevent control being exercised by preference shareholders. A dispute arose after the registration of the special resolution and a further meeting was convened to take place in March 1973 at which the earlier share capital increase special resolution would be validated and a proposed application for a building loan would be approved. Du Plessis was a preference shareholder and demanded that the 19 March 1973 extraordinary general meeting and annual general meeting be cancelled, that it be properly convened by notice both to the ordinary and preference shareholders and that the voting rights of the preference shareholders be admitted. When the company ignored these demands, Du Plessis launched an urgent application in the Transvaal Provincial Division where an order was granted that the Respondent, as a preference shareholder, was entitled both to notice of and to attend the meetings, that the preference dividend was in arrear and unpaid and that Du Plessis was accordingly entitled to vote at the meetings on both the special and ordinary resolutions. The appeal by Utopia was dismissed by judgment of Van Blerk, Jansen and Rabie JJ.A but Trollop JA delivered a minority judgment concurred by Muller JA relating to the interests of preference shareholders in the proposed loan because the loan and related bond would not affect the preference shareholders as a matter of business because funds to which those shareholders were entitled would in no way be used to pay interest under the loan or to redeem the capital. In the view of Trollip JA the rights of preference shareholders would not be affected either directly or indirectly by the relevant resolutions and he referred to *White v Bristol Aeroplane Co Limited*[158] and *John Smith's Tadcaster Brewery Co Limited*[159] and concluded that:

> "..... 'die belange' ten minste in 'n besigheidsin geraak moet word ('affected as a matter of business') - vgl. Lord Greene, M.R., in *Greenhalgh v. Arderne Cinemas, Ltd.*, (1946) 1 All E.R. 512(C.A.) op b. 518A; en ook Gower *Modern Company Law, 3de uit., bl. 512-3), en, tweedens, dat 'raak' die begrippe van 'verander', 'verswak', en 'benadeel' insluit. Ek beklemtoon dat die betrokke voorgestelde besluite 'die belange' van die voorkeuraandeelhouers regstreeks moet verander, verawak of benadeel, soos oorsaak en gevolg, want 'regstreeks' kwalifiseer 'raak' en nie 'belange' nie. Die is nie voldoende dat*

> *voorkeuraandeelhouers 'n regstreekse belang besit wat indirek geraak sal word nie; hulle belang, al is dit direk, sal nogtans regstreeks geraak moet word om aan die vereistes van die sub-paragraaf te voldoen, alhoewel die direktheid daarvan natuurlik 'n relevante oorweging sal wees."*[160]

South African Company Law Text Books

The standard text books on South African Company Law refer to *Greenhalgh (1946)* with approval.

Greenhalgh (1946) is referred to twice in Henochsberg op cit[161]. In comment on Section 75 of the Act relating to "the affecting of class rights" the following is said:

> "Whether in terms of the articles an increase, or , for that matter, any other alteration, of capital, must be by special resolution also of a particular class of shareholders, or requires that they be afforded an opportunity to attend and vote at the meeting of the company called to pass the resolution for the increase or other alteration, or requires their written consent as involving a variation of their rights, depends on the facts of the case and the application of the particular articles upon their proper construction : see eg *White v Bristol Aeroplane Co Ltd* [1953] Ch 65 (CA);.....the company's articles contained one providing that any rights attaching to any class of shares might *inter alia* be 'affected' in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class and one providing that preference stock was not to confer on its holders the right to receive notice of, or to attend, or to vote at, a general meeting unless the meeting was to consider a resolution *inter alia* directly 'affecting' their rights as a separate class; the issue was whether the company's proposal was one which 'affected' the preference shareholders' rights, within the meaning of the articles; it was held, upon a construction of the articles, that it did not: Sir Raymond Evershed MR stated ..... 'there is..... a distinction, and a sensible distinction, between the affecting of the rights and an affecting of the enjoyment of the rights, or of the stockholders' capacity to turn them to account...' See also In FNre John Smith's Tadcaster Brewery Co Ltd [1953] Ch 308 (CA); [1953] 1 All ER 518 and cf *Greenhalgh v Arderne Cinemas Ltd* [1946] 1 All ER 512 (CA) and *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (AD)"[162].

The second reference appears in the comment on the rights variation provisions of Section 102 of the Act where *Greenhalgh (1946)* is quoted as authority for the statement "If e.g. they are voting rights, they are not varied where they are not themselves changed in any way but the voting power they accord is diminished through the issue of further shares or the sub-division of the issued shares."[163]

Cilliers & Benade op cit[164] do not include a reference to *Greenhalgh (1946)* but do refer

to *Tadcaster and White* when dealing with variation of class rights and they state the law, briefly, as follows

> "Class rights are varied only if after the variation they differ in *substance* from what they have been before; there is no variation if the class rights still are the same in substance but commercially less valuable. A fresh issue of shares or the creation of new shares does not constitute a variation of shareholders' class rights merely because it changes the balance of voting power of the different class of shares."[165] and refer to Utopia, *Tadcaster and White* and to *Greenhalgh (1950)* (sic) as the authority for the last proposition.

Leveson in *Company Directors Law and Practice* dealing with class meetings in a footnote says "as to what constitutes different classes of shares see Greenhalgh v. Arderne Cinemas, Limited and Anor., [1945] 2 All E.R 719."[166]

The Law of South Africa[167] refers to variation of rights attaching to a class of shares when dealing with Section 102 (1) of the Companies Act, 1973 and says "For the meaning of different classes of shares see...."[168] *Greenhalgh (1945)*. Greenhalgh, Utopia and *White* are then quoted as the authority for the proposition "A variation of class rights only Soccurs if after such variation they differ substantially from what they had been before. Rights of one class of shares are not varied by operations effected upon other classes of shares."[169]

3. GREENHALGH [1947]

Introduction

While the principle in *Greenhalgh (1947)* has no direct impact on company law or the rights of shareholders, it is a remarkably "powerful" judgment if regard is had to references to it in cases, journals and text books. If only to re-inforce the importance of the series of Greenhalgh cases it will be dealt with briefly in its impact on English and Australian Law.

No reference to *Greenhalgh (1947)* has been found in any South African case or journal, but this is hardly surprising because the issue is one fully dealt with in the common law and there is no necessity for our courts to turn to English law for any guidance on the plea of *res iudicata* or frivolous or vexatious litigation. In their opening

paragraphs under a heading "Estoppel by Judgment - Exceptio Rei Judicatae", Hoffmann and Zeffert in their work "The South African Law of Evidence"[170] deal with the similarities, and differences, between some of the principles applicable in English law and those found in South African law. Moreover, the entire issue of vexatious actions has, since 17 February 1956, been dealt with by statute, namely the Vexatious Proceedings Act No. 3 of 1956.

English Case Law

The judgment of Somervell, L.J. in *Greenhalgh (1947)* has received attention in at least four English cases, namely *Re A Debtor* (no. 472 of 1950) (E.p. Swirsky) [1958] 1 All E.R. 581 (CA), *Public Trustee v Kenward* [1967] 2 All E.R. 1870 (Ch), *Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd* [1975] W.L.R. AC (PC) and *Ethiopian Oilseeds and Pulses Export Corporation v Rio Del Mar Foods Inc* [1990] 1 Q.B. 86.

In the first of these cases proceedings were brought against a solicitor, one Swirsky, under an ordinance and thereafter much the same relief was sought under the relevant provisions of the bankruptcy legislation. The solicitor applied for the second action to be set aside as oppressive, frivolous, vexatious and an abuse of the process of the court. In the appeal Jenkins LJ quoted[171] extensively from *Greenhalgh (1947)* and referred to the statement of principle by Somervell LJ at page 257 of his judgment, including:

> "I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

However in applying that principle the court found and held that there was a wide difference between the two forms of proceedings. Romer in his concurring judgment also referred, with approval, to *Greenhalgh (1947)*.

The second case, *Kenward*, is a judgment by Buckley J in the Chancery Division where the Defendant wished to bring a counter-claim arising from a partnership conducted by him and his late wife, but an earlier order had been made at which stage the Defendant had not pleaded his counter-claim and the public trustees submitted that he was now

de-barred from counter-claiming for the matter was *res iudicata*. The court, having quoted extensively from the judgment of Somervell LJ in *Greenhalgh (1947)* including the appeal court's reference to a rule extracted from *Henderson v Henderson*[172] held that the claim was something which properly belonged to the subject matter of the earlier account and enquiry, that the matter was *res iudicata* and that the public trustee was accordingly entitled to judgment.

Greenhalgh (1947) was also referred to and approved in a third case in a judgment of Hirst J in the matter of *Ethiopian Oilseeds* (supra). The dispute arose from an application to stay proceedings under the United Kingdom Arbitration Act and *Greenhalgh (1947)* was quoted as authority when the court dealt with a subsidiary point, holding that "... in identifying the relevant terms, the arbitrators were considering in reality the self-same point, and that therefore under well established principles the sellers would not be entitled to canvass the same point a second time under the different guise of a claim for rectification (Greenhalgh v Mallard [1947] 2 All E.R. 255)."[173]

In the *Yat Tung* case (supra), an appeal to the Privy Council from the full court of the Supreme Court of Hong Kong, the issues concerned, *inter alia*, matters which could and should have been litigated in prior proceedings. It was argued for the Appellant that the court *a quo* had erred in basing its judgment on *Greenhalgh (1947)*. The appeal failed with the Privy Council holding that the disputed statement of claim be struck out as an abuse of the process of court and, in the judgment, reference was made to the Wigram V.-C. statement of the law in *Henderson v Henderson*(supra note 172) having been expanded in *Greenhalgh (1947)* by the view of Somervell LJ at page 257 of his judgment quoted above in the Swirsky case.

The most recent reference found to *Greenhalgh (1947)* is in *Lonrho Plc v Fayed [1991] 3 W.L.R. 188*, a House of Lords Judgment where although the case was not dealt with by Lord Bridge of Harwich in his judgment, it was cited in argument.

Australian Case Law

Greenhalgh (1947) is apparently also "good law" in Australia and brief reference is made to decided cases where the judgment was both distinguished (*Chamberlain*) and followed (*Port of Melbourne Authority*).

In *Chamberlain v DCT* 13 FCR 94, a matter where *res iudicata* had been pleaded, Sheppard J referred to the matter of *Brisbane City Council v Attorney General for Queensland [1979] AC 411* and said:

> "In the latter case Lord Wilberforce referred to the judgment of Somervell LJ in Greenhalgh v Mallard where his Lordship said that *res iudicata* was not confined to the issues which the court was actually asked to decide: '..... it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'"[174]

In *Port of Melbourne Authority v Anshun (Proprietary) Limited* 147 FCR 589 the dispute arose from *res iudicata* and issue estoppel after the hire of certain plant. Gibbs CJ referring to the judgment in *Yat Tung Investment Company Limited*[175] said at 602:

> "Lord Kilbrandon's remarks go further than the statement of Somervell L.J. in *Greenhalgh v. Mallard* which was recently approved by Lord Wilberforce in *Brisbane City Council*[176]. Somervell L.J. has said : [and the extract reproduced in the immediately preceding paragraph was quoted in full]. Yet, *Greenhalgh v. Mallard and Brisbane City Council*, unlike *Yat Tung*, were not cases in which the alleged estoppel arose from a defendant's failure to plead a defence. They were cases in which it was argued that a plaintiff was estopped from bringing a new proceeding by reason of dismissal of an earlier action."

English Company Law Text Books

English text books have referred to *Greenhalgh (1947)* with approval.

Chitty on Contracts, op cit refers to *Greenhalgh (1947)* as the authority for the proposition:

> "The court also has power under rules of court and its inherent jursidiction, even though a plea of estoppel might not strictly be an answer to the action, to stay or dismiss the action if a plaintiff seeks to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings"[177]

The editors of *Phipson On Evidence* 13ed (1982)[178] refer to *Greenhalgh (1947)* in what they call "vexation cases". Having dealt with a rule that estoppel by judgment operates

only in litigation between the same parties but that the court has an inherent jurisdiction to prevent the prosecution of proceedings at the insistence of a person who is substantially not formerly identical to a party in the previous proceedings the editors continue to say:

> "The jurisdiction will also be exercised in further litigation between the same parties where the issues are not ones which are formerly identical to those decided in the earlier action; but in general the doctrine of merger and estoppel by judgment should prevent the need to resort to the inherent jurisdiction. Indeed, the very nature of *res judicata* in its broader senses is that a rule of law which is derived from this jurisdiction and depends on the application of the same tests."[179]

Volumes 12, 16 and 28 of *Halsbury's Laws of England* each contain references to *Greenhalgh (1947)*.

Paragraph 1134 in Volume 12 of *Halsbury* is headed 'Damages Assessed Once and For All' and, having said:

> "A second action can be brought in respect of a second course of action, as for example where a person, owing to negligence, suffers loss to his property and also personal injuries. These are two separate causes of action and a separate action lies in respect of each but the court has inherent jurisdiction to prevent multiplicity of actions upon the same closely related facts, as being vexatious and an abuse"

the authority cited is *Greenhalgh (1947)*. In volume 16 paragraph 1533, in a main heading 'Estoppel' under the sub-heading 'Raising Issues Available in Former Action' the authors say "A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one"[180], and cites *Greenhalgh (1947)*. Finally, in volume 28, dealing with liable and slander, paragraph 21 sets out a list of defences available, including "*res iudicata*", and refers to *Greenhalgh (1947)*.

English and Australian Journal Articles

Journal articles in England and Australia in which *Greenhalgh (1947)* receives mention are Hall Williams in the *Modern Law Review*, Jolowicz writing in *Current Legal Problems*

and an essay by Parsonage on DPP v Humphrys[181] in the *Sydney Law Review*.

Hall Williams article[182] is headed 'Res Iudicata In Recent Cases' where he discusses *res iudicata* in the light of the judgments in ten cases decided in 1947, 1948 and 1949, including *Greenhalgh (1947)*. He finds that judgment important, being ".... an exercise by the court of its inherent power to protect itself and its process from abuse" and because the case concerned the question of a plea of *res iudicata*, not as regards the parties between whom it is raised, but with regard to the subject matter. The writer says "*Greenhalgh v. Mallard* emphasises the adjectival nature of the *res iudicata* principle, since it shows it in relation to a rule of practice - that concerned with the striking out of a pleading".[183]

Jolowicz[184] in his *Current Legal Problems* article entitled 'Abuse of Process of the Court' deals with the history of rules of court dealing with abuse of the process of court and the procedures by which a preliminary point of law can be taken on the pleadings and dealt with as a separate issue, then refers to the example which:

> ".... occurs where a pleading actually seeks to re-litigate the matter which has already been before the court and decided against the party pleading: it cannot be struck out under the rule but under the inherent jurisdiction the court can discover what is involved and act accordingly"[185]

and refers as his authority to *Greenhalgh (1947)*.

The Parsonage essay in the *Sydney Law Review*[186] is entitled 'Issue Estoppel, Perjury and Criminal Procedure', and deals with *D.P.P. v Humphrys* [1977] A.C. 1. Although one might have expected the court to have cited *Greenhalgh (1947)* it did not, but Parsonage does refer to it, with others, where he says "Civil cases of the highest authority differ as to the extent to which a party is precluded from raising issues at a second trial which could properly have been raised at the first trial."[187]

Footnotes : Chapter III

[31] Greenhalgh (1943) 237
[32] Gower op cit note [5] at 445
[33] ibid
[34] [1942] Ch. 304 C.A.
[35] Gower op cit note [5] at 569
[36] Pennington's Company Law 6 ed (1990) 753
[37] Buckley on the Companies Acts 14 ed (1981) 203
[38] (1868) 4 Ch. at page 20
[39] Gore-Brown on Companies 43 ed at para 16.4
[40] Farrar's Company Law 2 ed (1988) 124
[41] ibid 124
[42] Palmer's Company Law 25 ed (1992) at page
[43] (1868) L.R. 3 Q.B. 584 at page 595
[44] Palmer op cit note [42] at 6126
[45] ibid 6137
[46] Tett v Phoenix & Property & Investment Co. Ltd [1984] BCLC 599
[47] Curtis v J J Curtis & Co. Ltd [1984] 2NZLR 267
[48] Palmer op cit note [42] at 6138
[49] Halsbury's Laws of England 4 ed (1974), Volume 7(1)
[50] ibid 310
[51] ibid 205
[52] Chitty on Contracts 25 ed (1983) Vol 1 at 688
[53] The Law of Contract 3 ed (1970)
[54] ibid 553
[55] Lord Strathcona SS Co. v Dominion Coal Co. [1926] AC 108
[56] Port Line Ltd v Ben Line Steamers Ltd [1958] 2Q.B. 146
[57] De Mattos v Gibson (1858) 4 D& J 276
[58] Port Line supra 797
[59] Treitel, op cit note [53] at 533
[60] [1984] BCLC 599
[61] ibid 157
[62] [1982] 1 W.L.R. 1359
[63] ibid 1370

64 1943-44 Modern LR 74
65 [1926] AC 108
66 (1944) 60 LQR 11
67 1950 Modern LR 470
68 ibid 477
69 (1965) 81 LQR 248
70 (1877) 6 Ch D 70
71 Pickering, op cit note 69 at 256
72 ibid 256
73 ibid 257
74 (1990) 11 Co Law 170
75 (1868) 4 Ch. App. at page 20
76 [1942] 1 All E.R. 542
77 Hannigan, op cit note 74 at 171
78 [1986] BCLC 149
79 Hannigan, op cit note 74 at 173
80 Lipton and Herzberg Understanding Company Law 3 ed (1988)
81 ibid 205
82 ibid
83 [1926] AC 108
84 [1958] 2 Q.B. 146
85 (1959-1961) 3 Sydney LR 297
86 ibid 298
87 [1990] 8 ACLC 445
88 ibid 448
89 1959 (2) SA 427 (W)
90 ibid 47
91 1962 (2) SA 190 (D&CLD)
92 ibid 192
93 1983 (1) SA 826 (ZS)
94 ibid 830
95 ibid 830
96 1953 (4) SA 289 (N)
97 1962 (2) SA 190 (D)
98 Greenacre supra note 96 at 290

99 (1959) 76 SALJ 259; (1960) 77 SALJ 297

100 (1962) 79 SALJ 248

101 (1985) 102 SALJ 277

102 Lyle & Scott Ltd v Scott's Trustees [1959] AC 763

103 Safeguard Industrial Developments Ltd v National Westminster Bank Ltd [1982] 1 All ER 449

104 ibid 285

105 ibid 285

106 1985 TSAR 158

107 ibid 159

108 Henochsberg on the Companies Act 4 ed (1985)

109 ibid 792

110 Cilliers & Benade Company Law 4 ed (1982)

111 ibid 205

112 Hahlo, op cit 3 ed (1977) 305

113 at page 141

114 White v Bristol Aeroplan Co. Ltd [1953] 1 All E.R. 40

115 Re John Smith's Tadcaster Brewery Co Limited [1953] Ch. 308

116 Gower, op cit note 32 at 566

117 ibid

118 ibid 568

119 Pennington, op cit note 36 at 1999

120 ibid 228

121 ibid 229

122 Buckley, op cit note 37 at 14

123 Gore-Brown, op cit note 39 at para 11-13

124 Farrar, op cit note 40 at 196

125 ibid 187

126 Palmer, op cit note 42 403

127 ibid 6034

128 ibid 6035

129 Halsbury, op cit note 49 at page 127

130 L S Sealy: "Cases & Materials in Company Law" 4 ed

131 (1976) 92 LQR 502

132 [1976] 2 All E.R. 268

133 (1965) 81 LQR 248
134 ibid 256
135 Greenhalgh (1946) at page 513
136 Pickering, op cit note 133 at 257
137 (1958) Journal of Business Law at 29
138 ibid 29
139 ibid 31
140 ibid
141 ibid 32
142 ibid 33
143 ibid 34
144 ibid
145 (1977) Journal of Business Law 17
146 ibid 23
147 (1988) Journal of Business Law 486
148 Ford's Principles of Corporations Law 6 ed (1992) 242
149 ibid 596
150 ibid 598
151 op. cit. at page 165
152 1968 Australian LJ 490
153 (1939) 61 C.L.R. 457
154 [1959] S.R. (N.S.W.) 33
155 2nd Edition 467
156 20th Edition by Schmithoff & Curry
157 Baxt, op cit note 56 at 496
158 [1953] 1 All E.R. 40 (C.A.)
159 [1953] 1 All E.R. 518 (C.A.)
160 Utopia Vakansie-Oorde supra 152
161 Henochsberg, op cit note 108
162 ibid 123
163 ibid 165
164 Cilliers & Benade, op cit note 110
165 ibid 159
166 G Leveson Company Director Law & Practice (1970) 68
167 op cit at note 113

[168] ibid 129
[169] ibid
[170] at page 335
[171] Swirsky supra 587
[172] [1843-60] All E.R. Rep. 378
[173] Ethiopian Oil Seeds, supra 87
[174] Brisbane City Council supra 102
[175] [1875] AC 581
[176] [1979] AC 411
[177] Chitty op cit note [52] at 807
[178] Phipson 13 ed (1982) by Buzzard, May & Howard
[179] ibid 635
[180] Halsbury op cit note [49] Vol 12
[181] [1976] 2 All E.R. 497
[182] 1950 Modern LR 307
[183] ibid 311
[184] (1990) 43 Current Legal Problems 77
[185] ibid 83
[186] (1979) 8 Sydney LR 505
[187] ibid 516

CHAPTER IV

THE LAST ACTION

Introduction

The final chapter in "the epic of litigious heroism" is also the most significant of the seven actions and five appeals, and has had the greatest impact upon one of the criteria for balancing the interests of majority shareholders, and those of the company itself, against the the interests of minority shareholders, that is whether or not actions on the part of majority shareholders constitute a fraud on the minority, to be tested against whether the majority has "acted *bona fide* in the interests of the company as a whole." That criterion and test certainly apply, and have been applied firstly, when articles of association have been amended to the prejudice of the minority, or secondly, where directors have breached their fiduciary duties towards the company and the shareholders, thirdly, where shareholders are hoping, under exception to the rule in *Foss v Harbottle*, to bring a derivative action against directors and, finally, where shareholders in a situation of conflict apply to wind up a company on the grounds that it is just and equitable to do so because the majority is committing a fraud against the minority.

As a starting point it is recorded that it is probably trite law that, in general terms, shareholders, unlike directors, have no common law fiduciary duties towards each other or the company and thus they do not owe the company or each other any duty of good faith.

Gower op cit[188] deals in some detail with the issues involved in "fiduciary duties" and the concepts "fraud on the minority" and "*bona fide* in the interests of the company as a whole" and he considers two situations where there may be some duties on shareholders analogous to those of directors, namely the exercise by members of their votes at meetings of the company and where there has been insider dealing. It is in the first of these two situations that *Greenhalgh (1950)* has played a significant role.

Gower begins by asking whether an obligation upon members to vote "*bona fide* for the benefit of the company as a whole" is a principle of general application because, if so, shareholders would be subject to the same rules as directors but says that this is however "highly misleading" and is not supported by the decisions. He proceeds to note that, on the contrary, votes, being proprietary rights, may be exercised by the member "... in his own selfish interests even if these are opposed to those of the company"[189], a proposition accepted in a long line of cases starting with *North-West Transportation v Beatty*[190].

There is thus a great difference between the position of a shareholder compared with that of a director and Gower continues by pointing out that if the general meeting "... could only operate in the few residual matters reserved to it by the company's constitution this would not be unduly serious."[191] But there are, of course, as pointed out by Gower, a number of circumstances where the general meeting acts in place of the board of directors so that "... ultimate control (could revert) to shareholders who are free from duties of good faith to which the directors are subject."[192] What he regards as even more startling is that directors, who are also members, can vote in the capacity of members at a general meeting on a matter in which they have an interest.

What then are the restraints and constraints, if any, on the power of the majority and the answer seems to be that, in very general terms, the majority cannot use its votes to commit "a fraud on the minority" but that it will not do so where it acts *bona fide* in the interests of the company as a whole.

It is the purpose of this chapter to consider the concepts "*bona fide* in the interests of the company as a whole" and "fraud on the minority" and to establish, once again, by reference to decided cases, company law text books and journal articles the extent to which those two concepts as understood and explained by Lord Evershed M.R. in *Greenhalgh (1950)* and the principles which flow from them, have become a part of company law in England, Australia and South Africa.

By way of further introduction, Gower[193] suggests that there are three categories of activity on the part of majority shareholders which would constitute "acts of a fraudulent character" and these are:

(a) expropriation of a company's property;

(b) the general meeting releasing directors from their duties of good faith;

(c) expropriation of other members property, that is, where the controllers deprive other members of their shares, the prohibition being, it is suggested by Gower, not absolute and not of application where fair compensation is paid and the expropriation is required in the interests of the company as a whole.

Gower then poses the question whether the majority do have a fiduciary duty which imposes objective restraints on them when voting, that restraint being that they must at all times vote "*bona fide* for the benefit of the company as a whole". He continues:

> "if there is any such general principle it seems quite clear that in cases falling outside heads (a) to (c) it operates only if it can be shown that the action was not *bona fide* in the interests of the company as a whole whereas, in cases falling within heads (a) to (c) it may, at the most, be a defence if it can be shown positively that the action was *bona fide* in the interests of the company"[194].

Gower then concludes that there is a need for a general principle because there seems not to be "... an objective bar to alteration of members rights which fall short of an attempted expropriation of their shares."[195] In other words Gower considers that in the circumstances contemplated in paragraphs (a) to (c) the relevant resolutions will not be valid unless it is positively demonstrated that they were adopted *bona fide* in the interests of the company as a whole, while in any other situation the resolution will be valid and binding ".... unless it is shown that the purpose of those voting for it was improper or that reasonable men could not have regarded it as calculated to fulfil a proper purpose."[196]

Gower considers that the meaning of the expression "*bona fide* for the benefit of the company as a whole" first postulated by *Lindley MR in Allen* v Gold Reefs of West Africa Limited and restated by Evershed MR in *Greenhalgh (1950)* "....restores some validity to a principle, which after *Shuttleworth* had appeared to be completely impotent."[197]

English, Australian and South African Case Law

Before proceeding to record the views of text book authors, other than Gower, judgments in which *Greenhalgh (1950)* was considered and, in most instances, approved will be considered.

In order to bring *Greenhalgh (1950)* into context it is considered necessary, briefly, to deal with five judgments which preceded it, being *Allen*[198], *Brown*[199], *Dafen*[200], *Sidebottom*[201] and *Shuttleworth*[202].

In *Allen*, one Zuccani held fully paid and partly paid shares in Gold Reefs of West Africa Limited and, in terms of its articles of association, the company had a lien on all partly paid shares, as security for the debts and liabilities of the members to the company. The company then effectively created a lien on all shares by adopting a special resolution altering the articles by deleting the words "not fully paid". Lindley, MR in his judgment said *inter alia* that the statutory power to alter articles:

> ".... must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole ...."[203].

The court held that in all the circumstances and on that test the special resolution was valid and binding.

The concept was then considered in two Chancery Division cases and an appeal all heard within months of each other.

The first of these was *Brown* where Astbury J held that the adoption of a special resolution to include the insertion of a new article enabling the majority to purchase the minorities's shares compulsorily was not for the benefit of the company as a whole but was only for the benefit of the majority. This conclusion was arrived at notwithstanding that the good faith of the majority was not challenged. Their motive was not to prejudice the minority but to supply badly needed additional capital, but only if they could acquire the shares of a two percent minority.

The appeal court judgment in *Sidebottom* followed where Warrington LJ and Lord Sterndale M.R. found that the adoption of a special resolution to introduce a power for the directors to require a shareholder who competes with the company to transfer his shares, at fair value, to nominees of the directors, was passed *bona fide* for the benefit of the company as a whole and was enforceable by the majority against the minority. Warrington LJ said:

> "I have no doubt that the fact that there was this competitor, and probably the knowledge that he was doing harm to the company, awoke the directors to the disadvantage in which they were placed by having such a man as one of their shareholders; .... but that is a very different thing from saying that they passed this resolution with the mala fide and dishonest intention of getting rid of a shareholder whom they did not wish to remain in the company ...."[204]

Lord Sterndale, in his judgment, added :

> "The introduction into an altered article of a power of buying a person out or expelling him can only be held invalid if the alteration is not made bona fide for the benefit of the company ..... I think, looking at the alteration broadly, that it is for the benefit of the company that they should not be obliged to have amongst them as members persons who are competing with them in business, and who may get knowledge from their membership which would enable them to compete better ...."[205]

Petersen J in the third case, *Dafen*, was faced with the appeal court judgment in *Sidebottom* when having to decide whether an amendment to articles of association empowering the majority to compel any member to sell his shares to a person (whether a member or not) determined by the directors at fair value valid and enforceable. The court rejected the argument that the only question in the case was whether the shareholders *bona fide* or honestly believed that the alteration was for the benefit of the company as a whole that is, a subjective approach but that the true question was "whether in fact the alteration is genuinely for the benefit of the company ...."[206] that is, an objective approach.

Comparing the facts in *Sidebottom*, where it was competing minorities's shares which were expropriated, with those in *Dafen*, where the Plaintiff simply withdrew its custom from Llanelly Steel Co and purchased its steel bars for tin plate from a rival company, the court held that it:

> "cannot be said that a power on the part of the majority to expropriate any shareholder they may think proper at their will and pleasure is for the benefit of

> the company as a whole. To say that such an unrestricted and unlimited power of expropriation is for the benefit of the company appears to me to be confusing the interests of the majority with the benefit of the company as a whole."[207]

Finally, *Shuttleworth*, decided in 1927 on appeal from the Kings Bench arose from the addition of a seventh ground for the removal of a director, namely a request in writing by all co-directors that he should resign. Bankes and Scutton LL.J having found that there was no evidence of bad faith on the part of the shareholders, held that if the alteration was *bona fide* for the benefit of the company it was valid and, of some importance, there being no evidence of bad faith there was no basis for the court to question the shareholders on whether the alteration was for the benefit of the company. The finding was that it is not for the court but the shareholders to decide whether an alteration of articles is for the benefit of the company, provided only that the circumstances must be such that no reasonable man would find it to fail the test, thus something of a combination of a subjective and an objective approach.

Of significance to the later judgment of the Master of the Rolls in *Greenhalgh (1950)* is that Bankes LJ said:

> "The first thing to be considered is whether, in formulating the test I have mentioned, Lindley M.R. had in mind two separate and distinct matters; first bona fides, the state of mind of the persons whose act is complained of, and secondly, whether the alteration is for the benefit of the company, apart altogether from the state of mind of those who procured it. In my opinion this view of the test has been negatived by this court in *Sidebottom*'s case."[208]

The "lead up" to *Greenhalgh (1950)* would not be complete without a reference to the judgments in *Peter's American Delicacy*[209] by Latham CJ and Rich and Dixon JJ on appeal from a judgment of Nicholas J in the Supreme Court of New South Wales. The company had a substantial share capital divided into both fully paid up and partly paid shares. The articles provided for cash dividends to be paid in proportion to the amount of capital paid up on shares but that profits to be distributed in the form of shares would be pro-rated to the number of shares held, irrespective of whether they were fully paid or partly paid. A special resolution was adopted at a general meeting providing for bonus shares to distributed in accordance with the amounts paid up on shares. The Plaintiffs, Messrs Heath, Palmer and Nettheim, holders of partly paid shares, sought a declaratory order that the resolution was invalid having been passed solely for the purpose of benefiting fully paid shareholders to the disadvantage of partly paid

shareholders and not in the interests of or for the benefit of the company or the body of shareholders as a whole. Nicholas J found the resolution to be invalid but the appeal by the company was allowed. Latham CJ set out what he called "some relevant principles of law" including that the power to alter articles must be exercised *bona fide*, that it is not for a court to impose upon a company what is for the benefit of the company, that although a shareholder may vote in his own interests the power to alter articles is limited by the rule that the power must not be exercised fraudulently or for the purpose of oppressing a minority and that the onus must be discharged by the party complaining. He then introduced an objective criterion by saying "If .... the resolution was passed fraudulently or oppressively or was so extravagant that no reasonable person could believe that it was for the benefit of the company, it should be held to invalid."[210]

Thus the history - what then of the approval in subsequent cases of the "Evershed explanation" of the "Lindley principle"? These will be dealt with by referring in chronological order to cases decided in the three jurisdictions.

The judgments in *Peter's American Delicacy* and *Greenhalgh (1950)* were considered and applied in the New South Wales Supreme Court in a judgment of McLellan J in *Australian Fixed Trusts*[211]. The facts, briefly were, that the Defendant company gave notice of an extraordinary general meeting at which it was proposed to pass a special resolution altering the articles of association of the company by including a proviso that a member of the company holding shares as trustee for unit holders could not vote the shares in question without directions from the majority of the holders of the units. The Plaintiff made application for an interdict restraining the Defendant company from amending the articles. It was held, after approving and applying the dicta of Evershed MR in *Greenhalgh (1950)*, that in passing any resolution for the alteration of a company's articles of association the shareholders must proceed upon what, in their honest opinion, is for the benefit of the company as a whole, that is for the benefit of the corporators as a general body. The court also referred in detail to all of the earlier cases, and *Peter's American Delicacy* case in particular and concluded, again with reference to *Greenhalgh (1950)*:

> "It would appear from the words used by the Master of the Rolls that what the shareholders are to consider is the benefit of a hypothetical shareholder who presumably has no personal interests conflicting with those of the company and

> that if the resolution discriminates between the majority and the minority it would be liable to be impeached"[212].

Some five months after the *Australian Fixed Trusts* judgment was handed down, Kuper J heard an application for an interdict in the Witwatersrand Local Division in the matter of *United Trust*[213] (referred to more fully at page 25 above where the facts are given). The case is of significance not only because it considered and approved the principle in *Greenhalgh (1950)* but also because it was, according to Hahlo[214] "..... the first reported South African case in which the question was raised under which circumstances a sale of their shares by the majority shareholders in a company can be impeached by the minority shareholders on the ground that involves a sale of 'control'". Kuper J in referring to *Greenhalgh (1950)* and its explanation as to the meaning of the phrase "for the benefit of the company as a whole" said:

> "The persons voting for a special resolution are not required to dissociate themselves from their own prospects and consider what is for the benefit of the company as a going concern. If an outside person offers to buy all the shares, *prima facie*, if the corporators think it is a fair offer and vote in favour of a resolution accepting the offer, it is no ground for impeaching the resolution that in paassing it they considered their own individual positions", and then mentions that "this case, incidentally, was the last in a series of seven cases brought by Greenhalgh against the other shareholders of the Arderne Cinemas."[215]

Of significance, also, is the judgment in *Stylo Shoes*[216], a Chancery Division judgment by Pennycuick J in a dispute between majority and minority shareholders relating to a resolution which doubled the voting rights of certain management shares. The court, in a short judgment, quoted with approval the *Greenhalgh (1950)* judgment and dismissed the Plaintiff's claim there having been, it was decided no "oppressive act".

The concepts "Fraud on the minority" and "*bona fide* in the interests of the company as a whole" received close attention in *Sammel*[217] where the Appeal Court carefully analysed *Greenhalgh (1950)* and its principles, and approved and applied them. The litigation arose as a result of opposition by minority shareholders to a s103 ter (1926 Act - now s44DK) takeover scheme. The dissident shareholders had been unsuccessful before Nicholas J in the Witwatersrand Local Division and their appeal was dismissed in a lengthy and complex judgment by Trollip JA. The court (at page 646) paraphrased

the "Evershed explanation" and referred to, *inter alia*, *Greenhalgh (1950)* as the authority for an objective test. The court said:

> "Minority shareholders are entitled to be protected against the acts of majority shareholders only if the majority have not acted in good faith and for the benefit of the corporators as a general body; i.e. if the effect of what has been done is to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived. The Court will not, however, substitute its own opinion of the commercial wisdom of what has been done by the majority for the opinion held by the majority themselves. Greenhalgh v. Arderne Cinemas Ltd., 1951 Ch. at p. 291."[218]

Greenhalgh (1950) is again quoted with approval in *Sammel* at page 678 when the court deals with the principle that "supremacy of the majority is essential to the proper functioning of companies, a principle which was approved by Centlivres, C.J. in *Levin v Felt & Tweeds Ltd*[219]. *Greenhalgh (1950)* is again referred to extensively at pages 680 and 681 of the judgment when not only are the facts given by Trollip JA but he also quotes from and approves Sir Raymond Evershed's conclusions that the *Allen* proposition is "not two things but one thing" and summarises the Evershed test that the majority must not use its voting power to discriminate between themselves and the minority shareholders so as to give them an advantage at the expense of the minority. The court also concludes that where the resolutions are "intended to rescue the (company) from insolvency, the company as a whole must also include its creditors ...."[220].

The next important case, chronologically, in which *Greenhalgh (1950)* was referred to is in *Re Holders Investment Trust*[221], a judgment by Megarry J in the English Chancery Division dealing with opposition by minority preference shareholders to a reduction of capital. The reduction was not sanctioned by the court because the majority had not acted in the interests of the class as a whole - although *Greenhalgh (1950)* was not referred to in the judgment as such, it was referred to in argument.

Probably the most important, more recent, English case was that of *Clemens*[222] decided in February 1976. Ms Peggy Clemens issued a writ against Clemens Brothers Limited and her aunt, Miss Mabel Clemens, for a declaratory order that resolutions for the increase of share capital, which had, *inter alia*, the effect of reducing the Plaintiff's 45% shareholding in the company to less than 25%, had not been passed in good faith

and in the interests of the company. The facts are, of course, not that different from those in *Greenhalgh (1946)*, but Ms Clemens Jnr. was substantially more successful than Mr Greenhalgh because her action succeeded. There was reference by Foster J to *Allen* and *Greenhalgh (1950)* and the "Evershed test" which he proceeded to apply entirely subjectively. The court posed the question at page 281 ".... did Ms Clemens, when voting for the resolutions, honestly believed that those resolutions, when passed, would be for the benefit of the Plaintiff". This is hardly a correct application of the Evershed principle being, as it was, focused on a particular shareholder and not on "the corporators as a whole". Foster J then proceeded to say:

> "I think that one thing which emerges from the cases to which I have referred is that in a such case as the present Miss Clemens is not entitled to exercise her majority vote in whatever way she pleases. The difficulty is in finding a principle, and obviously expressions such as 'bona fide for the benefit of the company as a whole', 'fraud on the minority' and 'oppressive' do not assist in formulating a principle. I have come to the conclusion that it would be unwise to try to produce a principle, since the circumstances of each case are infinitely varied. It would not, I think, assist to say more than that in my judgment Miss Clemens is not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleases. To use the phrase of Lord Wilberforce, that is 'subject ... to equitable considerations .... which may make it unjust ... to exercise [it] in a particular way'. Are there then any such considerations in this case?"[223]

The Australian courts have also approved and applied the *Greenhalgh (1950)* principles and reference is made in this regard to the two *Russell Kinsela*[224,225] judgments which, on a strict basis should perhaps not be included, relating as they do to directors fiduciary obligations. However, both in the court *a quo* (Powell J in the Equity Division - New South Wales) and in the appeal court judgment (Street CJ), *Greenhalgh (1950)*, insofar as it relates to the rights of shareholders *inter se*, was approved with Street CJ saying, in particular, "In cases involving internal disputes between groups of shareholders, the concept of the benefit or interests of the company has been more particularly stated by reference to the interests of the shareholders as a whole"[226], and there is then a reference to the explanation of Evershed MR as to the meaning of the phrase "the company as a whole".

Although it is a "derivative action" case reference is also made to the 1982 English case *EstmanCo (Kilner House) Ltd v Greater London Council*[227] in order to highlight that there have been contemporary approval of *Greenhalgh (1950)*. In the *EstmanCo* judgment, Sir Robert Megarry VC heard an application by a shareholder in the Estman

Co company to be substituted as Plaintiff and for an action against the Greater London Council to continue as a derivative action and there is a very full analysis in the judgment of "fraud on the minority". Three months later *Greenhalgh (1950)* was again quoted with approval in a Chancery Division judgment by Goulding J in the matter *Mutual Life Insurance Co of New York and Others v The Rank Organisation Limited and Others*[228] where the judge quoted from what he referred to as "the well-known case of Greenhalgh v Arderne Cinemas Limited". Somewhat cryptically, the judge concludes that two words may have been omitted from one of Evershed MR's sentences, but does not say which words from which sentence!

There can be little doubt that in the light of the above English, Australian and South African cases that the "fraud on the minority" and "*bona fide* in the interests of the company as a whole" concepts and principles are analysed and explained by Evershed MR in *Greenhalgh (1950)* is now settled if not always entirely consistent concepts in the law relating to amendment of articles and expropriation of shares in the three jurisdictions.

English Company Law Text Books

Having dealt with the cases, reference will now be made as to how *Greenhalgh (1950)* is dealt with by the company law text book writers.

The approach of Gower op cit[229] approach has already been considered in detail at pages 50 to 52.

Pennington, op cit[230] deals with "the benefit of the company as a whole" principle in relation to amendments of articles only (and thus makes no case for a general principle) and having referred to the starting point in *Allen* he distinguishes between the subjective test which found support in *Shuttleworth* and the objective test postulated in *Greenhalgh (1950)*. He proceeds with an interesting analysis of the "individual hypothetical member" and finds justification for the decision in *Greenhalgh (1950)* but nevertheless finds the principle underlying it unsatisfactory. Having dealt with the judgment in *Stylo Shoes* and the facts and conclusions in the cases which preceded *Greenhalgh (1950)*, Pennington comes to a conclusion which contains four propositions, namely, that is that it is not necessary to prove that any member will

derive any particular advantage from the alteration in question, that the alteration must not literally discriminate between members of the same class, that the alteration must be made in good faith with an absence of fraud or oppression towards the minority and, finally, that the alteration must be for the benefit of any individual hypothetical member.

Buckley, op cit[231] in dealing with the power to vary articles refers to the facts in *Greenhalgh (1950)* and quotes with approval from the judgment of Evershed MR and this is repeated in Farrar op cit[233] who refers to alteration of the articles and deals with the seven "principles of law" set out by Latham CJ in *Peter's American Delicacy* Company supra.[234] He cites *Greenhalgh (1950)* when dealing with the proposition that the power to alter must be exercised *bona fide* for the benefit of the company as a whole and that it is not for the court, but for the shareholders to decide what is for the benefit of the company.

Gore Brown, op cit[232] deals in some detail with the expression "*bona fide* in the interests of the company as a whole" and quotes *Greenhalgh (1950)* as authority for the saying: "The court of appeal has repeatedly affirmed that what is ' *bona fide*' and what is 'for the best benefit of the company as a whole' are not two alternative grounds for intervention; they represent a single standard by which the majorities' decision is to be judged." He also refers to *Greenhalgh (1950)* as authority for what is meant by the expression "the company as a whole" and concludes ".... that mere discrimination is still not sufficient since Lord Evershed did not require the majority to "disassociate themselves altogether from their prospects'."

The Editors of *Palmer*, op cit[235] refer to *Greenhalgh (1950)* when they indicate that a subjective approach is to be preferred. They say "It is important to stress, however, that the test is not whether a reasonable person would think that the alteration was in the interests of the company, but whether those voting for the resolution thought so." (235) They also cite *Greenhalgh (1950)* at 6.029 as authority for the concept that the company must be "the company as a going concern". Finally, in dealing with powers given to directors, *Palmer* at 8.510 refers to *Greenhalgh (1950)* in support of the conclusion "the shareholders are, of course, at liberty by special resolution altering the articles to vest in the general meeting a power given to the directors, and then to exercise such power."

The Editors of *Halsbury* op cit, once again in volume 7(1), refer to *Greenhalgh (1950)* in relation to the alteration of articles of association. The first reference deals with provisions for compulsory transfer where *Greenhalgh (1950)* is cited in relation to the alteration of articles of association by the inclusion of compulsory sale and transfer provisions[236]. As might expected, a paragraph dealing with the alteration of articles of association refers to the judgments in *Allen*, *Sidebottom*, *Shuttleworth*, *Brown*, *Dafen* and *Greenhalgh (1950)* in support of the proposition that "Any alteration must be made in good faith for the benefit of the company as a whole, that is of the corporators as a general body."[237]

Hadden in *Company Law and Capitalism* 2ed deals in some detail with "fraud on the minority" and refers at length to the facts and findings in *Greenhalgh (1950)*.

Robin Hollington is the author of a book entitled *Minority Shareholder Rights* published in 1990. In his preface Hollington writes:

> "The purpose of this short book is to identify and analyse those circumstances in which minority shareholders in companies can escape from the general principle of majority rule. There are several relevant threads of judicial precedent and statute, some of respectable antiquity (such as 'the rule in Foss v. Harbottle') and others of unproven modernity (such as the unfair prejudice remedy in section 459 of the Companies Act 1985). An attempt is made here to draw those threads together so far as possible."[238]

After a short introduction, the second chapter entitled "Equitable Exceptions to the General Principle of Majority Rule" deals firstly with the concept "groups" in general and companies in particular and Hollington then says (at paragraph 2 -006):

> "The development of English law, in the field of the restrictions on the voting rights of shareholders in cases of conflict of interest and other circumstances, has proceeded on a case by case basis which virtually defies any attempt of rationalisation."

The chapter is dominated by references to *Greenhalgh (1950)* which is quoted as the authority for an important conclusion reached by Hollington at paragraph 2-009, namely "In theory, therefore, a minority shareholder can complain about a majority decision on two grounds :

(1) either the majority did not act bona fide for the benefit of the company; or

(2) the decision gave the majority an advantage that was denied to the minority."[239]

In a paragraph dealing with *Clemens* the author is critical of Foster J and says "It is respectfully submitted that this reasoning is unsound and that it was unnecessary, on the facts of the case, for the learned judge to extend the principles stated in *Greenhalgh v. Arderne* in the way that he did."[240]

Chapters 3, 4 and 5 of the work deal with, respectively, winding up on the just and equitable ground, the unfair prejudice remedy in section 459 (1) of the 1985 Act and personal rights of shareholders, being, in the main, rights arising from breach of the memorandum and articles of association while a final chapter deals with the "miscellaneous rights" of individual shareholders and deals with various shareholder protection provisions in the Companies Act.

Australian Company Law Text Books

The Australian text book writers, Ford[241], Colin Howard[242], Lipton and Herzberg[243] and Paul Redmond[244] all deal extensively with *Greenhalgh (1950)*, reinforcing that the judgment has been accepted as a leading authority in Australian law.

Ford refers to *Greenhalgh (1950)* in asking what is meant by "the company" and discusses what is meant by "the interests of the company as a whole" by referring to interests of existing members, interests of future members and the continuing enterprise, interests of creditors, interests of beneficiaries under trusts of which the company is a trustee and interests of employees, customers, contractors and the community.

Colin Howard in *Law of Commercial Companies* refers to the Evershed MR "explanation" and approves *Greenhalgh (1950)* insofar as it impacts on special resolutions altering the articles while Lipton and Herzberg provide a clear and detailed exposition of the law with reference to the *Peter's American Delicacy* case and the judgments in *Shuttleworth*, *Allen*, *Brown*, *Sidebottom* and *Greenhalgh (1950)*. They conclude

> "These cases indicate the difficulty of giving a precise meaning to the expression 'bona fide for the benefit of the company as a whole'. This is especially so because as a general rule of law, shareholders are entitled to exercise rights in their own self-interest"[245]

Redmond in a chapter entitled 'Shareholder Remedies' deals in great detail with minority shareholders' remedies referring to and discussing at length all of the relevant cases including *Greenhalgh (1950)*.

South African Company Law Text Books

The South African writers also regard *Greenhalgh (1950)* as authority for propositions advanced by them. Henochsberg, op cit, in the comment on Section 62 relating to the alteration of articles says "Wide though it is, there is nevertheless a limitation upon the company's statutory power to alter its articles"[246]. The limitation is that the power is required to be exercised, not only in the manner required by law but also *bona fide* for the benefit of the company as a whole. The comment continues:

> "An exercise of the power in breach of this limitation is an example of what is know in company law as a fraud on the minority." and "It is respectfully submitted that what constitutes such a fraud is conduct which, although sanctioned by the existence of legal rights, is nevertheless in the circumstances of the case, and viewed objectively at the level of dealing as between members, in some way unconscionable as between the majority and the minority"[247] and the authority given is *Greenhalgh (1950)*.

Greenhalgh (1950) is quoted with approval by Cilliers & Benade, *Company Law*, when dealing with the power to amend the articles. The authors say at page 47, citing *Allen*[248] "To be valid an alteration of the articles must be *bona fide* and for the benefit of the company as a whole".[249] They then refer, *inter alia*, to *Greenhalgh (1950)* when they say "This rule is fairly liberally construed in favour of the validity of the alteration."[250] They continue, in a footnote:

> "in England too the concept *bona fide* for the benefit of the company as a whole was interpreted very widely with the result that the minorities have had scant success in contesting alterations of articles whereby they are prejudiced (Greenhalgh v Arderne Cinemas Limited .... where a majority shareholder succeeded with his larger voting power in altering the articles providing for a right of pre-emption in favour of the other shareholders in such a way that he could sell his shares to an outsider and the court refused to regard the alteration as being contrary to the *bona fide* interests of the company; .....)"[251]

There is a reference to *Greenhalgh (1950)* in Naude *Die Regsposisie van die Maatskappydirekteur* where he deals with the fraud on the minority exception to the rule in *Foss v Harbottle* - he says with regard to the concept "fraud on the minority":

> "Die slotsom waartoe die skrywer kom is dat 'n besluit van die algemene vergadering as 'n 'fraud on the minority' tersydegestel kan word indien: (i) die oorheersende motief van diegene wat daarvoor gestem het was om die minderheidslede te benadeel, of om die mag van selfgelding of prestige te openbaar; of (ii) die besluit van so 'n aard is dat diegene wat daarvoor gestem het, dit nie redelikerwys as voordelig vir 'n hipotetiese lid sonder buitebelange wat met die van die maatskappy bots kon beskou het nie. Diskriminasie tussen lede wat dieselfde soort aandele hou of 'n gebrek aan openhartigheid in die kennisgewing van die vergadering waarop die besluit geneem is, is slegs getuienis van die aanvegbaarheid van die besluit op die een of ander van hierdie twee gronde."[252]

The authors and editors of Cilliers & Benade *Corporate Law* (1987), as might be expected, repeat what is said above and, in a paragraph dealing with "fraud on the minority" record that it is a ".... specialised term of English law which conveys more than appears from the meaning of the words and yet has an uncertain content"[253]. An analysis of "fraud" is then given with reference to Gower. The conclusion arrived at is:

> "A lasting principle to determine whether a particular act constitutes a 'fraud on the minority' or rather an unratifiable wrong does not appear to exist. From the casuistry of the case law many writers tried to arrive at a workable model but their results are either not supported by continuing authority or are so bound to authority that they fail in logic. As an example of a recognised 'fraud on the minority' reference may be made to the so-called expropriation cases where alterations of the articles were adopted to enable a majority to compel the minority to sell their shares at a reasonable price to an approved purchaser. In certain instances such amendments have been set aside in a personal action."[254]

Beuthin *Basic Company Law* (1984)[255] contains a reference to *Greenhalgh (1950)* and the *Stylo Shoes* and *Dafen* cases where the author says at page 54 "On the other hand, if the effect of the amendment were to discriminate between the majority shareholders and the minority shareholders, it would be void" and Leveson refers to *Greenhalgh (1950)* in relation to directors duties to act *bona fide* in the interests of the company and quotes the case twice with approval.

English Journal Articles

Finally, the journal articles published in the three countries which refer to *Greenhalgh (1950)* will be considered.

The earliest references found in the English law journals to *Greenhalgh (1950)* are in the articles by Lord Wedderburn in the *Cambridge Law Journal* 'Shareholders Rights and the Rule in Foss v Harbottle'[256] and 'Shareholders Rights and the Rule in Foss v Harbottle (continued)'[257]. He says at page 211 while dealing with personal rights derived from articles of association: "similarly, a member has a *personal* right to prevent alterations in the articles which would constitute a 'fraud' on the minority" and refers to *Greenhalgh (1950)* as his authority. The second part of the article is also relevant to this dissertation, dealing as it does, at some length, with the concept of "fraud" and the conclusion is: "Fraud lies in the nature of the transaction rather than in the motives of the majority"[258], an entirely objective test.

Sealy, also writing in the *Cambridge Law Journal*[259] in a case note entitled 'Company Law - Protection of Minority Shareholders' deals with the judgment in *Clemens*. An interesting observation by Sealy, with which Mr Greenhalgh would undoubtedly agree is "All too often, our Chancery judges have shown themselves to be more at home amid the finer points of construction than the tensions of the family board room or the pressures of commerce." He welcomes "the triumph of the underdog" in *Clemens* but observes ".... yet the scheme was not essentially different from that which finally ruined Mr Greenhalgh and would very likely have been upheld had it come before the earlier court."[260]

Barry Rider in a *Cambridge Law Journal* article[261] entitled 'Partnership Law and its Impact on Domestic Companies', deals with the question whether majority shareholders owe duties to their fellow shareholders similar to those owed by directors to shareholders and the company, and proceeds, after reference to all of the relevant decided cases referred to earlier in this chapter, including *Greenhalgh (1950)*, to deal with the objective and subjective nature of the different 'tests" laid down by the courts. He, like Sealy, has difficulty in reconciling *Clemens* with *Greenhalgh (1950)* and says at page 152 "Perhaps a more serious problem is the difficulty presented in attempting to reconcile the present decision (*Clemens*) with an earlier decision of the court of appeal made on very similar facts (Greenhalgh)." Dealing with shareholders' fiduciary duties,

Rider refers to the strict and fundamental duty of directors to act in what they consider to be in the best interests of the company but that "... it cannot be said that shareholders should be held to the same strict fiduciary standard."

Sealy in a *Cambridge Law Journal*[262] note entitled 'Company Law - When Discrimination is Legitimate' dealing with *Mutual Life Insurance Co of New York v Rank Organisation Limited* [1985] B.C.L.C. 11 refers to the Plaintiffs having cited "an anthology of judicial pronouncements regarding the equality of a company's individual shareholders in point of rights [being rights], "which are broken" if a resolution of shareholders "gives some shareholders an advantage not given to others of the same class." Foremost among the authorities cited is *Greenhalgh (1950).*

There are no less than six relevant articles published in *The Company Lawyer.* John Birds writing in (1980) 1 Co Law at page 67 in an article entitled 'Making Directors do their Duties' refers to the ".... commonly accepted thesis that (interests of the company) is to be judged by the interests of the shareholders present and future" being what he calls "the test clearly applicable to alterations of the articles" with a reference to *Greenhalgh (1950).* Susan Burridge in an article 'Minority Shareholders: A Further Ray of Hope?' (1981) 2 Co Law 107 commenting on an unreported decision by Templeman J mentions the Defendants having referred the court to *Greenhalgh (1950)* in the course of argument that the passing of a resolution to increase capital would amount to a fraud on the minority. JE Parkinson in his article 'Non-Commercial Transactions and Interests of Creditors' in (1984) 5 Co Law 55 deals in some detail with the concept of "interests of the company" and quotes *Greenhalgh (1950)* and what he calls 'Evershed interpretation' with approval.

There are two most erudite articles by Xuareb in *The Company Lawyer.* The earlier article entitled 'The Limitation on the Exercise of Majority Power'[263] deals with the same question as that raised by Gower, namely whether there is a general limitation applicable to the exercise of all general meeting power. The writer notes, as a starting point, that French and Italian law have a principle that the general meeting is bound to exercise its powers in the interests of the shareholders, and that while the English courts have applied such a principle solely to special resolutions altering the articles, there are areas of difficulty, stated by Xuareb to be firstly the meaning of the English formulation and, in particular, the concept "the company as a whole", secondly whether

that formulation does have general application to all exercises of general meeting power and, thirdly what the role of the courts is in controlling general meetings. The article deals at length with the history of "benefit to the company" with reference to all of the decided cases, focuses on what was then the recent decision in *Estmanco (Kilner House)*[264], looks at what is reasonable, examines the Australian law as postulated the *Peter's American Delicacy* and *Australian Fixed Trusts* judgments (supra) and then concludes that, while several English cases do provide ".... support for a general limitation applicable to the exercise of all general meeting powers", (with specific reference to *Greenhalgh (1950)* and what Xuareb calls "Lord Evershed's formulation") ".... the correctness of the restriction of the principle's application to the exercise of the power to alter articles appears doubtful."[265] The second article, 'Voting Rights : A Comparative Review',[266] is an interesting analysis of legislative restrictions on the exercise of majority power followed by a comparison of the position under Italian and French law. Xuareb deals with shareholders' fiduciary obligations under the common law and then in a paragraph headed "Is the English Law Changing?" he refers to the *Clemens* judgment and the reliance of Foster J on what is referred to as "Lord Evershed's famous passage" (in *Greenhalgh (1950)*) and the expounding of the "individual hypothetical member test" for what is or is not for the benefit of the company as a whole, and to what Xuareb calls Lord Evershed's apparent *faux pas* in "reading the duty as one incumbent on each individual shareholder".

The last English journal article from *The Company Lawyer* is that by Ruth Redmond-Cooper entitled 'Management Deficiencies and Judicial Intervention : A Comparative Analysis'[267] dealing primarily with the principle of non-intervention by the courts in the management of companies and the reluctance of English courts to become involved in business decisions. *Greenhalgh (1950)* is referred to in a paragraph headed "Protection of the Majority" where the writer says "Thus any proposed alteration of the memorandum or articles must be made in good faith, for the benefit of the company as a whole and without discriminating between members of the same class."[268]

An early *Journal of Business Law* article 'Gratuitous Payments for the Benefit of a Company' is by Harry Silberberg[269], where he quotes *Greenhalgh (1950)* and the "Evershed formulation" when dealing the concept "benefit of the company" and

proceeds with an interesting analysis of the words "company" and "shareholder" in that context.

A second article in the *Journal of Business Law* entitled 'Alteration of Articles and Protection of Minorities'[270] is that by G R Bretton of Alberta University where, in a section sub-headed "Protection at Common Law" he comments on and deals with all the cases from *Allen* to *Stylo Shoes* and refers to the statement by Evershed MR in *Greenhalgh (1950)* as "a more recent construction of the (Lindley MR) time-hallowed phrase" and to the subjective construction found in *Shuttleworth* and *Greenhalgh (1950)*. He refers to the courts' motivation for the subjective approach as being, *inter alia*, the reluctance of the judges to valuate the business expediency of the alteration sought to be impuned. Bretton's conclusion is somewhat depressing, and is:

> ".... the judges have subjected the phrase '*bona fide* for the benefit of the company as a whole' to minute scrutiny. This approach seems to have culminated in Evershed MR's judgment in *Greenhalgh v Arderne Cinemas Limited* and the meaning of the phrase has now become so debilitated as to offer scant protection to minorities."[271]

Greenhalgh (1950) also receives mention in a Frank Wooldridge article in the *Journal of Business Law* entitled 'Some Defences to Takeover Bids'[272] where it is somewhat misquoted, in a footnote, insofar as it is given as an authority for the proposition "The requirement of British company law is merely that the directors shall act in the interests of the shareholders as a whole"[273].

The *Law Quarterly Review* also contains relevant articles, the first of which is one by Pickering called 'Shareholders Voting Rights and Company Control'[274]. It refers not only to *Greenhalgh (1950)* but also to *Greenhalgh (1943)* and *Greenhalgh (1946)* (as dealt with on pages 21 and 33). The reference to *Greenhalgh (1950)* is found in a discussion of majority control arising under voting agreements. The author says:

> "The attitude which members may have towards such agreements or understandings was illustrated in the relationship which existed between the board of members of the Mallard 'faction' in *Greenhalgh v. Arderne Cinemas, Ltd.* Sir Raymond Evershed M.R. noted that one director concerned was a mere nominee, and went on:
>
> > 'He was asked in the course of his evidence whether he was ever instructed how to vote in respect of those shares, to which he replied : 'No, there were only three directors, I knew perfectly well what they desired done, and I did it."

> Informal agreements of this nature are often elusive and transitory in nature and they may be dissolved readily, whether informally or by conflict between the parties, or by changes in share ownership."[275]

Prentice, in an article entitled 'Restraints on the Exercise of Majority Shareholder Power' published in the *Law Quarterly Review*[276] analyses the judgment in *Clemens* and compares its facts and outcome with those in *Greenhalgh (1946)*. He deals in some detail with "a number of difficulties" raised in the Foster J judgment being, firstly, its incompatibility with *Greenhalgh (1946)*, secondly how it "fits in" with *Hogg v Cramphorn Limited* [1967] Ch. 254, thirdly, a dichotomy with the judgment in *Ebrahimi v Westbourne Galleries Limited* [1963] A.C. 360, fourthly the raising of what he calls the "potentially manipulative implications of Section 54 (1)(b) of the 1948 Companies Act and finally, the reliance on "..... the hallowed (hackened?) dictum of Lindley MR in *Allen*." He argues that *Allen* should not be confined to alterations of the articles and he argues for the imposition of fiduciary duties on the majority in their dealings with the minority. He ends by saying that "... it may be that Foster J (in *Clemens*) was pointing a rather unsure finger in this direction (see e.g. the Learned Judge's very wide interpretation (at p. 281) of Greenhalgh v Arderne Cinemas Limited."[277]

The three final English journal articles in which *Greenhalgh (1950)* is dealt with are all in the *Modern Law Review*.

The earliest is a case note by Wedderburn[278] on *Re Bugle Press Ltd* [1961] Ch. 270. It deals with the then section 20 of the English Companies Act (the South African equivalent being the former sections 314 to 321, now section 440K). In dealing with the reason for the enactment of the provisions he refers to *Greenhalgh (1950)* as support for the submission that "... the 'fraud' cases on changing the articles show that there is no rule prohibiting absolutely the compulsory transfer of minority shares where the majority acts honestly"[279].

Victor Joffe writing in the *Modern Law Review*[280], in a case note entitled 'Majority Rule Undermined' deals with the then just reported *Clemens v Clemens Bros Ltd*[281]. He regards as a crucial question "When will the courts intervene in cases not falling clearly within the 'fraud on the minority' principle?" and refers then to the test most commonly applied being "a phrase whose meaning has undergone a varied history" and the

reliance of Foster J in *Clemens* on the explanation given by Evershed MR in *Greenhalgh (1950)*.

Finally, there is an article by Rixon in the *Modern Law Review*[282] entitled 'Competing Interests and Conflicting Principles : An Examination of the Power of Alteration of Articles of Association' being "... a study prompted by a number of dicta of English and Australian judges" namely *Australian Fixed Trusts*, *Clemens* and *Estmanco*. Rixon deals lucidly and in detail with all of the relevant concepts and principles and refers to all of the applicable cases, including *Greenhalgh (1950)* and the "Evershed test".

Space constraints do not allow further analysis of the Rixon article but suffice to say it deals fully with all of the relevant principles and, like an Australian and South African article still to be dealt with is, on its own, fertile ground and a source of ideas for attempting to come to some definite conclusion with regard to "fraud on the minority" and majority shareholders acting "*bona fide* in the interests of the company as a whole". There is, for example, an entire section devoted to what Rixon calls "the test in Greenhalgh v Arderne Cinemas, Ltd"[283] and an attempt is made to reconcile the decision in the judgment with the test formulated in it for determining whether an alteration to articles is liable to impeachment. One cannot leave the Rixon article without at least touching on what he calls "the defect in the rule in *Allen v Gold Reefs of West Africa Limited*" namely, that having been formulated in a dispute relating to articles alteration involving a conflict of interest between a company and a member of the company ".... it is not serviceable in the case of an alteration involving a conflict of interest of members *inter se*". That proposition is in itself worthy of consideration in deciding whether there is a general obligation upon majority shareholders to act in the interests of minority shareholders, as well as themselves.

Australian Journal Articles

Australian academics (and a South African academic writing in an Australian journal) have also contributed towards the recognition, analysis, discussion, and criticism, of the principles derived from Greenhalgh[1950].

The earliest of all of the journal articles in the three countries is a 'Recent Cases - Notes and Comments' entry in the *Australian Law Journal*[284]. It highlights that no satisfactory

test had at that time been evolved to protect minority groups. After reference to the judgements in *Allen*, *Peter's American Delicacy*, and *Sidebottom* the facts in *Greenhalgh (1950)* are summarised and the Sir Raymond Evershed test quoted and explained, but criticised as follows:

> "It will be seen that the tests discussed by the Master of the Rolls do not assist in clarifying the problem, and the last sentence quoted is certainly opposed to the numerous cases (of which *Allen v. Gold Reefs of West Africa Ltd. (supra)* is one) in which a majority have been held entitled to an advantage of which a minority were deprived."[285]

McPherson writing in the *Australian Law Journal* in an article 'Opression of Minority Shareholders'[286] refers to the "Lindley statement" in *Allen* as the "proper starting point" in any consideration of minority protection. A useful analysis of "fraud on the minority" contrasted with "fraud on the company" follows, with a suggestion that there are three theories applicable, a wide theory, a narrow theory and a preferred third theory. He says the following:

> "Stated briefly, the three views are these : that it is incumbent upon the majority so to act only when (according to the first view) (1) it is proposed to pass a resolution of any kind which will bind the minority; or, on the second view (2) it is proposed to alter the articles of association; or (3) it is proposed to deprive the minority shareholders of some or all of their rights. Of these, only the first theory, which the widest, and the second, which is the narrowest, can be said to derive direct support from Lord Lindley's formulation. Nevertheless it is submitted that the choice must lie between the second and third of these, and that the third view is in some respects to be preferred."[287]

Greenhalgh (1950) is quoted when dealing with the narrow, articles, theory and reference is also made to *United Trust* and its rejection of the "wide" theory. In a foot note MacPherson records:

> "In any case, Professor Gower favours an extension of the supposed fiduciary duty to actions taken by the majority outside the general meeting, see Gower, op.cit., p. 524. According to Kuper J., (in *United Trust*) however, there is no authority which suggests that 'a decision of majority shareholders, taken outside a meeting of the company, can be impeached on the ground of the duty of the majority to vote for the benefit of the company as a whole."[288]

The *Australian Law Journal*[289] contains a third, most interesting, article, that by H H Mason called 'Fraud on the Minority. The Problem of a Single Formulation of the Principle'. His understanding of "the Evershed explanation" is that the earlier cases saw two elements in the rule as postulated by Lindley MR in *Allen*, namely that the shareholders are obliged to exercise their votes in the way that they honestly believe is for the benefit of the company as a whole, and the rights must in fact be thus exercised so that a court must be satisfied that what was done was to the benefit of the company as a whole. He continues "Recently, however, this formulation has been exposed to doubt. The matter was considered by the Court of Appeal in *Greenhalgh v. Arderne Cinemas Ltd.*"[290] Mason suggests that while Evershed's observations in *Greenhalgh (1950)* "...have been widely accepted as expressing the modern fraud on the minority principle," unfortunately they seem to raise more problems than they answer and Mason deals with these as being at least four in number which he proceeds to analyse with special reference to the Australian judgments in *Peter's American Delicacy* and *Australian Fixed Trusts* and he concludes that Peter's case is better law in establishing that "there is no single general formulation of the fraud on the minority principle, and that a number of considerations may be relevant in determining the question of what will constitute a fraud on the minority."[291]

D A Wishart, a law lecturer at Monash University writing in the *Melbourne University Law Review*[292] in an article entitled 'A Conceptual Analysis of the Control of Companies' concludes, with reference to, *inter alia*, *Clemens*, *Australian Fixed Trusts* and *Greenhalgh (1950)* that: "The common law has failed to enunciate any general principle for determining whether or not the general meeting can express the decision of the group or, more conventionally, when a resolution of the general meeting fails for being 'in fraud of the minority'."[293]

A law student, R S Thomson, in an essay published in the *Sydney Law Review*[294] entitled 'Statutory Expropriation of the Minority Shareholder' discusses Section 135 (1) of the (then) New South Wales Companies Act of 1936 (the United Kingdom and South African equivalent being, respectively, Sections 209(1) and 440K) and he concludes, at page 97 having referred with regard to "expropriation at general law" to *Brown*, *Sidebottom*, *Dafen*, *Australian Fixed Trusts*, *Allen* and Greenhalgh that "At general law expropriation of the minority by the majority shareholders by amendment of the articles of a company must be *bona fide* for the benefit of the company as a whole and must be

confined to the particular situation in which it is for the benefit of the company to compulsorily acquire the shares in question.", and *Greenhalgh (1950)* is also referred to in an essay by Judith Dorsch entitled "Unit Trusts" in the *Sydney Law Review*[295] in which she analyses the judgment in *Australian Fixed Trusts*.

Baxt is the author of two short articles in The Company and Securities Law Journal, the first of these[296] is a comment on the 1986 Kinsela appeal and the reference to *Greenhalgh (1950)* is at page 197:

> "Street C.J. in an interesting and important judgment examined the basic law relating to the duties of directors and to whom they are owed. He reminded us of the classic formulation of the statement of duties of directors being owed to the company in *Greenhalgh v. Arderne Cinemas Limited* [1951] 1 Ch. 286."

(Some 'poetic licence' - the duty referred to by the Master of the Rolls being one imposed upon majority shareholders). The second article[297] headed 'Sale of Control in a Company' contains, in a sense, an "indirect" reference to *Greenhalgh (1950)*, dealing as it does with the absence of an obligation on the part of majority shareholders to pass on to minorities any premium paid for the sale of the controlling interest. Reference is made to *United Trust* case as being "(the) only .... case in the common law jurisdiction outside of the United States which deals with this particular issue." A further important quotation for the purposes of this dissertation is:

> "The common law in Australia (and in England it would seem) provides that a shareholder in a company must not vote in such a way as to commit a fraud on the minority, or must not act in such a way as to appropriate corporate property or to oppress a minority shareholder; all of this amounting to what is known as fraud on the minority."

South African Thesis and Journal Articles

Finally, consideration will be given to South African Journal articles in which *Greenhalgh (1950)* "makes an appearance". Perhaps the most extensive and erudite is that by Van Rooyen in the Tydsrif vir die Suid Afrikaanse Reg entitled 'Enkle perspektiewe oor die reel dat die lede van 'n maatskappy hul stemreg na wens kan uitoefen en die ongeldigheid van meerderheidsbesluite weens magsmisbruik'[298]. The article was prompted by the judgment in *Rentekor (Pty) Ltd v Rheeder & Berman*[299] and its

reference to *Pender v Lushington*[300] and the concept that shareholders owe no fiduciary duties to each other. Van Rooyen has, of course, drawn to a great extent on his own doctoral thesis 'Die Geldigheid van die Besluite van 'n Algemene Vergadering in die Maatskappyreg'[301] and refers to numerous cases and articles in dealing with the question of whether majority resolutions are invalid as a result of abuse of power. Once again, unfortunately, space does not permit more than a superficial treatment of the article, but its relevance to this dissertation is such that a summary will be made of portions of it. The initial point discussed is that members may exercise their votes as they please, that they have no fiduciary duties to each other and, therefore, they can conclude voting agreements and can vote in matters in which they have an interest. The reason for this, according to the cases cited, is that a share is a proprietary right of shareholders and that votes must be "kept sharpened for use as a protective weapon". Van Rooyen is critical of this on the somewhat "purist" arguments that shares are not corporeals and that the exercise of a vote is not a capacity founded in property giving absolute or unlimited rights and, secondly, that the vote is exercised not only over the shareholders own property but also that of the company and co-shareholders. He refers to the conflict which exists between common law principles and statutory provisions designed to prevent the abusive power by majorities at general meetings, but concludes that the apparent conflict is not a problem in practice because it is qualified by common law rules against abusive power and by statutory provisions such as the minority protection provisions of Section 252 and the just and equitable winding up provisions of Section 344(h) of the Companies Act. The conclusion reached after reference to numerous cases and writers is that while members, acting as individuals, can exercise their voting rights as they please they may not commit a "fraud on the minority" or a "fraud on the company" and examples given are that amendments to the articles of association must be *bona fide* in the interests of the company, that *mala fide* acts by directors cannot be condoned by the general meeting and that the majority cannot condone or authorise expropriation of company assets.

Van Rooyen then proceeds to deal with invalidity of resolutions as a result of abuse of power and it is here that, as may be expected, there are multiple references to *Greenhalgh (1950)*. Next, in dealing with what Van Rooyen calls the invalidity of a majority resolution constituting an injustice towards members, he indicates that a resolution which both prejudices a member and is not *bona fide* in the interests of the company is a fraud on the minority and unenforceable but, that on the other hand, if a

resolution by a majority prejudices or wrongs or aggrieves a minority or even terminates their membership of the company, it is not necessarily invalid because the principle of majority rule will apply and the minority must subject themselves to the will of the majority, subject only to what he calls the common law rule that the majority must act *bona fide* in the interests of the company. The concepts appears, on Van Rooyen's view, to contain both a "positive" aspect and a "negative" one. He goes on to ask questions, which have been touched on by all the writers, that is, is the area of application amendments of articles only, is the test objective or subjective, what is meant by the company, is the "*bona fide* in the interests" rule the only common law criterion to test whether a majority resolution is invalid as a fraud on the minority and does the rule have any purpose for existence in parallel with Section 252? Once again, space precludes anything other than a somewhat superficial treatment of the answers to those questions and Van Rooyen's own conclusions are that the articles amendment should not be the only application, that an objective test is for cogent reasons given by Van Rooyen preferable to a subjective one, that the company, as stated by Rixon[302], has been understood by different judges in different circumstances to signify different things, that the concept is appropriate where a resolution is adopted in the interests of the company but is less appropriate when the resolution relates to a conflict between the interests of members *inter se*, or the regulation of their mutual rights, or where the interests of the company are not affected at all. Finally, on the authority of *Peter's American Delicacy* Co (supra) and the view of Rixon[302] and Ford[303], Van Rooyen concludes that a resolution of the majority which affects the rights of members prejudicially or on a discriminatory basis must always indeed be tested with reference to the interests of the company. There is also support to be found amongst a number of the writers that a resolution of a general meeting of the "quasi-partnership company" will be invalid if it conflicts with the personal relationship of confidence and good faith which ought to exist between such members and, finally, Van Rooyen suggests that s252 of the Companies Act does not represent a codification of the common law and does not replace the common law rules. The ultimate conclusion is that a traditional narrow approach and the unwillingness of courts to apply objective criteria is unacceptable and gives to both company and majority alike a somewhat limited protection. He recommends a far broader approach with the courts ceasing to decide matters on the basis of good faith and judgment on the part of the majority and the judges themselves being obliged to examine both the merits and consequences of decisions by the majority.

Hendrick Prins' doctoral thesis 'The Protection of the Minority Shareholders In a Limited Company'[304] deals, *inter alia*, with the alteration of articles of association and he commences that section of his thesis with a quote from Evershed's judgment, namely "... when a man comes into a company he is not entitled to assume that the articles always remain in a particular form ...". *Greenhalgh (1950)* is then quoted extensively in considering what emerges from the English common law in interpreting the expression "*bona fide* for the benefit of the company as a whole". Prins then develops four conclusions to be drawn from the not always consistent judgments and concludes that what he calls "the discrimination test" has great merit ".... since it forms a compromise between freedom of action for the majority and the protection for the minority"[305]. He also addresses the question whether the majority have a duty of good faith with regard to resolutions in general but comes to the conclusion, correctly no doubt, that there is no general duty of good faith in either English or South African law, unlike Dutch law where there is a general principle that the majority must act *bona fide* towards all interested parties. Prins also (and once again there are a number of references to *Greenhalgh (1950)*) includes an interesting analysis of what he calls "the three parties" namely the majority, the company and the minority but, consistently, his conclusion with regard to shareholders voting for their own interest is that in English and South African law ".... shareholders seem to have almost unlimited right to vote in their own interests."[306]

Remaining articles of relevance are those by Hahlo entitled '"Control" in Company Law' in the *South African Law Journal*[307], being comment on the *United Trust* case, followed by a more detailed article by McPherson[308] who in an article 'Limites of Fraud on the Minority' refers in an analysis of *United Trust* to *Greenhalgh (1950)* and proceeds to consider the meaning and application of the phrase "*bona fide* in the interests of the company as a whole" and to consider what amounts to "fraud". He contends with reference to *Thomas, Ltd v May*[309] that the answer has still to be given but that "we are now, it is hoped, in a better position to attempt to define the limits of fraud on the minority with reference to the decisions in the *United Trust* and *May's* cases." He suggests that the action for fraud on the minority should be confined to a deprivation of the rights of minorities contained in the memorandum and articles of association and that the action should be available normally only where although the majority "observe the required procedures, the resolution in question is not passed '*bona fide* for the

benefit of the company as a whole' (the test laid down in *Allen* v Gold Reefs and Greenhalgh v Arderne Cinemas)."

Of interest is Professor Beuthin's inaugural professorial lecture published in the *South African Law Journal*[310] under the title 'The Range of a Company's Interests'. After referring to, *inter alia*, *Greenhalgh (1950)*, Professor Beuthin asks, and answers, in imaginative detail what is meant by "the company". He goes beyond the obvious and includes both present and future members, employees, consumers of the company's product, the public and community which the company serves and perhaps even the interests of the State.

Finally, *Sammel* is the subject matter of a *South African Law Journal case note by H Rajak*[311] entitled 'Minority Rights and the Takeover Bid' where *Greenhalgh (1950)* is referred to twice, once in distinguishing between the objective and subjective tests in the English cases and, again, when saying that in opposing the alteration of articles "... here, too, the minority shareholders' task is far from easy".[312]

Footnotes : Chapter IV

188 Gower op cit note 32 at p 614-630

189 ibid 615

190 [1887] 12 App. Cas. 589 P.C.

191 Gower op cit note 32 at 615

192 ibid 615

193 ibid 616

194 ibid 623

195 ibid 624

196 ibid 629

197 ibid 626

198 Allen v Gold Reefs of West Africa [1900] 1 Ch 656

199 Brown v British Abrasive Wheel Co. [1919] 1 Ch 290

200 Dafen Tinplate Co. Ltd v Llanelly Steel Co [1920] 2 Ch 124

201 Sidebottom v Kershaw Leese & Co [1920] 1 Ch 154 C.A.

202 Shuttleworth v Cox Bros. & Co [1927] 2 K.B. 9 C.A.

203 Allen supra note 198 at 671

204 Sidebottom supra at note 201 at pp 171-172

205 ibid 164

206 Dafen supra note 200 at 140

207 ibid 141

208 Shuttleworth supra note 202 at 18

209 Peters American Delicacy Co v Heath (1939) 61 C.L.R. 457

210 ibid 482

211 Australian Fixed Investments v Clyde Industries Ltd [1959] S.R. (N.S.W.) 33

212 ibid 57

213 United Trust (Pty) Ltd v South African Milling Co 1959(2) SA 426 (W)

214 (1959) 76 SALJ 259

215 United Trust supra note 213 at 433

216 Rights and Issues Investment Trust Ltd v Stylo Shoes Ltd [1965] Ch 250

217 Sammel & Others v President Brand Gold Mining Co. Ltd 1969(3) SA 629(A)

218 ibid 647

219 1951(2) SA 401(A)

220 Sammel supra note 217 at 680

221 [1971] 1 W.L.R. 583
222 Clemens v Clemens Bros Ltd [1976] 2 All E.R. 268
223 ibid 282
224 Russell Kinsela (Pty) Ltd (in liq) v Kinsela [1983]2 N.S.W.L.R. 452
225 Russell Kinsela (Pty) Ltd (in liq) v Kinsela [1986] 4 NSWLR 722
226 ibid 729
227 [1982]1 All ER 437
228 [1985] BCLC 11
229 Gower op cit note 32 at pp 614-630
230 Pennington op cit note 36 at pp 75-82
231 Buckley op cit note 37 at 49
232 Gore-Brown op cit note 39 at para 4.5
233 Farrar op cit note 40 at pp 112-113
234 (1939) 61 C.L.R. 457
235 Palmer op cit note 42
236 Halsbury op cit note 49 Vol 71
237 ibid 381
238 Hollington "Minority Shareholders' Rights" (1990)
239 ibid 8
240 ibid 10
241 Ford op cit note 148 5ed (1990) pp 423-431 and 467
242 Howard - Law of Commercial Companies (1987) at 247
243 Lipton & Herzberg op cit note 80
244 Paul Redmond - Companies & Securities Law - Commentary & Materials (1988)
245 Howard op cit note 242 at 87
246 Henochsberg op cit note 108 at 95
247 ibid 95
248 Cilliers & Benade op cit note 110 at 95
249 Allen v Gold Reef Property West Africa Ltd [1900] Ch 656
250 Cilliers & Benade op cit note 110 at 47
251 ibid 117
252 S J Naude - Die Regsposisie van die Maatskappydirekteur (1970) at 182
253 Cilliers & Benade - Corporate Law (1987) 406
254 ibid 407
255 Beuthin - Basic Company Law (1984) 54

256 (1957) Cambridge LJ 194
257 (1959) Cambridge LJ 93
258 ibid 96
259 (1976) Cambridge LJ 235
260 ibid 236
261 (1979) Cambridge LJ 148
262 (1985) Cambridge LJ 367
263 (1985) 6 Co Law 199
264 Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 W.L.R. 2
265 Xuareb op cit note 263 at 208
266 (1987) 8 Co Law 16
267 (1988) 9 Co Law 169
268 ibid 172
269 1968 Journal of Business Law 213
270 1970 Journal of Business Law 185
271 ibid 196
272 1974 Journal of Business Law 202
273 ibid foot note at 210 at 210
274 (1965) 81 LQR (81) 248
275 ibid 270
276 (1976) 92 LQR 502
277 ibid 506
278 (1960) 23 Modern LR 663
279 ibid 665
280 (1977) 40 Modern LR 71
281 [1976] 2 All E.R. 268
282 (1986) 49 Modern LR 446
283 ibid 462
284 (1950) 24 Australian LJ 525
285 ibid 526
286 (1962) 36 Australian LJ 404
287 ibid 405
288 ibid footnote 31 at 407
289 (1972) 46 Australian LJ 67
290 ibid 68

291 ibid 72
292 (1983 - 1984) 14 Melbourne Univ. L.R. 601
293 ibid 619
294 (1962-1964) 4 Sydney LR 87
295 (1962-1964) 4 Sydney LR
296 (1985) 3 Companies & Securities LJ 197
297 (1987) 5 Companies & Securities LJ 293
298 1989 TSAR 593
299 1988(4) SA 469 (T)
300 (1877) 6 Ch. D70
301 Unpublished LL.D Thesis Rand Afrikaanse Universiteit 1983
302 (1986) 49 Modern LR 446
303 "Principles of Company Law" 4 ed (1986)
304 Unpublished LL.D Thesis University of Leiden 1972
305 ibid 20
306 ibid 51
307 (1959) 76 SALJ 259
308 (1960) 77 SALJ 297
309 1952(3) SA 750 (S.R.)
310 (1969) 86 SALJ 155
311 (1970) 87 SALJ 12
312 ibid 16

CHAPTER V

CONCLUSION

Bearing in mind the numerous references to the *Greenhalgh* litigation in the company law text books and journals and that the principles derived from the *Greenhalgh* cases have been approved by the Courts in each jurisdiction, there can be no doubt that although Mr Greenhalgh gained probably little benefit from his investment in the Arderne Cinema company and no benefit whatsoever from his "litigious fervour", the company law in England, Australia and South Africa has gained advantage and is richer as a result of his endeavours and the law of procedure in England and Australia has benefited from his "conspiracy" cases.

The law in England, Australia and South Africa has thus gained a great deal as a result of Mr Greenhalgh's actions, but has the position of minority shareholders been improved or advanced as a result of the litigation?

As one reads the facts in each of the reported judgments it is felt that Mr Greenhalgh did deserve to succeed and ought to have been granted the relief which he sought and is the fact that Mr Greenhalgh failed indicative of some fundamental failure in the English company law system?

The reason that the majority shareholders succeeded is, of course, a consequence of the fundamental principle that companies, like all associations of persons, are subject to "majority rule", coupled with the further principle that shareholders do not owe each other any fiduciary duties outside of the limited circumstances governed by the principles of "fraud on the minority" and the test of whether or not the activity complained with was "*bona fide* in the interests of the company as a whole." Moreover, the Courts are unwilling to abandon "the finer points of construction" and to become involved in "the tensions of the family board room or the processors of commerce" or to allow matters of business to influence principles of law.

There is therefore probably little prospect for the adoption of a general principle that majorities must always exercise their powers *bona fide* for the benefit of the company as a whole but the *Greenhalgh* series of cases does at least teach minorities that agreements must be properly and carefully drawn, that inherent rights attaching to shares or which shareholders enjoy will not easily "be taken away or cut down", that class rights must be carefully defined, entrenched and protected, that no shareholder must assume that the articles of association will always be in a particular form and that the Courts are reluctant to interfere with what majority shareholders, subjectively, consider to be in the interests of a company.