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profit and loss on its transactions, including that balance which is brought over into the period and that which is carried forward out of the period.

Holding that opinion, I am bound to come to the conclusion that the appellant fails to make out his case, and I dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Meares & Duigan.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

DUTTON . . . . . APPELLANT;
PLAINTIFF,

AND

GORTON AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 13-15, 18-21, 1916; *Aug.* 31, 1917.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Company—Rights of minority of shareholders—Refusal of company to enforce its rights—Attempt of majority of shareholders to benefit themselves at expense of minority.

In an action by a minority of the shareholders of the A Company, which owned a patent for a certain process, against certain other shareholders and the B Company, of which also those others were shareholders, claiming that the B Company might be restrained from infringing the patent, it was alleged that those other shareholders had obtained a majority of the votes in the A

Company for the purpose of preventing, and were thereby preventing, the A Company from taking proceedings to vindicate the right of the A Company to the patent and the use of the process as against the B Company.

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting) on the evidence, that the majority of the shareholders of the A Company had determined by means of voting power constituted for the purpose either to make a present to themselves and others, but mainly to themselves, at the expense of the minority, or to prevent the minority in a most proper case from obtaining the decision of a Court as to whether such a present had been made, and that the minority were entitled to maintain the action and to obtain a declaration that the B Company was infringing the patent.

Decision of the Supreme Court of New South Wales (*Harvey* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in Equity by Herbert de Courcy Dutton, on behalf of himself and all the other shareholders of the New South Wales Powell Wood Process Ltd. except the individual defendants, against John Rose Gorton, George Moore Bethell, John Charles Webster and Leslie Archibald Scandrett, the Sydney Powellising Co. Ltd. and the New South Wales Powell Wood Process Ltd., in which the statement of claim was as follows :—

(1) The above-named The New South Wales Powell Wood Process Limited (hereinafter called "the old Company") was duly registered as a company under the Companies Acts in force in the above-mentioned State on 22nd July 1907, and is entitled to sue and be sued in that name. The capital of the Company is divided into 20,000 shares of £1 each, of which only 18,000 have been issued, and upon a poll every member is entitled to one vote for every ten shares held or represented by him. Of the said 18,000 shares the defendants other than the defendant companies hold or control 9,150.

(2) The principal object for which the old Company was formed was to acquire the New South Wales patent rights of a certain invention, process or method of improving and preserving timber known as the "Powell process," which was protected and patented in New South Wales by letters patent dated 2nd February 1904 and numbered 13846, and to work the said invention.

(3) The old Company duly acquired the said invention and is now duly registered as the proprietor of the said letters patent under the provisions of the Patents Acts in force in the said State.

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(4) The directors of the old Company are the plaintiff, the defendants John Rose Gorton and George Moore Bethell and Arthur Edward Slater and Otto Bohrsmann, of whom the first four named are shareholders in the old Company and the said Otto Bohrsmann is not.

(5) The above-named defendant the Sydney Powellising Company Limited (hereinafter called "the new Company") was registered as a company under the Companies Acts in force in the said State on 28th May 1915, and is entitled to sue and be sued in that name.

(6) The directors of the new Company are the defendants John Rose Gorton, George Moore Bethell and John Charles Webster, who are all shareholders in the new Company or are beneficially interested in some of the shares in the same. The defendant Leslie Archibald Scandrett is secretary of and a shareholder in the new Company.

(7) By virtue of a sale made by the receiver for the holders of certain debentures issued by the old Company the new Company became the owner of certain assets belonging to the old Company, but the new Company has never acquired any right to or interest in the said invention and letters patent.

(8) Although the new Company has no right to or interest in the said invention and letters patent, the new Company shortly after its formation began to use the said Powell process for the purposes of its business.

(9) The old Company by its directors thereupon took legal advice with a view to the institution of proceedings against the new Company, and was advised that the said letters patent were still the property of the old Company, but at a meeting of the directors of the old Company a motion to the effect that no action be taken in the matter was carried by a majority of three to two; the said majority of three consisted of the defendants John Rose Gorton and George Moore Bethell and the said Otto Bohrsmann.

(10) Subsequently a meeting of the old Company was held, and a motion that the said motion passed at the said meeting of directors be rescinded was proposed and lost by 927 votes to 712. Of the said 927 votes, 915 votes were cast by the defendants John Rose Gorton, George Moore Bethell, John Charles Webster and Leslie Archibald

Scandrett and 12 by shareholders who are friendly to them and are supporting them in their present action.

(11) But for the voting power to which the said defendants are entitled and which they have exercised both at the said meeting of directors and the said meeting of the old Company, the Board of Directors of the old Company in general meeting would have decided to institute proceedings against the new Company for protection of the old Company's rights, and at any meeting of the directors or of the old Company at which the said defendants are restrained from voting a resolution to that effect can and will be carried.

(12) The defendants other than the defendant companies command a majority of the shares in the old Company and can carry any resolution which only requires a bare majority to carry it.

(13) The plaintiff submits that the action of the said defendants in voting at meetings of the directors and of the old Company against the institution of proceedings by the old Company against the new Company for breach of the patent rights of the old Company and in otherwise preventing such proceedings being taken is a fraud upon the old Company and upon the shareholders of the old Company other than the said defendants, and is an attempt to appropriate for the sole benefit of the said defendants and the shareholders in the new Company property belonging to all the shareholders in the old Company.

(14) The said defendants threaten, and intend to continue, to prevent the institution of any proceedings as aforesaid by the old Company against the new Company.

(15) The old Company has suffered great loss and damage by reason of the action of the new Company in using the said invention, and will continue so to do unless the new Company, which is still continuing to use the said invention, be restrained in manner hereinafter claimed.

The plaintiff therefore claims :—

(1) That the new Company may be restrained from using the said invention or from in any way infringing the rights of the old Company under the said letters patent.

(2) That it may be declared that the new Company is not entitled to any profits derived from the use of the old Company's said

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invention and is a trustee of all such profits for the plaintiff and all the shareholders of the old Company.

(3) That the defendants other than the old Company may be ordered to pay the costs of this suit.

(4) That the plaintiff may have such further or other relief as the nature of the case may require.

The suit was heard by *Harvey* J., who dismissed it with costs.

From that decision the plaintiff now appealed to the High Court.

The material facts and the nature of the arguments appear in the judgments hereunder.

Loxton K.C. and *Maughan*, for the appellant.

Innes K.C. (with him *J. A. Browne*), for the respondents Gorton and Bethell.

Jordan, for the respondents Webster and Scandrett.

J. A. Browne, for the respondent the Sydney Powellising Co. Ltd.

During argument reference was made to *Cook* v. *Deeks* (1); *Foss* v. *Harbottle* (2); *Menier* v. *Hooper's Telegraph Works* (3); *Burland* v. *Earle* (4); *Miles* v. *Sydney Meat-Preserving Co.* (5); *Pender* v. *Lushington* (6); *North-West Transportation Co.* v. *Beatty* (7); *Dominion Cotton Mills Co.* v. *Amyot* (8); *Foster* v. *Foster* (9); *Castello* v. *London General Omnibus Co.* (10); *Macdougall* v. *Gardiner* (11); *Clinch* v. *Financial Corporation* (12); *McMullan* v. *Stewarts & Lloyds (Australia) Ltd.* (13); *Calvert on Parties in Equity*, 2nd ed., p. 16; *Story's Equity Pleadings*, 6th ed., par. 232; *Attwood* v. *Small* (14); *Marshall* v. *Sladden* (15); *Barnes* v. *Addy* (16); *Frearson* v. *Loe* (17); *Halsbury's Laws of England*, vol. v., pp. 289, 318; *Russell* v. *Wakefield Waterworks Co.* (18); *Palmer's Company Precedents*, 11th ed., vol. I., p. 1360.

Cur. adv. vult.

(1) (1916) 1 A.C., 554, at pp. 558, 564.
(2) 2 Hare, 461.
(3) L.R. 9 Ch., 350.
(4) (1902) A.C., 83, at p. 93.
(5) 16 C.L.R., 50, at pp. 63, 65; 17 C.L.R., 639.
(6) 6 Ch. D., 70.
(7) 12 App. Cas., 589, at pp. 597, 598.
(8) (1912) A.C., 546.
(9) (1916) 1 Ch., 532.
(10) 107 L.T., 575.
(11) 1 Ch. D., 13.
(12) L.R. 5 Eq., 450, at p. 484; L.R. 4 Ch., 117.
(13) 20 C.L.R., 641.
(14) 6 Cl. & F., 232, at p. 352.
(15) 7 Hare, 428, at pp. 440-443.
(16) L.R. 9 Ch., 244, at p. 254.
(17) 9 Ch. D., 48, at p. 65.
(18) L.R. 20 Eq., 474, at p. 482.

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The following judgments were read :—

GRIFFITH C.J. (read by BARTON J.). This was a suit brought by the appellant suing on behalf of himself and all other members of the New South Wales Powell Wood Process Ltd. except the defendants Gorton, Bethell, Webster and Scandrett, against those defendants and the Sydney Powellising Co. Ltd., claiming (1) an injunction to restrain that company from using an invention for preserving timber patented in New South Wales of which the New South Wales Company is the owner ; (2) a declaration that the defendant Company is not entitled to profits derived from the use of the process and is a trustee of them for the New South Wales Company. The last-named Company was originally joined as a co-plaintiff, but was struck out by the Court on the ground of want of authority to use its name, and added as a defendant. It is important to note the distinction between claims (1) and (2), since the evidence in the suit was directed only to the right of the plaintiff to maintain the suit in respect of the claim to an injunction.

The principles which govern the right of a member of a company to maintain such a suit are well settled. It must be shown that some act complained of is wrongful to the company of which the plaintiff is a member, that the act is of a fraudulent character or oppressive or *ultra vires* of the company, and that the wrongdoers control a majority of votes, and deliberately and definitely refuse to allow it to be redressed by proceedings at the company's suit. It is not sufficient to show that the company has sustained a technical legal wrong and that the majority have omitted to take legal proceedings for its redress. For authority I need only refer to the recent case of *Dominion Cotton Mills Co.* v. *Amyot* (1), in which the test is stated to be whether the majority have abused their powers and deprived the minority of their rights, to which I venture to add "or are attempting to do so." No question of *ultra vires* arises. In my judgment the appellant has failed to establish either that the act of which he complains is fraudulent and oppressive or that the majority absolutely and improperly refuse to allow redress. I do not know of any authority, and I do not think that any can be found, to support the position that a Court will give its aid to a minority

(1) (1912) A.C., 546.

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of the members of a joint stock company in order to prevent a majority of the members, acting in good faith, from permitting the best practical use, or, indeed, any reasonable use, from being made of the company's property. Yet, according to the view of the evidence taken by the learned Judge appealed from, in which I entirely concur, that is exactly the present case, as I will proceed to show.

The company which the plaintiff claims to represent, and which I will call "the old Company," was formed in New South Wales in July 1907. Its principal object was to acquire from a Western Australian company called the Westralian Powell Wood Process Ltd. (and which I will call "the parent Company") the New South Wales patent rights in a process for preserving timber, called the "Powell process." The nominal capital of the Company was £20,000, in 20,000 shares of £1 each, of which 18,000 were issued. The parent Company were the holders of 6,250 shares. By art. 81 of the Articles of Association the defendants Bethell and Gorton, both of whom held a very large interest in the parent Company, were appointed with five other persons to be the first directors, the defendant Gorton being described as representing the parent Company. He was to continue to be a director for his life so long as he should be the holder of 100 shares in the Company, and he and the directors appointed by the parent Company were not to be subject to retirement by rotation.

The old Company acquired from the parent Company an assignment of the patent for New South Wales, terminable in the event of a winding up.

The old Company raised £12,000 upon debentures charged upon all its assets except the patent rights. In March 1909 it agreed for valuable consideration with the debenture-holders to allow them to use the patent at a royalty of 6d. per 100 superficial feet.

The operations of the Company were not successful, and in November 1913 the debenture-holders entered into possession of the Company's undertaking, comprising their land and plant. The receiver appointed by the debenture-holders carried on the operations of the Company for a time in order to perform certain subsisting contracts, with the result that the debenture debt was reduced to the extent of about £3,000. No fresh contracts were forthcoming,

and in 1915 the receiver proposed to the defendants Gorton and Bethell that they should buy the assets of the old Company. Bethell thereupon conceived the idea of forming a company to take over the assets, with a view of continuing to work the process, in which, as already said, he and Gorton were largely interested, both as members of the old company and as representing the parent Company, which desired to extend the use of its patent. They had, however, reason to believe that the debenture-holders, who were largely interested in the timber trade, did not desire that any purchasers of the moribund company's assets should enter into competition with them, and they thought that a proposal made in their own name to purchase the assets would not be entertained. Gorton therefore made an offer in the fictitious name of "H. G. Power" to buy the assets at the price of £1,750, which offer was accepted. The receiver was aware of the fact that Power was a fictitious name, but apparently did not inform his principals of that fact.

The matter is, however, although it appears to be the point mainly relied upon in support of the appellant's case, no more relevant to it than King Charles' head or the colour of Gorton's hair. The validity of the sale is not, and could not now be, impeached, even by the vendors, the debenture-holders, who are not parties to this suit, which must be determined on the assumption that the sale is valid. The only question, therefore, that can arise upon it is whether it did or did not confer on the defendant Company the right to use the old Company's patent.

Gorton and Bethell thereupon formed the Sydney Powellising Co. Ltd. (the defendant Company of that name), which I will call "the new Company," and which was registered on 28th May 1915. The assets of the old Company covered by the debentures were duly assigned to it. The parent Company was largely interested in the new Company, and the defendant Bethell was named in the Articles of Association (clause 80) as one of the first directors as representing the parent Company and not subject to retirement in rotation, just as Gorton had been in the old Company's Articles.

The new Company thereupon commenced operations, using the old Company's plant which they had acquired from the receiver. They were aware of the agreement between the old Company and the

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debenture-holders as to the use of the patented process. Gorton and Bethell honestly believed that the new Company had acquired by their purchase from the receiver a right to use the process as distinct from the patent right. The learned Judge upon the evidence found that they believed they had the same right to use the process as the debenture-holders had, whatever that was. The entertaining of such an opinion may be evidence, or even proof, of stupidity—I do not think so—but it is certainly no evidence of fraud. The learned Judge, however, also thought that this belief was not unreasonable, and I agree with him, whether it is or is not tenable in point of law.

At a meeting of directors of the old Company at which the persons present were the plaintiff (to whom shares in the Company had recently been transferred *gratis* by one of the principal debenture-holders), the defendant Bethell and a Mr. Slater, the question was raised whether the new Company was legally entitled to use the process, and it was determined to take the opinion of the Company's solicitors on the point. At a meeting of directors held on 6th July, at which the same directors and the defendant Gorton were present, the solicitors' opinion was read, to the effect that, as the debentures excepted the patent rights, the patent and the right to use it were still the property of the old Company, and were not part of the assets disposed of to the new Company. It was thereupon resolved, on the motion of the defendant Bethell seconded by the defendant Gorton, that no action be taken in the matter as the Board was of opinion "that the right to grant licences to use the Powell process other than our exclusive licence was part and parcel of the undertaking and assets of the Company," *i.e.*, of what they had bought from the receiver. Some comment was founded upon the language of this resolution, which did not describe the right claimed as being claimed (as it really was) under the Company's agreement with the debenture-holders. But the substance of the matter was the right to use the process, not the precise legal source or description of the right to use it. This will appear clearly from subsequent events. On 28th July an extraordinary general meeting of the old Company was held in pursuance of a requisition of shareholders to consider three resolutions to the following effect: (1) that the directors'

resolution of 6th July be rescinded; (2) that notice be given to the new Company of the assignment by the parent Company to the old Company of the full and exclusive benefit of the patent right for New South Wales and warning them against attempting in any way to use the patent; (3) that if the new Company should use the patent in New South Wales proceedings be at once instituted on behalf of the Company to obtain an injunction against the new Company's using it. After discussion, of which a full account was given in the evidence, the resolutions were put as a single resolution and negatived by a majority of 927 votes to 712.

Par. 13 of the statement of claim is as follows: "The plaintiff submits that the action of the said defendants in voting at meetings of the directors and of the old Company against the institution of proceedings by the old Company against the new Company for breach of the patent rights of the old Company and in otherwise preventing such proceedings being taken is a fraud upon the old Company and upon the shareholders of the old Company other than the said defendants and is an attempt to appropriate for the sole benefit of the said defendants and the shareholders in the new Company property belonging to all the shareholders in the old Company."

This is in form a submission of law and not a charge of fraud in fact, and Mr. *Loxton* told us that it was so intended. So treated, as I think it should be treated, the statement of claim is, in my opinion, bad on its face. The appellant's case is, indeed, in substance, that the mere refusal to pass the resolution is an "abuse of power of the majority and a deprivation of the minority of their rights." This contention seems to me to be founded upon an entire misconception of the doctrine on which the plaintiff professes to rely. Before dealing with it I will call attention to some other facts, which undoubtedly influenced the majority in their action, and which are essential to be considered in determining whether their action was in fact fraudulent or not. I premise by saying that in my opinion the term "fraudulent," as used in this connection, connotes something inconsistent with honesty and fair dealing, and not the vague notion of impropriety which used to be called equitable fraud, a notion which I supposed to have been finally dissipated by the case of *Derry* v. *Peek* (1).

(1) 14 App. Cas., 337.

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Assuming, however, that par. 13 of the statement of claim can be construed as containing a charge of personal fraud or oppression, I proceed to examine the facts as established by clear evidence. The only remaining assets of the old Company were the patent right, from which the only possible source of profit would be payments that persons desiring to use the process might be willing to make for its use. The only persons then actually willing to use the patent in New South Wales were the new Company, which had been formed for the purpose of using it, and there was abundant evidence that after the failure of the old Company it was highly improbable that any other customer would be found.

The only matter actually discussed at the shareholders' meeting of 28th July was the third branch of the resolution, that proceedings be " at once " instituted. The object of the movers was, manifestly, either to kill the new Company at once, or to prevent any amicable arrangement from being made between the two companies for a user of the patent on terms fair and profitable to both. The case of *Dominion Cotton Mills Co.* v. *Amyot* (1) already cited shows that it was competent for a majority of the members of the old Company to sanction an agreement with the new Company of which they were members for the use of the process on fair and reasonable terms, and that their freedom of action in this respect was not impaired by the fact that they were such members. There was nothing whatever up to this time to indicate that they desired to do anything else, and their subsequent conduct shows that that was all that they desired to do. It was in fact pointed out by speakers at the meeting that the patent right was the only asset the Company possessed, and that hasty litigation could do no good and would harm everyone concerned—a statement the truth of which was obvious. It is contended, however, that the failure of the majority formally to relinquish the right which they claimed under their purchase from the receiver conclusively established a fraudulent intention to deny the Company's right to royalty. That claim, however untenable at law, was certainly not a fraudulent one. Bethell at the meeting said that he had no doubt whatever on the point, and the learned Judge thought that he spoke the truth. He further thought that

(1) (1912) A.C., 546.

the attitude of the majority was that they were not satisfied with the soundness of the solicitors' opinion, but that, whether it was good or not, it was to the advantage of the old Company that the new Company should continue to use the process, and that it was inadvisable to start immediate litigation against them. Personally, I am unable to see how any person of ordinary common sense could come to any other conclusion.

This circumstance, in my judgment, disposes of the case so far as it depends upon the refusal of the majority to authorize instant litigation, which is all that they did. That refusal, being neither fraudulent nor oppressive, the plaintiff's right to initiate this action did not then arise. The suit was begun on 6th August. In the meantime all that had happened was that on 4th August the directors of the old Company had passed a resolution to the following effect: "In view of the fact as stated by Mr. Dutton that litigation is now being started by some of the shareholders of this Company, in connection with the question of the patent held by this Company and the right to use the Powell process, I propose that the Sydney Powellising Company be notified that in the event of it being found that they have not the right to use the Powell process, this Company hereby agrees to grant them the right to use the Powell process for the term of the patent on the same terms and conditions as they may be prepared to grant anyone else." The motion was carried, and on the following day was communicated to the new Company.

A subsidiary point was endeavoured to be made by way of a claim for damages. It is suggested that the majority had shown a fixed and unalterable determination to deny to the minority the benefit of any damages that might have been recoverable from the new Company in respect of the period from 28th May to 28th July. If these damages were taken on the basis of the royalty asked from the debenture-holders they could not have amounted to more than a trifle, for upon the evidence the maximum capacity of the plant was such that it could not under the most favourable circumstances have earned more than £1 a day in royalties at 6d. per 100 feet. What it is likely to have earned during the first two months of resumed work may be conjectured. It is sufficient to say that the matter was never considered at the meeting of 28th July, and that

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a charge of fraud or oppression cannot be founded upon mere inaction under such circumstances. Moreover, the rights of a majority of shareholders comprise a right to compromise a disputed claim or refer it to arbitration. A refusal to enter upon immediate litigation cannot, in my opinion, be relied upon as evidence of fraud or oppression unless it appears (1) that litigation is manifestly the only way in which the minority can effectually obtain its rights and (2) that the majority have definitely refused to allow it.

Attempts were in fact made after the commencement of the suit to come to an agreement for the future use of the process, and the directors representing the majority offered that the question of their rights, if any, under the Company's agreement with the debenture-holders should be referred to arbitration, as well as the terms on which they should be allowed to use the process in future. There were, however, naturally difficulties in dealing with the matter definitively pending the suit, and the negotiations were suspended.

To suggest that under these circumstances the Court should find that the only way in which the majority could effectually obtain their rights was by immediate litigation is to my mind preposterous. It is, however, enough to say that there is not a fragment of evidence of any such deliberate determination on the part of the majority as the Court requires as a condition of its intervention. That was the opinion of the learned Judge, and I agree with him.

I think, therefore, that the action is prematurely brought. In the most favourable view of the facts for the appellant the only order to which he could at present be entitled would be a declaration (if the Court are of that opinion) that the defendant Company is not entitled to use the old Company's patent without its consent. The conditions of granting such consent could then be determined in accordance with the principles laid down in *Amyot's Case* (1).

Before concluding I will state in the form of a *précis* the material facts and the questions of law which they raise.

Company A was possessed of the patent rights in New South Wales for a process for preserving wood which required a special plant for putting it in operation, and had provided such plant. It had exhausted all its capital and had issued debentures covering

(1) (1912) A.C., 546.

all its assets, except the patent right, to certain members of the Company, and had granted them a licence to use the patented process. The Company having suspended operations, the debenture-holders appointed a receiver who took possession of, and subsequently sold, all the Company's property to one G., who, with the knowledge of the receiver, dealt with him under a fictitious name. Company B was then formed with the object of taking over G.'s purchase and using the plant for the special purpose for which it was adapted, that is, the operation of the patented process, claiming to be entitled to do so under the licence granted by Company A to the debenture-holders, their vendors.

It was suggested that the concealment of G.'s identity was a fraud upon the debenture-holders, who, being themselves timber merchants, would not have been willing to sell to a probable local competitor. The sale was not, however, impeached by the vendors, who must be taken to have affirmed it.

When Company B began to use the process their right to do so was denied by the then directors of Company A. The patent right was the only remaining asset of that company, which company, however, could not utilize it, and the only plant that existed, or was reasonably likely to exist, in New South Wales by which it could be utilized was that just acquired by Company B. Members of Company B then acquired by purchase a controlling interest in Company A. At a general meeting of that company a resolution was proposed to the effect that legal proceedings should at once be instituted to prevent the use of the process by Company B, but was defeated by a substantial majority. Company B was thereupon informed by Company A that if it should be established by litigation (which was threatened) that it had no right to use the process, permission to use it would be granted to it on the same terms as to any other persons. This suit was thereupon brought.

The question of law is whether, assuming that Company B has no right to use the process, the Court will grant an immediate, unconditional, and perpetual injunction at the suit of a minority of the members of Company A. It will only admit of one answer.

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Barton J.

BARTON J. In view of the 11th and 13th paragraphs of the statement of claim it cannot be doubted that these proceedings are entirely founded on an allegation of fraud against the personal defendants based on the supposed misuse of their power as holders of the majority of the shares of the old Company. There is no attempt to show that any action of that company was *ultra vires*, and the action is not based on any allegation of oppressive conduct except so far as that may be urged to be an inseparable part of the alleged fraud. In this connection I refer to the remarks of Lord *Cranworth* in *Hickson* v. *Lombard* (1). I am of opinion that both in the original and amended statement of claim the plaintiff has rested his case on fraud, and that he has failed in his proof of that charge.

If the charge is founded on the facts stated in the statement of claim as a submission of law deduced therefrom, I think it can scarcely be argued that such a submission is justified. If, on the other hand, the evidence in the case is relied on for the purpose, I think the plaintiff is in no better plight.

A very large quantity of evidence was taken, both oral and documentary. The plaintiff has relied largely on his oral evidence to give the documents the complexion of fraud. In answer to him the defendants Gorton and Bethell also gave copious evidence. The learned Judge says that counsel for each side violently attacked the credibility of the other. His Honor heard and saw the examination and cross-examination of each, and came to the conclusion that the testimony of the two defendants named was to be preferred. He did not impute untruthfulness or recklessness to any of them; but he thought Gorton and Bethell were the better witnesses in point of accuracy, drawing his conclusions, of course, from all he heard and saw. We have their testimony only so far as it can be shown in print. His Honor had it to the full, and in a case like this, notwithstanding that we have reheard the case on appeal, it is enough to say that I have no reason to doubt his conclusions. They were all drawn upon a consideration of the oral with the documentary evidence, and the conclusions his Honor drew upon the oral evidence were entirely consistent with the view that the documents did not deprive it of that character of good faith which he attributed to it

(1) L.R. 1 H.L., 324, at p. 336.

as spoken. Upon those conclusions I think he was right in dismissing the suit.

The history of the case seems to establish it as one of strenuous contest between the majority and the minority for their views as to the internal management of the old Company. The plaintiff held his interest as the donee of a parcel of shares in the old Company from one of the debenture-holders. Gorton and Bethell were largely interested in the Westralian Company, the holders of the general patent rights. Both they and the Westralian Company were largely interested not only in the old Company, but afterwards in the new Company, and both of the local companies are defendants and respondents in this appeal. There were in fact two parties, each contending for the management of the old Company in the way which they thought most conductive to the interests which they owned or represented. The two defendants named represented the Westralian Company's interests as well as their own in both the companies. Against them were evidently also the holders of the old Company's debentures. Now the debenture-holders became such only by reason of the financial straits of the old Company. That is nothing against them, and I mention it because it brings into relief the fact that the old Company was at its last gasp. It had spent the bulk of its capital, had had to raise money by these debentures, none of which it paid off, though after taking possession those lenders reduced their debt by about one-third by the completion of certain contracts of the old Company. These operations were at an end, and no new business appeared to be forthcoming. This was shown at the Board meeting of 1st July 1915. The Company's operations had not resulted in any return to its shareholders, and to all appearances were unlikely to do so. The formation of the new Company was in the view of Gorton and Bethell the only means of getting the patent into use with a prospect of profit, and that is evidently why they took means to enable themselves to obtain its formation. The debenture-holders were in possession of the assets of the old Company, with the exception of the patent rights, and they had from that company the option of using the process at a royalty of 6d. per 100 superficial feet during the currency of their debentures, the right to be exercised only if the works fell into the hands of the debenture-holders through

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the old Company's inability to carry on. That event seems to have happened, and the balance of the debentures remains unpaid. The debentures did not otherwise include any patent right. But on 6th May 1915, when Gorton under the name of Power purchased for £1,750 the old Company's assets from the debenture-holders in possession, acting probably in concert with Bethell, the object was to enable the new Company, which was registered three weeks later, to acquire and work the assets; and when Gorton procured the direct assignment from the receiver to the new Company, both he and Bethell probably believed that they were procuring also for the new Company that right to work the process which the debenture-holders had possessed; whether as part of the assets which included the old Company's plant, or because they thought that the purchase included the right to work at a royalty. And I may remark here that there is no trace of any desire on the part of the majority to enable the new Company to work the process without fair payment. Whatever royalty might be obtained from the new Company would be for the benefit of the whole of the shareholders of the old Company, subject to the claims of the debenture-holders, who after selling the assets had no plant.

Much was made of the use of the name of Power. The name obviously was only a cloak for Gorton or Gorton and Bethell. Their reason has been given, and rightly or wrongly it seems really to have actuated them. The debenture-holders had large timber interests of their own, and were naturally averse, as these two defendants thought, to any competition from purchasers of the old Company's assets. While the old Company alone had the patent in respect of New South Wales, it was unable to use it for want of capital, and was no competitor at all. The case would be different if a live company came into existence or if Gorton and Bethell were in a position to use the process. Hence these defendants believed that though they were ready to give, as they did give, the price, a purchase in the name of either of them would not be entertained, especially as they thought it carried the right of user. No supposition has been made that can fairly displace this reason, nor is the sale by the receiver impeached in any way either as to its validity or as to the price paid. There was no attempt to deprive the debenture-holders

of their share of any royalty for the use of the process, any more than such an attempt was made as to the shareholders of the old Company. And the debenture-holders and the old Company were alike in this, that they had not any business.

The struggle for contending views went on. The new Company began to use the process on the supposition that it was entitled to do so, and the subject was discussed by the Board of the old Company at several meetings. These have been already described. When the opinion of Messrs. Sly & Russell was read at the Board it is clear that Gorton and Bethell dissented from that opinion. They thought, no doubt erroneously, that the right to use the patent, but not the title to the patent itself, had been acquired by the new Company. This again does not point to any readiness to grant the new Company the user free of charge. To acquire the right of the debenture-holders would subject the purchasers to the payment of the royalty. These gentlemen may have been somewhat obstinate in setting up their opinion against that of the Company's lawyers. But that is no evidence of participation in any scheme for fraud or oppression, nor is there the slightest indication of any desire that the new Company should use the liberty which they thought it had on any but business terms. On 10th July the requisition from some of the shareholders for an extraordinary general meeting came before the Board, and the projected resolutions, which I need not further set out, were considered. An endeavour was made by Gorton to postpone action for fourteen days, but this failed on the casting vote of the plaintiff, who presided. Instructions were given to the secretary to call the general meeting. Both parties began to buy up shares in the old Company, and a majority of the shares was secured by Gorton, Bethell and the new Company. The general meeting was held on 28th July. There the resolutions were brought forward, being moved by the plaintiff; a lengthy discussion ensued, and Dr. Armstrong, who does not appear to have been under the influence of either party, expressed a view which might well commend itself to the whole meeting. He held no shares in the new Company. He urged that "in view of the fact that the shareholders in the Company had not received anything since the flotation, and as most of them had written off the shares, he thought the people who were

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putting the money into the new concern should be given a fair deal to see if they could make a success of the process where this Company had failed, and consequently he considered that the motion was not a wise one." The defendants say, and the trial Judge believed, that the minutes of this meeting were defective; that they contended that whether the new Company was entitled to use the process or not, it would be suicidal to prevent them from using it, as the old Company itself could not use it, and there was no prospect of anyone else using it if the new Company did not; and that the process had no value to the old Company unless its usefulness were practically shown by its successful application. The gravamen of the resolutions was contained in the third of them, which demanded immediate proceedings if the new Company used the patent, by which the use of the process was meant. I think that Gorton and Bethell were by this time in doubt whether the new Company had acquired a positive right to use the process, and wished that matter to be made clearer before it was determined to invoke the Court. The resolutions were lost by 927 votes (including those of the four personal defendants and those of the Westralian Company) to 712, and it is upon this fact and the circumstances leading up to it that the plaintiff bases his claim.

At a Board meeting of the old Company held on 4th August, two days before this suit was begun, a motion was carried at the instance of the defendant Bethell that in view of the fact that litigation was being started by some of the shareholders, the new Company be notified that in the event of it being found that they had not the right to use the process, the old Company agreed to grant them the right to use it for the term of the patent "on the same terms and conditions as they may be prepared to grant to anyone else." This resolution is consistent with the view impressed upon the shareholders on 28th July. The shareholders had declared against immediate litigation, and evidently preferred an amicable arrangement with the new Company. I venture to think that it was an eminently sensible view, and one which it would be most unjust to stigmatize as fraudulent, that expensive litigation should be negatived, at least until there were a failure to arrange affairs between the two companies on a business footing.

But I do not wish to discuss the internal management of the old Company, and any remarks of mine on that head are intended merely to apply to the allegation of fraud. It is clear that the acquisition of a preponderance of votes was an object common to both parties. The one side wished to apply the votes in order to drive the Company into expensive litigation, which, even if no such consequences were intended, might ruin the new Company and might involve the old Company also in ruin, or exhaust whatever moneys the old Company might be able to raise for a lawsuit. The other side sought the preponderance of votes in order to exhaust the possibilities of business adjustment before launching into expensive proceedings which, if they did prevent the success of the new Company, could not possibly yield more than a trifle by way of a recovery of the small sum which the use of the process for a short term could have returned to a new undertaking.

I see no evidence that the majority were endeavouring in any way to appropriate to themselves money, property or advantages which belonged to the Company, or in which the other shareholders were entitled to participate, but from which their exclusion was attempted. The action of the minority in going to the Court a few days after the vote without further attempt to come to an amicable arrangement was in my judgment premature, to say the least of it. See the judgment of Lord *Davey* for the Judicial Committee in *Burland* v. *Earle* (1); I cited at length that case, and also *Menier* v. *Hooper's Telegraph Works* (2), *North-West Transportation Co.* v. *Beatty* (3), *Pender* v. *Lushington* (4) and *Dominion Cotton Mills Co.* v. *Amyot* (5), in my judgment in *Miles* v. *Sydney Meat-Preserving Co.* (6), and the extracts which I made from those cases are at pp. 71 to 74 inclusive. I mention these passages thus so as not to encumber the present judgment with them, for it is not necessary that I should cause them to be printed again in the reports of this Court. I content myself with saying that the passages which I then quoted contain the principles upon which I think the respondents in this case rightly rely, and I think that the learned Judge of first instance

(1) (1902) A.C., 83, at pp. 93-94.
(2) L.R. 9 Ch., 350.
(3) 12 App. Cas., 589.
(4) 6 Ch. D., 70.
(5) (1912) A.C., 546, at p. 551.
(6) 16 C.L.R., 50.

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was fully justified in his view of the facts and in his conclusions of law. I am therefore of opinion that this appeal should be dismissed.

ISAACS, GAVAN DUFFY AND RICH JJ. The plaintiff is a shareholder in a company named the New South Wales Powell Wood Process Ltd.—conveniently called "the old Company." He brought this suit on behalf of himself and other shareholders acting with him, but forming only a minority of the members of the old Company. The relief claimed was in effect to establish the absolute and complete right of ownership of the old Company as against another company named the Sydney Powellising Co. Ltd.—and conveniently called "the new Company"—in a certain patent process. As the suit was originally framed, the old Company was made a plaintiff as well as the individual plaintiff, and the four individual defendants were joined as defendants.

The relief claimed was entirely for the benefit of the old Company. The old Company's rights were based on its being the registered proprietor of the patent, and that the new Company without any right to or interest in the patent was using the process for the purposes of its business.

The right of the minority to sue was based on the facts as alleged that the individual defendants were interested as shareholders in the new Company, that they had deliberately obtained and commanded a majority of votes in the old Company for the purpose of preventing, and were thereby preventing, the old Company from taking proceedings to vindicate the right of the old Company to the patent, and the use of the process as against the new Company. Stifling the rights of the minority in the old Company in this way was, at the Bar as well as in the pleadings, relied on as conduct which, on the authorities, enabled them in the circumstances to sue on behalf of the Company in a Court of equity, and learned counsel contended that, if actual fraud was necessary, this conduct amounted to it.

The individual defendants procured the name of the old Company to be struck out as a plaintiff. On that application *Harvey* J. (1)

(1) 15 S.R. (N.S.W.), 454.

was so perfectly satisfied that the majority in the old Company had finally and definitely determined that the Company should not be a party to any legal proceedings, that he would not direct a meeting unless plaintiff's counsel asked for it. Plaintiff's counsel, being equally convinced of the futility of such a meeting, did not ask for it, and so the old Company was struck out as a plaintiff. Not only, then, did the old Company moved by the majority cease to be a plaintiff, but although no formal entry of appearance seems to have been made in the Equity Court office, yet it appeared at the trial, by the same counsel as Gorton and Bethell, and opposed the vindication of its own proprietary rights, which for its sake the present plaintiff was insisting on. The old Company also appeared in the same way to resist this appeal, by learned counsel acting for it and for Gorton and Bethell, and only when the obvious inference from its action in this respect was pointed out from the Bench, did learned counsel say he would argue henceforth only for Gorton and Bethell. His retirement, he said, was due to the fact that he was then instructed there had been no formal entry of appearance. No one, however, had raised any objection to his appearing. Both in so appearing, and in so withdrawing, the complete subordination of the action of the old Company to the will of the defendants Gorton and Bethell, and their group, became obtrusively manifest.

The new Company distinctly claims in its pleadings that it has the right to use the patent adversely to the old Company. On this appeal learned counsel for the new Company expressly stated that in view of the possibility of this case going further, he did not relinquish the new Company's claim to use the patent free. The new Company's defence also sets up correspondence from which it desires an inference to be drawn that there has been a consent given to use the patent sufficient to create a right to defeat the action. This will be dealt with later. There has been also an attempt to draw a distinction in law between the patent and the right to use it.

But the essential meaning of a patent right is a right to exclude others from using the invention (*Steers* v. *Rogers* (1)). And here, as the main claim of the new Company is a right adverse to the old

(1) (1893) A.C., 232.

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Company to use the patent, by reason of the agreement of 6th May, it necessarily follows that the right, if it exists at all, is exclusive.

The two defendants Gorton and Bethell put the plaintiff to proof of all the allegations in the claim; they denied they had the controlling interest in the old Company—a denial that has been completely disproved; and they said (par. 5) that the only possible right of the new Company was dependent upon the true construction of the memorandum of agreement made on 6th May 1915 between the receiver for debenture-holders of the new Company, and "one Herbert George Power." There is no trace in their defence that Herbert George Power was identical with the defendant Gorton.

This memorandum is eventually the base upon which the whole case for the defendants rests; they not only rely on it in their pleading as the groundwork of their conduct as already mentioned, but they build up in argument a structure of *bona fides* upon it, and urge that it was their honest even though mistaken reliance upon that agreement that has led them first to insist on the new Company's right, next to hesitate, and finally to persist by directors' meetings and shareholders' meetings, and attitude in Court, in preventing the old Company's rights being vindicated in this suit.

Harvey J. passed that agreement by, as one the morality of which he was unconcerned with. But as it is the acknowledged cornerstone of the defendants' claims to resist the prosecution of this suit, and as those claims are put forward as sufficiently established by honest reliance on that agreement, the morality of it is plainly of commanding importance.

It arose in this way. The old Company purchased the patent from the Westralian Company, one of the defendants. A clause in the agreement of purchase (clause 9) provided, *inter alia*, that in the event of liquidation of the old Company the patent should *ipso facto* revert to the selling Company. The validity of that provision is not now under consideration, and its problematical value may or may not have been one of the reasons inducing the individual defendants and the Westralian Company itself to pursue the course they actually took.

The old Company went on for some years. Its career was not

successful. Its whole nominal capital was £20,000, all of which has been paid up in money except so far as shares were taken by the Westralian Company as payment for the patent.

The Company borrowed on two series of debentures in all about £12,000, and part of this amount with interest is yet unpaid. Its own capital is exhausted. As things stand, the debenture-holders—represented by Sir Allen Taylor and his partner Anderson—are still unpaid, and under the first series of debentures have a charge on all the Company's assets, including the patent. Under the second series, there is no charge on the patent—that being expressly excepted.

The patent is a valuable one, the debenture-holders clearing off, by using it, what *Harvey* J. calls a considerable sum, perhaps £4,200, less £1,750 or £2,450 in all, of their debt in less than two years. The value of the patent itself is undeniable even from the defendants' standpoint.

In November 1913 the debenture-holders appointed a receiver. That gentleman was Mr. Nesbitt, who then occupied the position of secretary of the old Company. His clear and unqualified duty was to protect the interests of his principals, the debenture-holders, and, so far as these were consistent with the old Company's interests, to protect the old Company's interests against all other persons.

Now, at this point, it is necessary to advert to a circumstance on which the defendants Gorton and Bethel strongly relied, to which they devoted a mass of evidence, and as to which their learned counsel engaged the attention of the Court for some considerable time.

There were two groups of the shareholders in the old Company. One group, represented by Taylor and Anderson, had interests that might or might not be better served by neglecting the business of the old Company and by not persevering with the use of the Powell process in New South Wales; the others, represented by Gorton and Bethell, were shareholders having no such outside interests, and who could be best served by making the old Company a success.

It is complained on behalf of the Gorton group that the Taylor group purposely let the old Company drift, and that what was subsequently done by the Gorton group was in defence of their own interests, or, as it is shortly put, "to save the process." Of course

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"the process" has no rights of its own; the persons who rightfully own it can do as they please with their own property. And so the majority of the shareholders of the old Company, so long as they act within the terms of their social compact and commit no fraud on their fellow shareholders, have a right to control the operations of that company.

That is accepted law on both sides. It is a principle insisted on by the defendants themselves, and for this they principally rely on *Beatty's Case* (1). But the ricochet of this argument is fatal to the first step of the defendants' attempted justification. The case shows that inasmuch as the policy of drift they complain of—if that was the policy—affected all shareholders' interests in the common property alike, and was one entirely within the scope of the social compact, no legal complaint can be made by them of what was done in that regard either on the ground of *ultra vires* or fraud. That it was felt as a hardship by those who had no outside competing interests may be conceded. But it is no ground of complaint that a Court can notice. It is the result of the bargain they made when they entered into the social compact of the Company.

To find a way out from this was the object of Gorton and Bethell. A scheme was devised by which Gorton and Bethell arranged with Nesbitt as receiver to purchase the old Company's property and undertaking. That scheme, which is relied on all through to support their position and to defeat the old Company, is unquestionably steeped in deception. The defendants say it was harmless and pardonable deception. Gorton knew, and told Nesbitt, that the debenture-holders for their own reasons would not sell to Gorton or Bethell at all, and would not sell to anyone if they thought the plant was going to be utilized for the Powell process. So it was arranged between them and also with Samuels, the manager of the old Company, that Gorton should purchase from Nesbitt under a false name, for the purpose of deceiving the debenture-holders; that Gorton should float a company to work the process, pass the agreement on to the new Company, and the new Company should employ Nesbitt as traveller for its business, and Samuels as manager.

They even worked out an estimate in figures of the quantity of

(1) 12 App. Cas., 589.

timber the new Company could treat every year. Nothing was said then about any royalty to the old Company. On the contrary the evidence of Gorton is that it was arranged to liquidate the old Company straight away. It was suggested at the Bar that a royalty of 6d. per 100 feet would have been paid. If even that were so, it would, on the estimate deposed to, leave the old Company £460 a year to the bad.

Gorton put in a letter dated 27th March 1915, addressed to Nesbitt. It was headed, "Bunbury, W.A.," naturally leading to the belief that the plant was wanted for Western Australia. It depreciated the condition of the plant, and it said "nearly all of it, as far as I am concerned, being useless for my purpose." It asked for a decision within three days, saying "as I have other sites under offer." It was signed, with consummate irony, "yours faithfully, H. G. Power, Box 959 Sydney."

Nesbitt and Samuels preserved strict secrecy with respect to this arrangement, and apparently left their principals, debenture-holders and old Company, completely in the dark with regard to the plot they had entered into.

Gorton was naturally anxious that his real object—namely, the acquisition of patent rights—should not fail if he could help it. He and Bethell—who was participant in the scheme—discussed this with Nesbitt, and the position cannot be better stated than in Gorton's words. He says in cross-examination :—"I said this, that if we put anything in the agreement or in the letter asking for the use of the patent rights it would stultify the letter that I have previously put in, in the name of Power, because they would possibly smell a rat, and know that the plant was going to be used for the Powell process. Both Mr. Nesbitt and Mr. Bethell, it is rather hard to say that they said so, but they expressed the opinion that we acquired the same right as the debenture-holders, that is, to use this process, on the payment of 6d. royalty, and we were quite prepared to do that." The concluding statement is certainly remarkable.

Nesbitt wrote two letters—16th April and 20th April—to "H. G. Power, Esq., G.P.O., Box 959 Sydney." Finally, on 23rd April, a letter was written to Nesbitt by Webster & Maclean, as "solicitors and agents for the purchaser," stating : "We have been handed

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your letter addressed to H. G. Power of the 20th instant with instructions to accept the offer of the whole of the assets of the above Company," &c., for the sum of £1,750. On 24th April Nesbitt, signing as "receiver," wrote to Webster & Maclean acknowledging receipt of the letter "on behalf of your client Mr. H. G. Power," and of a deposit of £175.

It was one thing for Nesbitt to express an opinion, if he did so, that the purchasers could use the process, and it was quite another thing to get the debenture-holders to agree to it. The formal agreement had yet to be signed, and had to pass the fire of the debenture-holders' solicitors, Messrs. Sly & Russell.

Webster & Maclean drew up the agreement, and it naturally had to take the form in which it appears. This is the document the construction of which the defendants claim establishes their *bona fides* and justifies their conduct. It is dated 6th May 1915, and purports to be made between Nesbitt, as receiver, and "Herbert George Power of Perth in the State of West Australia merchant." It recited the second issue of debentures, that the charge on the Company's property excepted the patents, that the receiver had agreed to sell the Company's property "excepting nevertheless the patents" for £1,750, and then proceeds to sell. It is signed by "New South Wales Powell Wood Process Ltd. by R. H. Nesbitt, receiver for the debenture-holders," "in the presence of H. A. Russell, of Sydney, solicitor." And it is signed by "H. G. Power" in the presence of the defendant "G. Bethell."

Gorton admits that he signed that document with a view to concealing from Anderson the fact he was purchasing this interest, and that he did this under the legal advice of the defendant Webster. Bethell swears he knew and approved of what Gorton did, though he was of opinion there was no chance of the debenture-holders selling to him and Gorton. This was a fraud (*Gordon* v. *Street* (1)).

Webster admits he knew Gorton was the real purchaser, and understood the concealment was because the debenture-holders would not have sold to Gorton.

Now, in the face of the express recitals and declarations in the agreement of 6th May, it is impossible to understand how any man

(1) (1899) 2 Q.B., 641.

could honestly believe that any right to use the patent had passed. Looking at the letter of 27th March, which was written to be shown to the debenture-holders, for the very purpose of making them believe that the purchaser was *not* intending to use the patent and was offering a price inconsistent with such intention, it is difficult to understand how any honest man, even though he is not a lawyer, could believe that the agreement conferred the least moral right to use it.

The new Company was formed on 28th May 1915, and Gorton, Bethell, Webster and Scandrett were among the original subscribers. Bethell and Gorton were directors.

On 3rd June Gorton, still under the name of "Herbert George Power," executed a document witnessed by Bethell in which he recited that he had purchased the whole of the undertaking, property and assets of the old Company "excepting nevertheless the patents," and requested Nesbitt as receiver to transfer direct to the new Company.

The transfer took place accordingly.

On 22nd June the lease of the premises was assigned by Nesbitt, as receiver, and the old Company to the new Company.

Turning now to the old Company, a meeting of directors was held on 1st July 1915, apparently the first for over a year, the debenture-holders having been in possession. The plaintiff Dutton was in the chair, and Messrs. Bethell and Slater were present. The secretary (Nesbitt) stated at this meeting that the Company possessed no property *except the patent*, and that it was necessary to call the shareholders together to submit resolutions "regarding voluntary liquidation or to take steps to operate the patent." It was, however, pointed out that the new Company were operating the patent, and the question was raised if they were legally doing so. This is the first indication that the design of Gorton and Bethell and their creation, the new Company, of interfering with the patent was being put into effect. It was agreed on the suggestion of Dutton to take the opinion of Sly & Russell, the Company's solicitors, Dutton undertaking to personally pay the costs. Bethell then gave the first indication of the new Company's claim to use the patent adversely to the old Company, by stating that in his opinion

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the right to use the patent had been disposed of by the debenture-holders together with the other assets. Be it observed, he was purporting to speak as a director owing fidelity to the old Company. The meeting was adjourned till 5th July.

It is illuminating to note the instant activity of the Gorton group to frustrate their opponents. The opinion of Sly & Russell was sent on 2nd July. The next meeting of importance took place on 6th July. In preparation for any action that might be taken on that opinion, arrangements were made to secure a majority of directors, as is seen by reference to the minutes of 6th July. Sly & Russell's opinion was read, stating that it was clear the patent and the right to use it in New South Wales were still vested in the old Company. Bethell nominated Dr. Bohrsmann (who was really acting for the Westralian Company), and he also handed in a letter for the same Company nominating Gorton. Then these three passed a resolution opposed by Dutton and Slater, that "*no action be taken in the matter* as this Board of Directors is of the opinion that *the right to grant licences* to use the Powell process other than an exclusive licence was *part and parcel of the undertaking and assets of the Company.*" The italics are ours. It is not merely the right to use, but the right to grant licences, that is alleged to have passed. But perhaps the most significant fact in connection with that resolution —which has been strictly adhered to—is that it initiates what was maintained throughout, namely, the attitude of the majority that the new Company was entitled not to what the debenture-holders had but to what the old Company had, which they said had been sold to them by the debenture-holders, and that by that sale the new Company had the right to use the patent *free from any royalty whatever.*

The resolution is definite that "no action" is to be taken. If we are to suppose these directors were acting in the interests of their own company (the old Company), their attitude is astonishing.

On 10th July, at a directors' meeting, a requisition was received to call a shareholders' meeting for 28th July to pass a certain resolution in three parts—and being substantially (1) to rescind the resolution of 6th July, (2) to warn the new Company to desist from using the patent, (3) in case the warning was disregarded then

"at once" to institute proceedings for an injunction. Observe, the "at once" is only after neglect to conform to the warning.

In preparation for this meeting, the defendants set to work to buy up, they say with the new Company's funds, shares in the old Company, which they procured to be transferred partly into their own names and partly into the names of Webster and Scandrett respectively, for the avowed purpose of defeating the proposed resolution.

On 28th July the extraordinary meeting of shareholders, so called, was held. Dutton, Gorton, Bethell, Webster and Scandrett were present, with others. Sly & Russell's clear opinion was referred to. Webster demanded a poll. Reference was made to a prospectus issued really by the new Company under a former name, which stated that the plant and machinery obtained for £1,750 had originally cost £18,000, and then went on to state that terms had been arranged for the use of the patent, showing that even the new Company did not think their agreement of 6th May conferred any right to use it. Bethell definitely asserted the original sale did include that right. The defendants were asked why they had bought shares up to 5s. a share if they really thought the right to the patent had been disposed of. The minutes state: "Mr. Bethell declined to answer the question." Bethell drew a distinction between acquiring the patent, and the right to use it other than the exclusive right.

Eventually, the defendants negatived the resolution *in toto*, thereby affirming the directors' resolution of 6th July, thus adhering to their claim to use the patent free from any royalty or permission, and also refusing to give any warning to the new Company, and also, consequently, refusing to take action "at once" if that warning were disregarded.

The defendants say now that they had not definitely made up their minds not to take action; and so the learned Judge, in the face of these circumstances, has found. Apparently his Honor's conclusion was arrived at through overlooking the importance of the connected scheme the defendants had arranged and were adhering to. Learned counsel for the defendants urged that the defendants were only acting in a business-like way in not plunging the old Company

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instantly into litigation. The inference is that they were waiting before involving the old Company, to which they owed allegiance, in litigation to see if the new Company would yield, or would refuse to make a reasonable bargain with the old Company. Now, mentally reviewing the position so far, that is a morally impossible explanation. The defendants had deliberately conceived and carried out a scheme for the very purpose of the new Company using the patent, as the old Company had used it, and free from permission or royalty; they had secured the plant, had induced the Taylor group to grant a lease, dated 22nd June 1915, of the premises, had formed the new Company with a prospectus stating the right had been arranged for, and they controlled the new Company. They actually started using the patent without waiting for any agreement with the old Company, or apparently any intention of paying any royalty. The defendants were only pulled up on 1st July when Bethell insisted on the new Company's right to do as they were doing. So that it would be a violent stretch of credulity to believe they ever, as the new Company, contemplated yielding on that point.

They, in directors' meeting, had blocked the path definitely. Forced by a requisition to hold a shareholders' meeting, they expended money in securing the means of again blocking the resolution. They negatived everything proposed. They adhered definitely to the resolution of 6th July; they in effect reaffirmed it: and that resolution constitutes the real contention of the new Company, and the Gorton group in the old Company.

The shareholders' meeting proposed nothing in place of the directors' resolution of 6th July. At the conclusion of that meeting, the minority were helpless unless the Court protected them. The majority on 3rd August, at a directors' meeting, then pressed their position further. They removed the Company's office to 58 Pitt Street, where the new Company's office and the defendants Gorton and Bethell's own office were. Scandrett, as secretary of the new Company, was there too. Nesbitt was on this day discharged. On 4th August they adhered to their position, and also deposed Dutton as chairman, replacing him with Gorton. Then Bethell moved and it was carried, by three to two (that is, evidently Bethell, Gorton and Bohrsmann against Dutton and Slater),

that with reference to the "litigation now being started" the new Company be notified that "*in the event of its being found that they have not the right to use the Powell process*, this Company hereby agree to grant them the right to use the Powell process for the term of the patent on the same terms and conditions as they may be prepared to grant anyone else." Sly & Russell were discharged as solicitors for the old Company. Minter, Simpson & Co. were next day appointed solicitors. Forsyth was appointed secretary in place of Nesbitt, discharged the day before.

On 17th August, pursuant to a directors' resolution, a letter was sent which is set out in the new Company's defence, and is relied on as a permission by the old Company to the new to use the process pending this litigation, and to afford an answer to the plaintiff. That is, supposing the plaintiff is right in charging the defendants with oppressively or fraudulently standing in the way of asserting their rights, this may be cured by a further act of the same nature by the same defendants.

But when that letter, giving a conditional permission, is read with the answer dated 20th August declining the condition, and preferring to wait till the litigation is over before binding the new Company to anything, and with the final resolution at the directors' meeting of 27th August, it is clear that there is not even a technical bar to the claim arising from this attempt by the defendants to secure themselves in any event. On 30th August the defendants, at a directors' meeting, put the seal on their determination not to allow the new Company's action to be questioned so far as they could prevent it, and particularly by directing that steps be taken to strike out the old Company's name as plaintiff. This came on 12th October, and was acceded to as already stated.

It appears to us an irresistible inference from those facts that the defendants determined from the first to adhere to their original scheme of obtaining and using, whether the majority of the old Company wished it or not, the patent or the use of it, that is, the benefit of it. They have never wavered in that course. They have manœuvred so as to secure it whatever happens; and this manœuvring has been called common-sense business caution. Their

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policy throughout has been: "*Rem facias; rem, si possis recte; si non, quocumque modo rem.*"

Gorton would have liked to get it stated expressly at first, if he had not known, as he says, that the bargain then would never have been made. But, ever since, it has been on his part not hesitation as to the end to be achieved, but caution as to how it might be best achieved.

In our opinion the old Company has never parted with its patent; it has never sold any right to use it: Gorton led the vendors to believe the purchase was for a totally different purpose, and the fact that the debenture-holders have never set it aside does not detract from the fact that it was a surreptitious and dishonest step in a scheme to secure some advantage over fellow shareholders, and in any case it indicates the intention from the first to claim and act adversely to the old Company in this matter. The formal agreement of 6th May tells any honest man that there was no transfer of patent right, but a mere transfer of tangible property, and not even the tangible property of office furniture; and the constant and undeviating struggle on the part of the individual defendants (including Webster, practically from the first, and Scandrett, from a later date), and on the part of the new Company by its agents, since it came into existence and got its lease, has been to cling to the resolve, adverse to the old Company, to use the patent free from charge.

The apparent offer to fix a reasonable royalty is illusory. At best it is an attempt at compulsory purchase. In reality it was an attempt to fix a sum to be determined on as a last resource by the defendants, antagonistically to their fellow shareholders, in circumstances which did not recognize the full and unrestricted ownership of the patent by the old Company.

The principles of equity in such circumstances are not doubtful. They fall easily into the rules recognized in the cases cited. They amount to determination by the majority—by means of voting power constituted for the purpose—(1) to make a present to themselves and others, but mainly themselves, at the expense of the minority, or at least (2) to prevent the minority in a most proper case from obtaining the decision of a Court whether such a present is being made.

In either case the action of the majority is outside the fair scope of the social contract, and is a decision by them as judges in a real contest between themselves and the minority, who are claiming that in effect the partnership agreement of sharing the common property in specified proportions is openly violated. That is a flagrant abuse of power.

It is unnecessary to do more than refer to *Menier* v. *Hooper's Telegraph Co.* (1), *Dominion Cotton Mills Co.* v. *Amyot* (2), *Baillie* v. *Oriental Telephone and Electric Co.* (3) and *Cook* v. *Deeks* (4).

In our opinion the appeal should be allowed with costs, and the case remitted to the Supreme Court with the opinion of this Court that the plaintiff had established his right to sue, and was entitled to a declaration that the defendant new Company were infringing, and that the case should be proceeded with consistently with this judgment.

Appeal allowed. Order appealed from discharged with costs and suit remitted to the Supreme Court in Equity for further hearing in accordance with the judgment of this Court. Respondents other than the old Company to pay costs of this appeal.

Solicitors for the appellant, *Sly & Russell.*

Solicitors for the respondents, *Minter, Simpson & Co.*; *Webster & Maclean.*

B.L.

(1) 9 Ch., 350.
(2) (1912) A.C., 546.
(3) (1915) 1 Ch., 503, at pp. 518, 519.
(4) (1916) 1 A.C., at pp. 564, 565.