[HIGH COURT OF AUSTRALIA.]

THE MANNING RIVER CO-OPERATIVE DAIRY COMPANY LIMITED . } APPELLANTS;

AND

SHOESMITH AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 14, 15, 22.

Griffith C.J., Isaacs and Rich JJ.

Company—Shares—Transfer—Refusal of registration—Discretion of directors—Increase of voting power—Transfer to a trustee for transferor—Articles of association—Companies Act 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *secs.* 232, 235.

By the articles of association of a company incorporated in New South Wales it was provided that shareholders should be entitled to vote according to the number of shares held by them as follows: holders of 1 share to 10 shares 1 vote, holders of 11 to 25 shares 2 votes, holders of 26 to 50 shares 3 votes, holders of over 50 shares 4 votes. It was also provided that shares should be transferred only at the discretion of the directors.

Held, that the directors might properly, in the exercise of their discretion, refuse to register a transfer of a share where the whole beneficial interest in the share was retained by the transferor and the transfer was made for the purpose of increasing the voting power of the transferor.

Decision of the Supreme Court of New South Wales (*Simpson* C.J. in Eq.): *In re Manning River Co-operative Dairy Co. Ltd.*, 14 S.R. (N.S.W.), 344, reversed.

APPEAL from the Supreme Court of New South Wales.

The Manning River Co-operative Dairy Co. Ltd, was a company incorporated in 1892 under the *Companies Act* 1874. Among the articles of association were the following:—

"9. Shares in the Company shall be transferred only at the discretion of the directors and in the following form:—

"I of in consideration of the sum of pounds paid to me by of do hereby transfer to the said the share numbered standing in my name in the books of 'The Manning Co-operative Dairy Company Limited' to hold unto the said his executors administrators and assigns subject to the several conditions on which I hold the same at the time of the execution hereof. And I the said do hereby agree to take the share (or shares) subject to the same conditions.

As witness our hands this day of 19 .

"10. The directors may decline to register any transfer of shares made by a shareholder if he either alone or jointly with any other person or persons is indebted to the Company on any account whatsoever."

"33. At all meetings all motions, questions and propositions which shall be submitted for determination shall unless otherwise specially herein provided be primarily decided by the majority in number of the persons present or represented at such meeting and qualified to vote . . . and upon every show of hands or ballot each shareholder or his proxy shall be entitled to vote in respect of the shares which he shall hold as follows, viz.: 10 shares and under 1 vote, 25 shares and over 10 shares 2 votes, 50 shares and over 25 shares 3 votes, 100 shares and over 50 shares 4 votes. No shareholder shall hold more than 100 shares, and no shareholder shall be entitled to vote until the amount of every over-due call made in respect of his shares together with interest and expenses thereon, if any, should have accrued shall have been fully paid . . ."

One William Henry Shoesmith was the holder of eight fully paid shares in the Company. On 5th March 1914 Shoesmith executed a transfer of one of his shares to Hector George Hinten, and on 16th March the transfer was lodged with the Company for registration. On 2nd June at a meeting of the directors a resolution was carried that registration of the transfer, along with several others, be refused on the ground of "vote splitting."

Shoesmith and Hinten then moved under the *Companies Act* 1899 for rectification of the register of the Company by the

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removal of Shoesmith's name, and the substitution of that of Hinten, as the holder of the one share.

The motion was heard by *Simpson* C.J. in Eq., who held that the reason given by the directors for refusing to register the transfer was not a sufficient one, and he therefore made an order for rectification as asked: *In re Manning River Co-operative Dairy Co. Ltd.* (1).

From that decision the Company now, by special leave, appealed to the High Court.

Further facts are stated in the judgments hereunder.

Knox K.C. (with him *Cowan*), for the appellants.

R. K. Manning, for the respondents.

During argument reference was made to *Borland's Trustee* v. *Steel Brothers & Co. Ltd.* (2); *In re Stranton Iron and Steel Co.* (3); *In re Discoverers Finance Corporation Ltd.*; *Lindlar's Case* (4); *Moffatt* v. *Farquhar* (5); *Re Bell Brothers Ltd.*; *Ex parte Hodgson* (6); *In re Gresham Life Assurance Society*; *Ex parte Penney* (7); *New Lambton Land and Coal Co. Ltd.* v. *London Bank of Australia Ltd.* (8); *Re Phœnix Life Assurance Co.*; *Ex parte Hatton* (9); *In re Smith, Knight & Co.*; *Ex parte Weston* (10); *Blackburn* v. *Flavelle* (11); *Anning* v. *Anning* (12); *Trevor* v. *Whitworth* (13); *Pender* v. *Lushington* (14); *Salomon* v. *Salomon* (15).

Cur. adv. vult.

April 22.

The following judgments were read:—

GRIFFITH C.J. By the articles of association of the appellant Company it is provided (art. 33) that shareholders shall be entitled to vote according to the number of shares held by them as follows: holders of 1 share to 10 shares 1 vote, holders of

(1) 14 S.R. (N.S.W.), 344.
(2) (1901) 1 Ch., 279, at p. 288.
(3) L.R. 16 Eq., 559.
(4) (1910) 1 Ch., 312, at p. 316.
(5) 7 Ch. D., 591.
(6) 65 L.T., 245.
(7) L.R. 8 Ch., 446.
(8) 1 C.L.R., 524.
(9) 31 L.J. Ch., 340.
(10) 38 L.J. Ch., 49.
(11) 6 App. Cas., 628.
(12) 4 C.L.R., 1049.
(13) 12 App. Cas., 409, at p. 440.
(14) 6 Ch. D., 70.
(15) (1897) A.C., 22.

11 to 25 shares 2 votes, holders of 26 to 50 shares 3 votes, holders of over 50 shares 4 votes. Art. 9 provides that shares in the Company shall be transferred "only at the discretion of the directors," and art. 10 provides that the directors may decline to register a transfer of shares made by a shareholder who is indebted to the Company.

The respondent Shoesmith is the holder of eight shares in the Company, and is therefore entitled to one vote only. He proposed to transfer seven of his shares to seven other persons of whom the respondent Hinten was one, and the directors in asserted exercise of their discretion under art. 15, resolved "that the transfers be refused on the ground of vote splitting." They had before them grounds for believing, and it is not now contested, that Hinten was to hold the shares as trustee for the transferor.

The power of a member of a joint stock company to transfer his shares is conferred by the *Companies Act* 1899, sec. 235, which declares that the shares shall be personal property capable of being transferred in manner provided by the rules or regulations of the company. These latter words have been construed by the Courts as authorizing the company by its articles to impose fetters upon the right of transfer, which would otherwise be unfettered. The provisions of art. 15 in the present case are, therefore, to be regarded as restrictive, but the restriction can only operate in cases in which the articles confer a discretion upon the directors. That discretion may be limited or unlimited. In all the reported cases to which we were referred in argument the discretion was limited to a specific matter or specific matters. In the present case it is in form unlimited. It is a settled rule, to use the words of *Chitty* J. in *Re Bell Brothers* (1), that "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". To this the learned Judge added that "they must fairly consider the

(1) 65 L.T., 245.

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question of the transferee's fitness at a board meeting." These last words had reference to the particular case, in which the only discretion conferred upon the directors depended upon the fitness of the transferee. I venture to add that, in my opinion, the matters to be taken into consideration where, as in the present case, the discretion is expressed to be unlimited, include the interests of the other shareholders. But the discretionary power of refusal can only be exercised upon grounds relevant to some matter which the directors are authorized to take into consideration. If it is exercised on grounds not relevant to such a matter the exercise is not within the power, and the Court will enforce the transferor's *primâ facie* right to dispose of his property. But unless it so appears the Court will not interfere with the exercise of their discretion.

In the present case the question for determination is whether, when the voting powers of the persons associated in the adventure under the contract contained in the articles of association are limited by the mutual bargain therein expressed (as in this case, where it is stipulated that a holder of not more than ten shares shall have only one vote), a transfer which is intended to have and, if allowed, will have, the effect of increasing the voting power of the transferor in respect of the shares beneficially owned, though not nominally held, by him to more than one vote, can be regarded by the directors as an attempt by the transferor to acquire an unfair advantage over the other shareholders in the control of the affairs of the Company, and, if so, whether such an attempt is a relevant matter to be taken into consideration by them in the exercise of their discretion. It is plain that when a share is transferred to a person who is to hold it as trustee for the transferor, so that the transfer does not *bonâ fide* divest the transferor of all benefit, it is, in one sense, not a *bonâ fide* transfer at all: *Lindlar's Case* (1). Such questions have generally arisen in the case of transfers of shares not fully paid in companies *in extremis*, but the principle seems to be that such a transfer is a violation of the mutual rights of the associated co-adventurers. The *obiter* opinion of *Chitty* J. in *Re Bell Brothers* (2), relied upon by the respondent, and similar opinions

(1) (1910) 1 Ch., 312.

(2) 65 L.T., 245.

expressed in other cases, that directors cannot take into consideration the fact that a proposed transfer is intended to have the effect of increasing the voting power of the transferor, were all given in cases in which the discretionary power of the directors was limited and did not authorize such matters to be taken into consideration by them.

The case appears, therefore, to be free from authority. I have no difficulty in holding that the question which I have stated should be answered in the affirmative.

The terms of art. 9 are "only at the discretion of the directors." In my judgment, the discretionary power of refusal conferred by these words is not limited by art. 10, and includes a power to refuse approval to a transfer upon the ground that the proposed transfer is an attempt by the transferor to obtain an unfair advantage over his co-adventurers in contravention of the bargain to which they were all parties.

Before exercising their discretion, the directors must, of course, satisfy themselves as to the facts in the best way open to them. Having done so in a reasonable manner, they are in my opinion entitled, and indeed bound, to act upon the facts as they so appear to them. In the present case it appears that immediately before the consideration of the proposed transfer by the directors the transferor had said to the chairman of directors:—"I had eight shares in the Company. I split up my eight shares to get votes, and now I have eight votes instead of one."

From this statement it was an inference that might reasonably be drawn, and is now admitted to have been properly drawn, that the respondent Shoesmith had not by the transfer divested himself of the beneficial ownership of the shares. If this were so, all the rest follows, and the refusal to approve the transfer cannot be impeached as not being a *bonâ fide* exercise of discretion upon a relevant ground. It is not necessary to consider what would be the right of a transferor if the supposed facts on which the directors acted were non-existent, but the observations of *James* L.J. in *Penney's Case* (1) do not afford any encouragement to the view that in such a case the Court would interfere,

(1) L.R. 8 Ch., 446.

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if it appeared that they had honestly investigated the matter before exercising their discretion.

The appeal should therefore be allowed.

ISAACS J. Some very important questions in company law arise in this case.

Shoesmith's and Hinten's combined application was made under sec. 232 of the *Companies Act* 1899, which requires the Court, before making an order for the rectification of the register, to be "satisfied of the justice of the case" (*Sichell's Case* (1) and *Trevor* v. *Whitworth* (2)). If it is not so satisfied, it will not make the summary order, but direct or leave the question to be determined by action or suit (*Ex parte Shaw* (3) and *Penney's Case* (4)).

The "justice of the case" does not mean justice according to some ethical standard, which appeals to the Court's sense of honour: it means justice measured by the rights which the law creates and protects; that is, legal rights or equitable rights, as ordinarily recognized.

For instance, in *Trevor* v. *Whitworth* (5), Lord *Macnaghten* took as an illustration the necessity Lord *Cairns* felt in *Sichell's Case* (6) to go into all the circumstances, and consider what equity the applicant had to call for the Court's interference; and Lord *Macnaghten* himself proceeded to inquire whether the applicant had an equity to set the Court in motion.

In *Bellerby's Case* (7) *Collins* M.R., in dealing with the view of *Kekewich* J. that he was not satisfied of the justice of the case, quoted these words of Lord *Shand* in a Scottish case:—"If the legal right of the company be clear, then it follows that the justice of the case requires that effect shall be given to that right." *Bellerby's Case* (8) was an action, but the observation nevertheless had reference to the phrase in question.

In *Sargent's Case* (9), *Jessel* M.R. adopted and acted on the view of the section stated by *Channell* B. in *Ward's Case* (10).

(1) L.R. 3 Ch., 119, at p. 122.
(2) 12 App. Cas., 409, at p. 440.
(3) 2 Q.B.D., 463.
(4) L.R. 8 Ch., 446, at p. 448.
(5) 12 App. Cas., 409.
(6) L.R. 3 Ch., 119.
(7) (1902) 2 Ch., 14, at p. 27.
(8) (1902) 2 Ch., 14.
(9) L.R. 17 Eq., 273, at p. 281.
(10) L.R. 3 Ex., 180, at p. 184.

Those words are:—"If the applicant shows a clear right to have his name put on or taken off the register, then, as the result of determining this question, the Court will ministerially exercise the power of rectifying the register; but the right must first be established." And this may be done even retrospectively (*In re Sussex Brick Co.* (1)).

We start, therefore, with this: that the applicants have to show a clear right—that is, a clear legal or equitable right—to compel the Company to register the transfer.

Then what right do they show?

The facts make it undoubted, that Shoesmith's seven transfers were, as between himself and the proposed transferees, merely empty form. The essential truth in every instance was that Shoesmith did not part, or intend to part, with any of his proprietary benefit in the shares to any of those persons, and they never intended to obtain any benefit. They, if registered, would be in fact his marionettes, lending him their names, but doing whatever he willed, and assisting him formally to do what he willed in respect of the shares, taking no burdens to the Company because the shares were fully paid up, accepting no obligation towards Shoesmith, but handing over to him mechanically all the benefits to be received. Hinten, then, has no equitable right whatever to get on the register, and Shoesmith has no equitable right to place him there. What are their respective legal rights? As between each other—none.

It comes down to this: that, in order to succeed, Shoesmith or Hinten must in the first place, and before we reach the question of discretion to refuse or the question of any equity against Shoesmith, show a strict legal right to compel the Company to register the transfer. It is transparently clear that Hinten can have none if Shoesmith has none; and so the question refines itself into the inquiry—What legal right has Shoesmith to insist on registration?

Now Shoesmith's argument is this:—He says he has the proprietary right in the eight shares, and a consequent right to transfer them, or any of them, to whomsoever he pleases, subject only to whatever restriction he has agreed to, by the social

(1) (1904) 1 Ch., 598.

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compact of the Company; and he asserts there is no restriction applicable.

The Company's refusal to register the transfers was on the single ground that they were "vote splitting."

There is no provision in the articles directly aimed at vote splitting, either as an absolute legal restriction or as a specific subject of discretion. Art. 33 prohibits more than four votes by any shareholder at any general meeting, and prohibits any shareholder holding more than 100 shares. That is a definite consensual restriction of rights. The enforcement of art. 33 is in no way dependent on discretion; no violation of the article can be permitted. There is in addition, however, a general provision in art. 9 that "shares in the Company shall be transferred only at the discretion of the directors and in the following form." Art. 10 gives power to the directors to decline registration of a transfer where the shareholder is indebted to the Company. It was faintly suggested that that limited the generality of art. 9, but the suggestion was not pressed, and is untenable.

The power given by art 9 is general, and in the fullest literal terms, and it distinguishes this case from the *Stranton Case* (1) and from *Moffat* v. *Farquhar* (2). So long as it is exercised *bonâ fide*, and within the limits of the purpose for which it was created, no Court can review the determination of the directors. No question arises here as to the *bona fides* of its exercise, but the respondent Shoesmith contends it has been attempted to exert it beyond its true limits. Both *Penney's Case* (3) and the *Coalport China Co.'s Case* (4) show that the power, wide as it is in terms, is not arbitrary or capricious. It is given by the shareholders to the directors for the purpose only of the Company's welfare, and to that extent a limitation of individual rights is assented to. In the latter case (5) *Rigby* L.J. said of the power, "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." And it is equally true that it is to be exercised with due regard for the rights of the transferor.

(1) L.R. 16 Eq., 559.
(2) 7 Ch. D., 591.
(3) L.R. 8 Ch., 446.
(4) (1895) 2 Ch., 404.
(5) (1895) 2 Ch., 404, at p. 410.

It is no answer to an exercise of discretion under such a power, to say that the ground on which they have proceeded is outside any express prohibition in the articles. As I have pointed out, discretion is not wanted for that. But if, outside any express provision, the directors as business men, and with a faithful desire to protect the interests of the Company, determine under such a power, upon some ground on which fair-minded men in such a situation might reasonably consider registration detrimental to the interests of the Company, that a particular transfer should not be registered, their decision cannot be questioned or overruled in a Court of law. Shareholders who have agreed to abide by the honest discretion of directors for the common welfare, cannot ask a Judge to override it. In arriving at their decision, they must not take into account considerations plainly foreign to the matter, for then they would vitiate the result.

So far, I have stated the legal propositions which each side has relied on—First, Shoesmith asserts a clear legal right to transfer; and next, the Company meet it with a discretionary refusal.

It will be convenient to consider the second one first; though the other is the more radical feature of this case.

I should again observe that the one ground on which the directors refused registration was that the transfer amounted to "vote splitting." Having stated their single ground of objection, it must be assumed no other objection operated to influence their discretion. See *per* Lord *Herschell* in *Balkis Consolidated Co.* v. *Tomkinson* (1), and *per Chitty* J. in *Bell Brothers' Case* (2).

Their action is defended on the ground that Shoesmith was in effect doing what was forbidden. His reply is that he was doing something entirely different—that he was not asking to give more than four votes at a meeting, in respect of shares held by him as a shareholder, but to give up his position in respect of some of his shares, leaving the law to settle voting rights afterwards, as in *Pender* v. *Lushington* (3). Literally he is right in that contention, but it does not meet the discretionary power in art. 9.

(1) (1893) A.C., 396, at p. 407. (2) 65 L.T., 245, at p. 246.
(3) 6 Ch. D., 70.

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Art. 33 is framed upon a distinct view, namely, to limit any one member exercising direct control at a general meeting, beyond the force of four votes, and to prevent him from exercising indirect control of meetings beyond the legal attributes of 100 shares, by buying out other persons, and thereby lessening the number of adverse votes. That is a very clear policy, and it cannot be doubted that the foundation of art. 33 is the prevention of what the Company considers excessive individual control. Such excessive control is assumed to be in principle inimical to the interests of the Company.

Now, it is true that excessive individual control is not *eo nomine* and in all forms proscribed as an end. That would be difficult to phrase as a legal restriction. It is true also that one means only—namely, art. 33—whereby excessive individual control is prevented, has been adopted as a legal restriction. And I agree that the refusal to register is not sustainable on the ground that the transfer is a breach of the actual provisions of art. 33.

But it cannot, in my opinion, be fairly said that with that clear demonstration of general policy, and of what is regarded as inimical to the Company's interests, before them, the directors in acting with that policy in view, in exercising their discretion to refuse a transfer, are acting, to use the words of *James* L.J. in *Penney's Case* (1), "from some improper motive, or arbitrarily and capriciously." To apply a phrase of *Mellish* L.J. in the same case (2), "it may be a matter of very great importance to the company" that no person should be able at his own will to directly control more than four votes at a general meeting.

I am, therefore, of opinion that the directors, in acting upon that as a principle, were not abusing their power, or applying any consideration foreign to its object, and as their *bona fides* is unquestioned, and on the facts unquestionable, I think that so far as discretion enters into this matter at all as a necessary element, their determination must stand.

But, I am also distinctly of opinion that we do not really reach the point where discretion is material. The very foundation of Shoesmith's position is that he has a right to dispose of his

(1) L.R. 8 Ch., 446, at p. 449. (2) L.R. 8 Ch., 446, at p. 451.

property as he pleases. So he has. But has he disposed of his shares at all? Has he in truth transferred them? Or has he only pretended to? Is it, as *Campbell* L.C. said in *Hyam's Case* (1), "a mere fable they were acting, not intended to have any real operation," that is, as between themselves? This involves a short examination of what the right is, because, if it is a right simply to make a real transfer, and to have that recorded in the Company's register, then he has not yet exercised his right, and there is nothing to record; the form he presents is unsubstantial; the transaction it purports to effectuate is unreal.

Can such a transaction ever be fixed upon a company?

In *R.* v. *Lambourn Valley Railway Co.* (2), a mandamus was sought to compel registration of a transfer of shares. The case was actually decided on the discretionary power of the Court to grant mandamus, but *Pollock* B. in a dictum, after reference to authorities, said (3) "these authorities in substance support the proposition that if the transfer be real, it will be upheld." In my opinion, that correctly represents the effect of the authorities.

De Pass's Case (4) was decided in 1859, and the applicants were held free from liability as contributories, because their shares were "absolutely and *bonâ fide* parted with by the appellants, out and out, without any trust for their benefit, or any reservation whatever" (5). In *Hyam's Case* (6), in the same year, *Turner* L.J. said of the shareholders: "that they could make a mere nominal transfer of the shares, in trust for themselves, I beg leave altogether to dispute."

In *Costello's Case* (7), November 1860, *Turner* L.J. says that the power to transfer shares means a *bonâ fide* transfer in the sense of being not a mere colourable or unsubstantial transaction. In *Budd's Case* (8), in 1861, the same position is maintained.

Then in 1862 came the *Companies Act*, which provided, just as the New South Act of 1899 provides by sec. 235, that shares in a registered company shall be "personal property, capable of

(1) 1 De G. F. & J., 75, at p. 79.
(2) 22 Q.B.D., 463.
(3) 22 Q.B., 463, at p. 466.
(4) 4 De G. & J., 544.
(5) 4 De G. & J., 544, at p. 558.
(6) 1 De G. F. & J., 75, at p 80.
(7) 2 De G. F. & J., 302, at p. 308.
(8) 3 De G. F. & J., 297, at p. 305.

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being transferred in manner provided by the rules or regulations of the company."

There is no doubt in my mind that the word "transfer" was used, and is used, in the same sense as it was understood and defined in the prior decisions.

It is necessary to bear in mind from this point that the whole matter rests on a statutory basis. The Company itself, its attributes, the nature of the shares, their attributes, and the powers and rights of the members in relation to the shares, depend on the Statute, and any contractual modifications permitted by it. The right claimed by Shoesmith of transferring his share to Hinten depends on sec. 235 and the meaning of the word "transferred" in that section, and not on any general common law power of disposition. If that word "transferred" includes the right of substituting a mere nominee for the shareholder's name, then, apart from the question of discretion, he is right; if not, he is wrong.

The cases decided under the Act, following the earlier cases, in my opinion show that "transferred" is not satisfied by executing a nominal transfer.

In *Masters' Case* (1), a contributory case, both *James* L.J. and *Mellish* L.J. took as the test whether the transfer was a sham or represented a real transaction.

Cawley & Co.'s Case (2) was an application under sec. 35 of the Act to compel registration. Lord *Esher* M.R. says (3):— "It is not suggested that he" (the transferor) "was making a nominal transfer to the clerk with the intention of keeping the shares in his own power or under his own control. It was, then, a real transfer made with the motive I have stated." The motive stated was to avoid a prospective call. His Lordship held that the Company ought, in view of the circumstances, ministerially to have registered the transfer.

Lindlar's Case (4) is a case of high authority. Some observations on page 318 were relied on as to the right of a shareholder to transfer to a trustee for him, and Mr. *Manning*, who put his case well, urged that where the shares were fully paid

(1) L.R. 7 Ch., 292, at p. 301.
(2) 42 Ch. D., 209.
(3) 42 Ch. D., 209, at p. 225.
(4) (1910) 1 Ch., 312.

up, the objection referred to by the Court in *Lindlar's Case* did not exist. It is unnecessary here to say what precisely the true import and effect of the passage referred to may be, as to a company in any case being compelled to register a transfer to a mere trustee for a shareholder. One thing is clear from that case, as from prior cases, namely, that the transfer of property allowed by the Act is not a mere nominal transfer, with nothing of substance behind it. That, in the words of the judgment in that case, is "purporting to do one thing and in fact doing another."

In my opinion the applicants fail at the threshold, because there was no real transfer of the shares at all, and the motive of vote splitting only becomes material as the dominating circumstance, leading to the conclusion of fact that the transaction was of a merely formal and nominal character, attracting no legal right of enforcement.

The appeal should, therefore, be allowed.

RICH J. The New South Wales *Companies Act* 1899 (sec. 235), like its model the English Act, gives a free right of disposition of shares subject to such restrictions and limitations upon its exercise as may be imposed by the articles. Restriction of the power of transfer of shares is often desirable especially in a co-operative company such as this. *Chadwyck Healey*, 3rd ed., at p. 90, says:—"Again, an owner of shares may distribute them amongst his nominees for the mere purpose of securing votes, and may insist on the registration of the transfers, if there be nothing in the rules of the company to afford a reason for refusing to do so. In this way meetings may be packed and real majorities overruled. The everyday working of a company constantly affords evidence of the desirability of some restriction."

"A member," says *Palmer*, 11th ed., at p. 704, "is entitled to transfer his shares to nominees, so as to secure to himself the maximum of voting power, and the directors must register the transfers, unless the articles give them a power to decline, which is applicable in such a case."

The facts of this case appear to me to disclose a transaction not of an out-and-out gift or sale of shares, but a contrivance on

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the part of the applicant so to split up his present holding in the Company as to set up puppets in the Company who, having neither property nor interest in it, will vote in accordance with the directions of the applicant. Is the power to decline to register given to the directors applicable to these facts? If so, have the directors *bonâ fide* exercised the power? The articles contain a power to decline in a specified case (art. 10) and a power that "shares in the Company shall be transferred only at the discretion of the directors and in the following form" (art. 9).

This article was, no doubt, intended to, and does, in my opinion, vest in the directors the fullest power of dealing with transfers so as to protect the Company and its shareholders from transfers of shares which would be injurious to it or them. Although in terms the power of the directors is absolute, it is a fiduciary power, and must be exercised by them for the benefit of the Company and in the interest of the shareholders, and with due regard to their rights. It is for the applicant, however, to satisfy the Court that the directors have not acted *bonâ fide*.

The applicant is seeking relief under sec. 232 of the New South Wales *Companies Act* 1899. The section says that the Court "may, if satisfied of the justice of the case, make an order." "Those are not mere idle words. They mean, I think, what they say. Although they have been sometimes overlooked, Lord *Cairns*, I may observe, relied upon them in *Sichell's Case* (1), as showing that the Court is bound to go into all the circumstances and to consider what equity the applicant has to call for its interposition": *Trevor* v. *Whitworth* (2).

Upon the facts before us, I am unable to say that the directors have not acted *bonâ fide* and in the best interests of the Company. I see nothing in the evidence to justify the Court in substituting its judgment for the discretion of the directors which has been vested in them by the articles.

I would only add that the cases or dicta relied on by Mr. *Manning* have reference to articles which do not contain a general power to refuse registration such as is conferred upon

(1) L.R. 3 Ch., 119.

(2) 12 App. Cas., 409, at p. 440.

the directors by art. 9, but are designed to meet particular cases.

Appeal allowed. Order appealed from discharged. Motion to rectify dismissed with costs. Respondents to pay costs of appeal.

Solicitors, for appellants, *D. Cowan*, Taree, by *F. C. Petrie.*

Solicitors, for respondents, *L. O. Martin*, Taree, by *Boyce & Magney.*

B. L.

END OF VOL. XIX.