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the appellant, who acted upon it in accordance with the practice in England and other parts of Australia, had exposed himself to a number of actions for trespass and false imprisonment to which he would have had no defence. In my opinion there is no sufficient ground for rescinding the leave to appeal, and the motion therefore fails.

BARTON, J., and O'CONNOR, J., concurred.

Appeal allowed. Order of the Supreme Court discharged with costs. Case remitted to the magistrate for his determination with the expression of the opinion of the Court. Motion to rescind dismissed with costs.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for the respondent, *J. W. Abigail.*

[HIGH COURT OF AUSTRALIA.]

THE NEW LAMBTON LAND & COAL CO. LTD. . . . . } APPELLANT;

AND

THE LONDON BANK OF AUSTRALIA LTD., EDWARD WILLIAM BANCROFT, AND JAMES LINDSAY BALLANTYNE } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 2, 5, 6.

Company—Transfer of shares—Directors' power to refuse to register—Rectification of register—Companies Act (N.S.W.), No. 40 of 1899, sec. 232—Practice—Parties—Person or member aggrieved—Power of Court to impose conditions—Amendment.

Griffith, C.J., Barton and O'Connor, JJ.

The directors of a company, in exercising their power of refusal to register transfers of shares, must exercise it in good faith, and with due regard to the

transferror's right of property in the shares, and the rights of the transferee, and must fairly consider the question of the transferee's fitness.

In an application under sec. 232 of the *Companies Act*, 1899, to compel the directors of a company to register a transfer, although it is for the applicant to satisfy the Court by evidence that there was no sufficient reason for the refusal of the directors to register, the Court may, as in other cases, in the absence of direct evidence on that point, draw inferences of fact from the circumstances surrounding the refusal; and, if the reasons inferred are improper or insufficient, may direct the company to register.

In making an order for registration of a transfer, and rectification of the register, in such a case, the Court has no power to make it a condition of the order that the applicant should give, and the company should accept, an undertaking by the applicant to indemnify the company in respect of calls for which the transferror would have been liable if his name had remained on the register as holder of the shares; *Ex parte Penney*, L.R. 8 Ch., 446; *In re Bell Bros. Ltd.*, 65 L.T. (N.S.), 246; and *In re Coalport China Co.*, (1895) 2 Ch., 404; considered and applied.

Where an application was made by the party beneficially interested in shares, to compel registration of a transfer of the shares in the name of nominees, who had executed the transfer as transferees, but who were not joined as parties to the application:—

Held, that the proceedings could be amended by joining the nominees as applicants.

Decision of *Walker*, *J.* (24th May, 1904), except as to the undertaking, affirmed.

Semble, the High Court in the hearing of an appeal from the Supreme Court of a State cannot receive fresh evidence.

APPEAL from a decision of *Walker*, J. In an application for rectification of the share register of a company, under sec. 232 of the *Companies Act*, 1899 (*a*).

(*a*) 232. (1) If the name of any person is without sufficient cause entered in or omitted from the register of members of any company registered under this Act, or if default is made or unnecessary delay takes place in entering on the register of members the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company or the company itself, may by motion in the Supreme Court, either in its common law or in its equitable jurisdiction, or by application to a Judge in Chambers, or in such other manner as such Court may direct, apply for an order that the register may be rectified, and such Court or Judge may either refuse such application, with or without costs to be paid by the applicant, or may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the com-

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The following statement of the facts is taken from the judgment of *Griffith*, C.J.

The appellant company was formed in 1891 for the purpose of acquiring a certain colliery property, together with the right, title and interest therein of three persons, Alexander Brown, John Campbell Dibbs, and George Richard Dibbs. The capital of the company was to be £150,000, consisting of 15,000 shares of £10 per share, issued as fully paid up. The allottees of the shares were Alexander Brown, who took 7,498; John Campbell Dibbs, and George Richard Dibbs, who took 3,749 each, and four other persons who took the remaining 4 shares for the purpose of bringing the number of shareholders up to seven. By one of the regulations of the company, the qualification for a director was the holding of 200 shares. The three persons named, therefore, were the only members qualified for that position. They were the first directors, and the directorate continued unchanged for a considerable time. In 1897 Brown executed seven blank transfers for 1,000 shares each, and handed them to the London Bank of Australia under circumstances not fully in evidence before the Court. It appeared, however, that in an equity suit brought by the bank some years afterwards against Brown, he was declared by the Court to be a trustee for the bank of the 7,000 shares. In 1897 the three original directors were still in office. No transactions in the company's shares had taken place up to that time; but between that date and 18th June, 1902, Brown transferred 200 shares to William Lockhart Brown, his son, and 100 to a person named Lewington, the business manager of the company. Brown himself was managing director at this time. In the mean-

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pany or any other party to such proceeding to pay all the costs of such a motion or application, and any damages the party aggrieved may have sustained.

(2) Such Court or Judge may in any proceeding under this section decide any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arise between two or more alleged members and the company, and generally such Court or Judge may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register or the adjustment of the rights of the parties thereto.

(3) Such Court or Judge may direct an issue to be tried in the said Court on the trial of which any question of law may be raised for decision.

time J. C. Dibbs had died, and it had apparently been thought necessary to qualify some other person to become a director in his place. Accordingly we find that in March, 1902, the directors were Alexander Brown, G. R. Dibbs, and William Lockhart Brown, the son. In that year the bank proposed to make use of the transfers from Brown, and they were filled up in the names of J. L. Ballantyne and E. W. Bancroft, and sent to the company accompanied by a letter from the bank's solicitors, dated 18th March, 1902, requesting registration. No notice being taken of that request by the company, the bank repeated it a week later, but the company refused to accede to it, and returned the transfers to the bank, giving no reasons for the refusal. On 8th April a letter was written by the bank's solicitors asking for the reason, and this was replied to by the company on the 17th, in a letter which stated that the Board declined to give any reason. There seemed at that time to be some difficulty about the bank not having complied with the *Stamp Act*. On 10th June, the transfers having in the meantime been duly stamped, another request for registration was made by the bank, and on 18th June that also was refused, the directors being the same as at the date of the first application for registration. On 15th August the bank instituted a suit in equity against Alexander Brown to have him declared a trustee for the bank of the 7,000 shares. On 12th December Brown consented to a decree to that effect, he being a director while the suit was pending. During that year until 12th December, *i.e.*, until after the decree in the equity suit, there had been no change in the directorate. But immediately after the decree, by which Alexander Brown was declared a trustee for the bank, restrained by injunction from in any way preventing or hindering registration by the company of the 7,000 shares so transferred by him, and ordered to take all necessary steps to have the transfers registered, he resigned his position as director. There were consequently then only two directors, and there was no one else qualified for the position. At that time Brown had 7,198 shares standing in his name. A month later one Forsyth became a director. In order to do so it was necessary for him to acquire 200 shares. In the interval between Alexander Brown's resignation and Forsyth's appointment, Brown had

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divested himself of 197 of the 198 shares which he had left, and Lewington had divested himself of 8, while Forsyth, described as an agent, of Dudley, near Newcastle, had become a holder of 200 shares, and, therefore, eligible as a director. The other 5 shares were distributed among 5 different persons. This having been done, Forsyth was elected director by virtue of these shares, which had been transferred to him by Brown and Lewington. The directors were then Sir George Dibbs, W. L. Brown and Forsyth. On 7th May, 1903, the bank's solicitor sent a copy of the decree, with the transfers, to the company, pointing out that the bank was entitled to registration, and requesting that the transfers might be registered. The reply was that the board declined to comply with the bank's request, and the transfers were returned. No reasons were given. On 3rd June the bank sent the transfers back with a letter to this effect :—

"The London Bank of Australia Limited, the owner of the 7,000 shares standing in Mr. Brown's name, has now tendered for registration transfers executed by Mr. Brown to Messrs. Bancroft and Ballantyne, and has also tendered transfers by the bank in pursuance of Article 31 to their nominees Messrs. Bancroft and Ballantyne, both of which transfers your company has refused to register.

"We would point out that both the proposed transferees are men of means, business capacity and experience, and well able to meet any responsibility which the ownership of the shares may throw upon them, Mr. Ballantyne occupying the position of branch inspector of the bank, and Mr. Bancroft that of sub-manager at the head office of the bank. If, however, your company is not satisfied with the financial position of these gentlemen, the bank is prepared to give an undertaking to be responsible for any liability that the ownership of the shares may throw upon them, although by reason of the shares being fully paid up we do not see what liability there can be. If, however, the objection of your company is to the proposed nominees personally, the bank do not wish to insist upon the transfers to them being registered, but are willing to withdraw their names and nominate other transferees, should your company so desire. If there is any other objection that the company may have, or any requirements to be fulfilled,

we shall be glad to hear from you, so that we may meet your company's wishes."

The answer to that letter was a letter merely acknowledging the receipt, and stating that the board of directors declined to register the transfers.

The bank then made an application, by motion under sec. 232 of the *Companies Act*, 1899, to the Supreme Court in its equitable jurisdiction, before *Walker*, J., for an order compelling the appellant company to register the transfers of the 7,000 shares and directing that the share register should be rectified by removing the name of Alexander Brown therefrom as holder of the 7,000 shares, and by entering in the register the names of J. L. Ballantyne and E. W. Bancroft as the holders thereof. After an amendment, the nature of which appears from the judgment of *Griffith*, C.J., the application was granted.

Article of association, No. 29, is as follows:—"No member shall be entitled to transfer his share or shares without the approval of the directors and neither shall he transfer the same whilst he or any joint holder thereof is indebted to the company either solely or jointly with any other person, whether a member or not on any account whatsoever, and if any transfer is made or attempted to be made contrary to this regulation the directors may decline to register the same."

Wise, K.C., and *Leverrier*, for the appellants.

Wise, K.C. The jurisdiction conferred by sec. 232 is discretionary, not to be exercised *ex debito justitiae*. When the directors have power under the articles to refuse to register a transfer, they will not be compelled to register except when their refusal is tainted with fraud. The section does not make the Court a mere Court of appeal from the decision of the directors. The mere refusal to register will not justify the Court in drawing unfavourable inferences as to the motives of the directors; *In re Bell Bros. Ltd.*, 65 L.T., 246; *In re Coalport China Co.*, (1895), 2 Ch., 404. The original application for registration was made in respect of the transfers from Brown to the bank, not from Brown to Ballantyne and Bancroft. The letter of 10th June, 1902, is the only one

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relevant to this particular application. The letters in March, 1903, submit for registration transfers from the bank to Bancroft and Ballantyne, referring to Article of association No. 31. That article only applies to cases of devolution by operation of law. In June and September, 1902, the directors were, as far as the Court is concerned, justified in refusing to register. There is nothing in the circumstances of refusal to show fraud. There was a suit pending between Brown and the bank, and the directors might well be unwilling to register the transfers under those circumstances. If the rights of the bank were prejudiced by the refusal, they had still the right of proceeding by suit in equity to enforce their rights against Brown. Sec. 232 merely provides a summary remedy, to be applied only in certain special circumstances, but does not exclude the remedy by action. Article 29 imposes a restriction upon the right to transfer, which a shareholder assents to by becoming a shareholder. It is a matter of contract, and unless the reasons which actuate the directors are improper, capricious or frivolous, the Court will not interfere. The directors are not bound to give any reasons for their refusal. The *onus* is on the person complaining of the refusal to prove that the reasons are improper; *In re Coalport China Co.* (*supra*); *In re British Sugar Refining Co.*, 3 K. & J., 408, at p. 416; or that the refusal amounts to an absolute denial of the right to transfer; *Borland's Trustees* v. *Steel Bros. & Co.*, (1901) 1 Ch., 279. In the absence of evidence of improper motive the discretion of the directors should not be reviewed; *Ex parte Penney*, L.R. 8 Ch., 446; *Robinson* v. *Chartered Bank*, 35 Beav., 79; L.R., 1 Eq., 32; *Moffatt* v. *Farquhar*, 7 Ch. D., 591; *Stewart's Case*, L.R. 1 Ch., 574, at p. 585. The interests of other shareholders and creditors must be considered, not only those of the parties to the application; *White's Case*, L.R. 3 Eq., 84.

Many reasons may be suggested, which would justify the directors in refusing to register these particular transfers. First, Brown's name, as a large shareholder, was a valuable asset to the company, and other persons may have bought shares or become creditors on the faith of it, whereas there is no evidence that the bank was even entitled to hold shares. Although the shares were issued as fully paid up, the holder of them is liable

to be called upon to pay the amount that remains unpaid. *Dalton Time Lock Co.* v. *Dalton*, 66 L.T. (N.S.), 704, followed in *Bonang Gold Mining Co.'s Case*, 14 (N.S.W.) L.R. (E.), 262; *In re Ebenezer Timmins & Sons Ltd.*, (1902) 1 Ch., 238, at p. 243. The company cannot legally contract to treat shares on which there is a balance unpaid as fully paid up. Shareholders are liable to pay for them in cash; *Lindley on Companies*, 6th ed., vol. II., p. 1096.

[GRIFFITH, C.J.—I do not think there has been any case deciding that where the terms of the memorandum of association itself provide that the signatories shall take the shares as fully paid up, the contract is invalid. (He referred to *In re Whitehead & Bros.*, (1900) 1 Ch., 804, and *Palmer on Company Precedents*, 7th ed., p. 289).]

This is, at least, a doubtful point, and one which the directors might reasonably consider a ground for refusing to part with their claim against Brown. *Walker*, J., evidently thought that there was something in the point, because he made it a condition of his order that the bank should give the company an undertaking to indemnify them in respect of any money due or becoming due to them in respect of the shares, for which Brown would have been liable if he had remained on the register as holder of the shares. Unless the transferees took the shares with notice of this liability the company would have been estopped as against them from saying that there was a balance due upon the shares; *Burkinshaw* v. *Nicolls*, 3 App. Cas., 1004; *In re London Celluloid Co.*, 39 Ch. D., 190; *In re A. W. Hall & Co. Ltd.*, 37 Ch. D., 712; *Ottos Kopje Diamond Mines Ltd.*, (1893) 1 Ch., 618; *Buckley on Companies Acts*, 6th ed., p. 93. The company should not have been compelled by the Court to accept this undertaking in place of the liability of Brown, nor should the Court have drawn any inference unfavourable to the directors, from their unwillingness to accept the offer of the indemnity at the hearing.

It has been held that it is a sufficient reason for refusal to register, that the directors consider the transferee a "disagreeable person." It would be undesirable to have a bank on the directorate, and Brown's shares would have given them an almost preponderating influence in the company. The bank might be

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interested in rival mining companies, and therefore have conflicting interests. Or, if the company needed an advance of money, the bank might prevent the company from applying to other banks for that purpose, and, by compelling the company to wind up, obtain the company's property at its own price. The directors might naturally object to having a mere nominee, who would be bound to vote as he was told, on the register as a large shareholder.

[GRIFFITH, C.J.—But already Brown is a mere dry trustee of the bank, and bound to act as his *cestuis que trustent* direct. What advantage would there be in retaining him rather than another nominee ?]

We may have objected to these particular nominees.

[BARTON, J.—The conduct of the directors under the circumstances seems to afford some evidence of a refusal to transfer to any nominee of the bank.]

There were no reasons given at all. The directors were not bound to say that they objected to those particular men ; in *In re Bell Bros. Ltd.* (*supra*), the Court practically said that if the directors had only abstained from saying anything more than that they refused to register, the decision would have been the other way. In *In re Coalport China Co.* (*supra*), the directors were, under the articles, only entitled to refuse registration on certain limited grounds.

[GRIFFITH, C.J.—The Court may draw inferences of fact in the same way as the Court of Equity, which can draw any inference that a jury may draw.]

At the time of the refusal Brown was not a director. Even if he had been, no inference should be drawn unfavourable to the board merely because the transferror was one of the directors when the board refused registration ; *Bush's Case*, L.R. 6 Ch., 246. He may have been in favour of granting the application and have been over-ruled. This could have been settled by the minute book, which was in Court, but not used by the applicants. It could be put in evidence now by affidavit.

GRIFFITH, C.J.—I do not think that we can take fresh evidence on an appeal from the Supreme Court. An equity appeal to the Supreme Court is a rehearing, but this is not a rehearing in that sense.]

The bank were disentitled to have the application granted owing to their laches. They waited from 1897, when the shares were transferred to them, until 1902, before applying for registration. Other persons have bought shares and become creditors on the understanding that Brown was still a shareholder; *Walker's Case*, L.R. 6 Eq., 30; *Buckley on Companies Acts*, 6th ed., p. 135.

[GRIFFITH, C.J.—On your argument trusteeship of shares is a wrong thing, because it leads the public to believe that the trustees are shareholders.]

Leverrier followed. The Judge had no power to make an amendment on the application of the bank. The evidence showed that the application should have been made by Ballantyne and Bancroft, who were the transferees, and therefore the "persons aggrieved" by the refusal to register. The bank therefore had no *locus standi*, and the application should have been dismissed; *Walcott* v. *Lyons*, 29 Ch. D., 548; *Young* v. *Turner*, 14 A.L.T., 89; *Equity Practice of N.S.W.*, p. 97. On the application of the bank an amendment was allowed, by adding the names of Bancroft and Ballantyne as applicants. The amendment amounted to the allowance of a new application by Bancroft and Ballantyne, on a notice of motion filed by a party which had no cause of action. There was no party before the Court entitled to ask for such an amendment, and therefore there ought to have been a fresh proceeding, begun in the ordinary way by notice of motion. There was no notice of the new motion filed. The order of the judge was made in pursuance of the original notice of motion by the bank, reciting it. It is the invariable practice in the Court of Equity in New South Wales to commence proceedings by notice of motion. The affidavits filed under the notice of motion by the bank were not admissible on the new motion.

GRIFFITH, C.J.—The bank, as *cestui que trust* could have filed a bill in equity against the trustee and all other persons. The defect was therefore one of parties. If the bank would have been a good plaintiff, it would have been entitled to ask for an amendment by adding parties.]

The bank could not apply by motion under sec. 232, because the only persons entitled to do so are the transferror and trans-

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feree. The section substitutes the summary proceeding by motion for the proceeding by suit in equity, and no other persons than those mentioned in the section can take advantage of it.

Under Article 29, the transferror should have obtained from the directors their approval of the transferee before transferring the shares. The directors' approval of the proposed transfer is a condition precedent to the execution of the instrument. No evidence was given of any such approval, or that the directors were given the opportunity of approving or disapproving.

The burden of proof that the directors acted on improper or unreasonable grounds is upon the applicant. In the absence of positive evidence on that point the Court should assume that the directors acted *bonâ fide*. The transferees never actually asked to be registered, as they are required to do by the articles of association. The only application for registration made before the motion was by the bank, asking for registration of the transfers from Brown to the bank. It should have been made by Ballantyne and Bancroft, in whose names the transfers were to be registered.

Dr. Cullen and *Lamb*, for the respondents. If the appellant's contention is correct, the conduct of directors who refuse to register cannot be impeached under any circumstances. There is no presumption in favour of their *bonâ fides*. Their silence may be strong evidence against them. It is not necessary for the applicant to go so far as to prove fraud or *malâ fides*. It is sufficient to show that the only possible grounds of refusal are unreasonable, or that the directors have made a mistaken use of their power. If no proper reason can be discovered, the Court should compel the directors to register. The objection to registration must be based upon some personal unfitness of the transferee, and the reason of the transfers is immaterial; *Moffatt* v. *Farquhar*, 7 Ch. D., 591; *In re Bell Bros. Ltd.*, 65 L.T., 246. The mere fact that the transferees are nominees is not a valid ground of objection; *In re Coalport China Co.* (*supra*); *Pender* v. *Lushington*, 6 Ch. D., 70, at p. 75. The bank offered to substitute others if those particular nominees were objectionable. The right to transfer is a right of property of the shareholders, and the

directors cannot act in such a way as to render that right nugatory; *Pender* v. *Lushington* (*supra*). The fact that the transferee is the nominee of a rival company is not in itself a sufficient objection; *Robinson* v. *Chartered Bank*, L.R. 1 Eq., 32. In the present case there was no question of rivalry between the bank and the company. *Ex parte Penney*, L.R. 8 Ch., 446, is not against the respondent. The only evidence in that case was that there had been a tender of the transfer for registration and a refusal. There was therefore nothing from which the Court could infer that the directors were acting unreasonably.

As to the suggestion that Brown was still liable for £10 on each share for which so much cash had not been paid, even assuming that that was so, the bank offered to indemnify the company to that extent. There is no such liability here by virtue of sec. 1 of the *Companies Act*, No. 47 of 1900. If the directors were really anxious to retain Brown's name on the register for that reason, they would not have allowed the transfer of 497 of his remaining 498 shares to W. L. Brown, Forsyth and Lewington. The evidence shows that the directors had no proper reason for refusing to register. Their whole attitude indicates that they would not allow the bank to get any benefit from Brown's transfer, and that they would not accept any nominee of the bank at all. They have brought themselves within the ruling of *Chitty*, J., in *In re Bell Bros. Ltd.* (*supra*), which was a very similar case. The objection that the directors were not asked to approve or disapprove of the intended transfer, is met by *Moffatt* v. *Farquhar* (*supra*).

"Person aggrieved" in sec. 232 does not mean only the intending shareholder. It includes, for instance, executors and administrators. If the bank had not been a party to the application the company might have said that the nominees were not entitled to apply, because they were not really aggrieved. No point was taken below as to there being no evidence properly before the Court in the new motion after the amendment.

If the Court is of opinion that the Judge below had no power to impose the undertaking upon the bank, or to compel the company to accept it, the order could be amended by striking out so

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much as depended upon the undertaking. Although made part of the order, it is not an essential part.

Leverrier in reply. The appellants should not have been ordered to pay the costs of the original motion, and, if the order appealed from should be affirmed, the part referring to the undertaking should not be struck out, because the Judge partly based his decision upon the bank's giving it.

GRIFFITH, C.J. This is an appeal from an order made by Mr. Justice *Walker*, on an application under sec. 232 of the *Companies Act* for rectification of the appellants' share register by entering upon it the transfer of 7,000 shares, which stood in the name of one Alexander Brown, to Messrs. Bancroft and Ballantyne, nominees of the London Bank of Australia Limited. The bank are, with Messrs. Bancroft and Ballantyne, respondents in the appeal. The order appealed from was made on 24th May, and it appears from the order that the motion for rectification was first made on notice given on behalf of the respondents, the London Bank, alone. At the hearing the Judge in Equity ordered an amendment to be made in the notice of motion, by joining Bancroft and Ballantyne with the bank, as applicants. The order states that the amendment was made by the Judge after hearing arguments of counsel, and then recites that the London Bank had undertaken to indemnify the appellant company in respect of any moneys due or becoming due to the company on the 7,000 shares in the notice of motion mentioned for which Alexander Brown would have been liable if his name had remained on the register as holder of the shares, and proceeds to order the appellant company to forthwith register the seven transfers of shares of which particulars are then given, and to rectify the share register of the company by removing from it the name of Alexander Brown and entering the names of James Lindsay Ballantyne and Edward William Bancroft as holders of the shares mentioned in the transfers. An objection was taken that the amendment of the notice of motion was unauthorized by law, and that on that ground the motion should have been dismissed and this appeal should be allowed. The transfers in question were seven in number, for 1,000 shares

each, which were executed by Alexander Brown in blank, with authority to fill in the names of transferees, and which have been so filled in with the names of Ballantyne and Bancroft, 6,000 shares being transferred to the former and 1,000 to the latter. As a matter of fact Ballantyne and Bancroft are nominees of the bank, which is the only party beneficially interested in the shares. The bank made the application for rectification of the register. Before that the transfers had been sent to the company for registration and the company had refused to register them. Then the bank, being the only party interested, made the application to the Court in its own name, and during the hearing applied for an amendment as stated. The application was objected to by counsel for the respondent company, but was granted. It is contended now that the Court had no power to make the amendment. First of all it is urged that the motion by the bank could not be heard by the Court, because it did not come within the meaning of sec. 232, which provides that application may be made by "the person or member aggrieved." In this case, it is said, the bank is not a member, and the only persons aggrieved were Bancroft and Ballantyne. Technically, perhaps, the transferees are the only persons aggrieved. But as the case is now presented to us, it is not necessary to decide this point, though it might have been if there had been no amendment. In favour of the contention it is urged that this is a section which gives a summary remedy and procedure, and can only be taken advantage of by the persons for whose relief it is expressly intended. But the Court of Equity could give the same relief in a suit, and if the application had been made to the Supreme Court in its equitable jurisdiction that Court would have entertained it, and the principles of equity would have been applied. One of those principles is that the person who is in substance interested in a matter may move the Court in his own name, and may join the trustee as a party in the suit, either as a plaintiff or a defendant. But the power of the Court to entertain the suit and add necessary parties is never restricted merely on account of a original absence of formal parties.

It seems probable that the section was intended merely to substitute a summary method of proceeding for the old remedy by

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suit in equity. If that is so, the ordinary principles that are applied in the Court of Equity should be applied by the Court which deals with applications under the section. Supposing, however, that this is not so, and that under its Statutes the Supreme Court of New South Wales has no general power of amendment, then the matter must be regarded not as one of form but as a matter of substance and treated accordingly. The words of the section are "may by motion in the Supreme Court, either in its common law or in its equitable jurisdiction, or by application to a Judge in Chambers, or in such other manner as the Court may direct." There is, therefore, no restriction upon the powers of the Court as to the mode of hearing the application. The substance of the matter, if there was no power of amendment, is that a new motion was made on notice given orally on behalf of Ballantyne and Bancroft in open Court, in the presence of all the parties interested, after all the evidence had been given, and the whole of the facts were before the Court, and that under those circumstances the present order was made. In that view there is, in my opinion, nothing in the objection. It is said that the evidence given on the original motion was not admissible on the new one. There is, however, no weight in that objection. The affidavits were properly entitled, although, when filed, they were intended to be used on an application by different applicants. But, where an objection is taken before a Court of Appeal as to the reception of evidence, it is never allowed if the defect could have been cured by amendment or adjournment in the Court below, without prejudice to the objecting party. That objection, therefore, fails. There was another objection, also a technical one, viz., that the application to the company for registration was not made in the name of the persons entitled to be registered, that it should have been made in the names of Ballantyne and Bancroft, and not of the bank. But it was proved that the transfers were sent to the company with a request for registration by the solicitors for the bank, who were the parties beneficially interested, and, inasmuch as both Ballantyne and Bancroft were officers and nominees of the bank, we may take it as a matter of inference of fact that the application was made and understood by the company to be made on behalf of the persons formally entitled. Substantially the bank was the transferee.

With respect to the merits there is no dispute as to the law. A share in a joint stock company is defined by sec. 235, which provides that it "shall be personal property, capable of being transferred in manner provided by the rules of the company." Now the regulations of a company may, and often do, modify this right of transfer. Sec. 29 of the articles of association of the appellant company is in the following terms: [His Honor read the article.] The contention made for the appellants was that this article practically made the shares in the company non-transferable, and that it was in the absolute discretion of the directors to decide whether shares should be transferred or not. That, however, is inconsistent with sec. 235 and with decisions which have been given in English cases under the *Companies Acts*, since that Act became law. The earliest is *Robinson* v. *Chartered Bank*, L.R. 1 Eq., 32, a case of a bill to compel a company to allow a transfer of shares, in which it was held that the company had practically, by refusing to transfer, deprived the plaintiffs of the enjoyment of their property, and that a refusal to make any transfer at all was not a reasonable exercise of their powers by the directors. The next case was *Ex parte Penney*, L.R. 8 Ch., 446. There the company was an insurance company, not at the time under the *Companies Act* of 1862, but afterwards registered under it. A clause of the deed of settlement provided that "every shareholder shall be at liberty to sell and transfer his shares to any other person who shall already be a shareholder, or who shall have been approved of as such by the board of directors, and that no person not already a shareholder, or the executors or administrators, legatee or next of kin, of any shareholder shall be entitled to become the transferee of any share unless approved of by the board." In that case the only facts were that some shares were sold on the Stock Exchange in the ordinary way, and the transfer was executed and lodged for registration at the company's office, but the directors declined to register the transfer or give any reason for their refusal, and an affidavit filed by the secretary stated that the directors had arrived at their determination "upon deliberation and after consideration, and with reference only to the circumstances of the case." That was all that was before the Court. *James*, L.J., said (at p. 449):

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"No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this Court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon that ground it must be made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. That must be alleged and proved, and the person who has a right to allege and prove it is the shareholder who seeks to be removed from the list of shareholders and to substitute another person for himself." He goes on to give some instances of an improper exercise of the power of refusal, and further on he says: "If there is no such corrupt or arbitrary conduct as between the directors and the person who is seeking to transfer his shares, it does not appear to me that this Court has any jurisdiction to sit as a Court of Appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed. If the directors had been minded, and the Court was satisfied that they were minded, whether they expressed it or not positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose, the Court would probably, in exercise of its duty as between the *cestui que trust* and the trustees, interfere to redress the mischief, either by compelling the transfer or giving damages, or in some mode or other to redress the mischief which the shareholder would have had a just right to complain of." That learned Lord Justice indicated as his opinion that the directors have no power to prevent a shareholder altogether from parting with his shares. In that case nothing appeared but that the directors refused to register the transfer without giving any reason whatever. *Mellish*, L.J., pointed out that " this being an insurance company, it is quite obvious that it may be a matter of very great importance to the company that they should have a substantial body of shareholders;" and, at the conclusion of his judgment, he said: "I am, therefore, of opinion that in order to preserve to the company the right which is given by the articles a shareholder is not to be put upon the register if the board of directors do not assent to him,

and it is absolutely necessary that they should not be bound to give their reasons, although I perfectly agree that if it can be shown affirmatively that they are exercising their power capriciously and wantonly, that may be ground for the Court interfering."

Then he referred to *Robinson's Case*, taking it to be a case in which the directors had refused to allow a transfer at all to anybody, and added: "I quite agree that this would be a breach of trust towards the shareholders. They have no right to say, 'we will force a particular shareholder to continue a shareholder, and we will not allow him to transfer his shares at all.' That would be an abuse of their power. In the same way it would be an abuse of this power to object, on any ground not applying personally to the transferee, to say, for instance, that a particular shareholder should not transfer his shares till he had given security for the calls. These would be plain cases of abuse, and I do not find any single case where it has been held that the directors, under a power like this, are bound to communicate the reasons for which they reject the intended shareholder." That was in 1872, and was decided by Judges very learned in company law. Then in 1891 came *Re Bell Bros. Ltd.*, 65 L.T. (N.S.), 245, before *Chitty*, J. I will read a few words from the beginning of his judgment. He says (at p. 245): "According to the constitution of this company, every shareholder is entitled to transfer his shares to any person not being an infant, lunatic, married woman or under any legal disability. This right, which is a right of property, is subject to the discretionary power conferred on the directors by Articles 18 and 34, of approving of the person to whom the transfer is made, and of rejecting the transfer on the ground that they do not approve of the transferee. The discretionary power is of a fiduciary nature, and must be exercised in good faith; that is legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it, the directors must act in good faith in the interests of the company, and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting. When the Court once arrives at the conclusion that the directors

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have in good faith rejected a tranfer on the ground that the transferee is not a fit person to become a member of the company, it will not review the directors' decision"; and goes on to state that "the directors are not bound out of Court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, in giving such evidence, they refrain from stating their reasons, the Court will not, merely on that account, draw unfavourable inferences against them." The learned Judge then went on to examine the facts of the case, to see whether the directors had brought themselves within the rule.

In the *Coalport China Company's Case*, (1895) 2 Ch., 404, which is the only other one that need be mentioned, there was nothing in the case except that the directors had refused to register the transfer. *Lindley*, L.J., pointed out (at p. 407), that it was for those who say that the directors have exercised their power improperly to give some evidence to that effect. "Here," he said, "there is absolutely none." And later on, he said (at p. 409): "I have not the slightest doubt that the Court has ample power to control the refusal of directors, or the exercise by them of their power to refuse, provided that there is some evidence which justifies the Court in coming to the conclusion that they have not done their duty; but in the absence of all such evidence the Court has no right to presume—it is contrary to the ordinary principles of justice to do so—that they have done wrong, but it must be presumed that they have done right." *Rigby*, L.J., summed up the rule again thus: "Even though in terms the power is absolute, it is a fiduciary power, it is to be exercised for the benefit of the company, and with due regard to the rights of the transferee; so that no power is absolute in that sense." It appears, therefore, that the directors, in exercising this power, must have due regard to the rights of the transferee, and also to those of the shareholders.

Bearing in mind these principles, the next thing is to apply them to the facts of the present case, as was done by *Chitty*, J., in *Bell Bros.' Case*. These facts are interesting, and, when carefully looked at and considered, they leave no room for doubt as to the

conclusion which must be drawn as to the conduct and motives of the directors in refusing to register the transfer.

[His Honor then stated the facts as reported above, and proceeded.]

Now what inference is to be drawn from these facts? In the first place, when the transfers were sent in for registration, the managing director, holding 7,498 shares, refuses to register his own transfers. Holding half the shares in the company, his influence with the board must have preponderated. It appears that he had some dispute with his transferees, and the bank had to take proceedings against him in equity. He remained a director during the proceedings, and again the request to register was refused. At the moment that the decree is pronounced and he is restrained by injunction from interfering with or hindering the registration, he resigns from the board, and a sufficient number of his shares are transferred to Forsyth, who becomes a director in his place, whilst he himself remains a shareholder in the company with one share. The whole matter is then brought before the company, and the three directors, Forsyth, W. L. Brown, the son of the transferror, and Sir George Dibbs, the last-named being indebted to the extent of £20,000 to the bank, refuse to register the transfer, giving no reason whatever for their refusal. What conclusion are we to draw? The only conclusion that is possible for sensible men to draw in such circumstances is that the company was resolved that the bank should not get the benefit of Brown's transfer, and should not get the benefit of the trust. It was all very well for the Court to declare that Brown was a trustee for the bank, and to order him to abstain from hindering the registration of the transfers; the company said, "we shall not allow any other person to join the company except those whose names are already on the register." Clearly, according to the authorities, the directors had no right to act in that way. Their refusal to register was clearly within the rule that the directors will not be allowed to absolutely prohibit the transfer of shares by a shareholder, and, not only that, it was obviously done to prevent the transferees from enjoying their rights. The company has done nothing to suggest that there was any *bonâ fide* objection to the bank's nominee. On the contrary, when invited to say what

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were their reasons they absolutely declined to give any. The case in that respect differs from any of the others that have been referred to. The bank having shown that the nominees were officers of the bank, and having requested the company to say whether they had any objection to them personally, and to suggest any nominees in their place, the company simply say that they decline to register. Under these circumstances I think that the order of the learned Judge was right in directing that the share register be rectified by registering the transfers and entering the names of the bank's nominees as holders of the shares transferred.

There is another matter to be considered. It appears that the bank, by letter, offered to guarantee the amount of Brown's liability for calls on the shares, if any calls could be made on them. There was a suggestion that Brown could have been made liable for the full amount of the shares although they were nominally paid up. At the hearing counsel for the bank, somewhat incautiously perhaps, offered to give such a guarantee. The learned Judge accepted the offer, and practically made his judgment dependent on that condition, and the undertaking is embodied in the order. There does not seem to have been any argument on the point. But it appears to me that if the Court could not make the order except on such an undertaking it could not make it all. I think that it was not in the power of the Court to impose such a condition, and it would be a dangerous precedent to allow it to stand as part of the order.

As to the suggested reasons that might have operated on the directors in refusing registration: First, as to the suggestion that the liability of Brown was an asset which the directors might naturally be disinclined to part with, that was sufficiently disposed of during the argument. The right of the transferror is a right of property the exercise of which can only be prevented for some valid reason. Secondly, if the liability of the shareholder for the full amount of the shares, as uncalled capital, is a sufficient reason for refusing to register a transfer of his shares, that is practically denying the right of transfer to anyone who has signed the memorandum of association of a company. The third reason, that the bank's nominees might have been considered disagreeable persons, is met by the conduct of the directors when the bank offered to

substitute any nominees whom the directors would name. The fourth reason, that it was undesirable for a bank to have a controlling or large influence in the company, is met by *Bell Bros.' Case*. The fifth reason, that the company might naturally object to registering nominees, is met by *Bell Bros.' Case*, and the case of *Pender* v. *Lushington*. These are all the reasons that have been suggested, and on examination they all appear to be idle and trivial. The real reason is to be discovered from the evidence, and it amounted to a breach of trust on the part of the directors, if they acted upon the motives that their counsel has suggested.

The order therefore should be amended by omitting the condition as to the undertaking, but with that variation it will be affirmed.

BARTON, J. The judgment of the *Chief Justice* has been so exhaustive that I feel that I could not with advantage add anything to what he has said.

O'CONNOR, J. I am of the same opinion.

Appeal dismissed. Order of Supreme Court varied by omitting undertaking. Order so varied affirmed. Appellants to pay the costs of the appeal.

Solicitors, for appellants, *Dawson, Waldron & Glover.*

Solicitors, for respondents, *Macnamara & Smith.*