[HIGH COURT OF AUSTRALIA.]

WOOD . . . . . APPELLANT;
APPLICANT,

AND

W. & G. DEAN PROPRIETARY LIMITED . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Nov.* 1; *Dec.* 12.

Knox C.J., Isaacs and Starke JJ.

Company—Shares—Insolvency of member—Claim by assignee in insolvency to be registered as member—Transmission—No restrictions on—Articles of Association—Articles neither giving rights to registration on transmission nor imposing restrictions thereon—Table A excluded—Right of assignee to registration—Insolvency Act 1915 (*Vict.*) (*No.* 2671), *secs.* 4, 154, 166—*Companies Act* 1915 (*Vict.*) (*No.* 2631), *sec.* 29 (1).

The assignee of an insolvent member of a company is entitled, as an incident of his property in the shares, to have his name placed on the register of members, subject to the restrictions, if any, imposed by the memorandum or articles of association of the company.

The appellant was the assignee of the insolvent estate of a person who at the date of his insolvency was the holder of 7,034 fully paid shares in the respondent company. Certificates for 4,500 of these shares came into the hands of the appellant as assignee of the insolvent, and certificates for the remaining 2,534 shares were held as security by creditors of the insolvent. A request by the assignee to the Company to have his name entered on the register of members as the holder of all the fully paid-up shares shown on the register as belonging to the insolvent having been refused, and an application to the Supreme Court of Victoria to enforce such request having been dismissed, on appeal to the High Court by the assignee,

Held, that as neither the memorandum nor the articles of association of the respondent Company contained any provision restricting the right of an

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assignee in insolvency to become registered as a member by transmission, the appellant was entitled to be registered as a member in respect of the 4,500 unencumbered shares standing in the name of the insolvent.

Decision of the Supreme Court of Victoria (*Irvine* C.J.): *In re W. & G. Dean Pty. Ltd.*, (1929) V.L.R. 140, reversed.

APPEAL from the Supreme Court of Victoria.

By an order nisi which was made absolute on 2nd April 1925 the estate of Ernest Dean was placed under sequestration pursuant to the provisions of sec. 52 of the *Insolvency Act* 1915 (Vict.), and by such order the appellant, John Vivian Montgomery Wood, was appointed as assignee thereof. At the date of the sequestration of his estate Dean was the owner and/or was registered as the owner of 7,034 fully paid shares in W. & G. Dean Pty. Ltd., a company incorporated under the law of the State of Victoria. Certificates for 4,500 of these shares had come into the hands of the appellant as assignee of the insolvent, and certificates for the remaining 2,534 shares were held as security by creditors of the insolvent. The appellant notified the Company of his appointment as assignee of the insolvent, and claimed to be entitled to the 7,034 shares owned by the insolvent and forbade the registration by the Company of any transfer of such shares. The appellant also by letter to the Company requested that all fully paid shares shown on the share register of the Company as being owned by the insolvent should be transferred to him as assignee of the insolvent. The appellant later requested the Company to place a valuation on the shares of the insolvent and to arrange for the purchase from him of the shares by some member of the Company or by some approved person; and in reply thereto he received a letter from the Company informing him that no arrangement had been made for the purchase of the shares and that it was impossible to place a value upon them. The appellant in 1926 forwarded scrip certificates in the name of the insolvent for 3,500 fully paid £1 shares in the Company and requested that he should be registered in the share register of the Company as the owner of such shares as assignee or trustee of the insolvent, and that new scrip for such shares should be issued to him as such assignee or trustee. In reply to this request the appellant received a letter from the Company informing him that it was not competent for him to be registered as the proprietor of

such 3,500 shares, and refusing to comply with his request to be registered as owner. By later letters in August and December 1928 the appellant again requested the Company to cause him to be registered as the owner of all shares in the said Company the scrip for which, in the name of the insolvent, had come into his possession. To these letters the appellant received no reply. In or about April 1928 an amendment of the articles of association of the Company was purported to have been made, the effect of which was to allow the directors of the Company to fix their own remuneration. The appellant had not received any dividend, bonus or return of any kind whatever in respect of the 7,034 shares or any of them which the insolvent had in the Company, and he was not registered in the share register of the Company as the owner of any of such shares; and he stated in his affidavit that by reason of these facts he had been unable to realize either capital or income in respect of the 7,034 shares or any of them, and that by reason of the conduct of the Company he had been unable to discharge completely his duty as assignee or trustee of the insolvent, and that the due claims of the creditors of the insolvent had been defeated and/or delayed. The insolvent, since the date of the sequestration, remained in the employment of the Company, and the order sequestrating the estate of the insolvent remained in full force and effect and the insolvent had not applied for or received a certificate of discharge.

The articles of association of the Company included the following clauses :—

" 1. The regulations contained in Table A in the first Schedule to the *Companies Act* 1910 shall not apply."

" 26. Subject to the restrictions of these articles any member may transfer all or any of his shares by transfer in the following form : . . . Or in such other form as the directors may from time to time prescribe," &c.

" 28. The Company shall provide a book to be called the register of transfers which shall be kept under the control of the directors and in which shall be entered the particulars of every transfer or transmission of every share."

" 29. The directors may in their discretion and without assigning any reason therefor refuse to register the transfer of any share to

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any person whom they shall not approve as transferee. The directors may also refuse to register any transfer of shares on which the Company has a lien."

"32. Subject to articles 33 to 41 inclusive hereinafter contained any person becoming entitled to a share in consequence of the death of any member, may with the consent of the directors (which they shall not be under any obligation to give) be registered as a member upon such evidence being produced as may from time to time be required by the directors."

"33. As it is not intended that the Company shall be conducted as a public company with an unlimited power of transfer, no shares shall be sold and transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the Company to admit to membership is willing to purchase the same at a fair value."

Arts. 34 to 39 dealt with the procedure to be followed in order to ascertain the willingness of a member to purchase shares, the method of determining the fair value of shares, &c.

"40. The directors may from time to time request the assignee or trustee of the estate of any insolvent member to sell and transfer the whole of the shares of such insolvent member to some person to be selected by the directors and at the fair value thereof to be fixed by them on the basis aforesaid and if such assignee or trustee do not comply forthwith with such call he shall be deemed to have served the Company with a transfer notice and to have specified therein the sum specified by the directors as aforesaid as the fair value thereof and such of the provisions of articles 33 to 39 as are applicable to the case shall apply thereto."

(The above arts. 26, &c., were under the heading "Transfer and Transmission of Shares.")

Art. 128 provided for the method by which "a notice may be given by the Company to the persons entitled to a share in consequence of the death, bankruptcy or insolvency of a member."

"129. Notice of every general meeting shall be given in some manner hereinbefore authorized to (a) every member of the Company . . . also to (b) every person entitled to a share in consequence of the death, bankruptcy or insolvency of a member who but for

his death, bankruptcy or insolvency would be entitled to receive notice of the meeting," &c.

No provision was contained in the memorandum or articles of association of the Company relating to the registration of a person becoming entitled to shares by reason of the insolvency of a member.

In these circumstances the assignee in insolvency gave notice of motion to the Supreme Court of Victoria for an order that the register of members of the above-named Company should be rectified by inserting therein the name of the assignee as shareholder in the Company as the holder of 7,034 shares, or alternatively of 4,500 fully paid ordinary £1 shares, on the ground that the assignee was entitled to be registered as the holder thereof under the provisions of the *Insolvency Act* 1915; and for a further order that scrip for such shares be issued forthwith to the assignee in his own name.

The application was heard by *Irvine* C.J., who held that the assignee was not entitled to be registered. In the course of his judgment *Irvine* C.J. said: "The short ground on which I think the Court cannot give this relief arises from the nature of a company, which is, in essence, a partnership to which Parliament has attached certain qualities but which still retains the right, save in so far as it is taken away by Parliament or its articles, to grant or refuse others admission to the partnership": *In re W. & G. Dean Pty. Ltd.* (1).

From the decision of *Irvine* C.J. the assignee now appealed to the High Court.

Ham K.C. (with him *Ellis*), for the appellant. An assignee in insolvency of a shareholder has a right to registration unless such right is expressly excluded by the articles of the company. The articles of this Company imply a right in the transmittee to registration and do not contain any express prohibition of the right to registration. The articles leave the position of the assignee untouched as regards registration. [Counsel referred to *Companies Act* 1915 (Vict.), sec. 34; *Palmer's Company Precedents*, 12th ed., Part I., p. 651.] Under Table A of the *Companies Act* 1915 an alternative right is given to the trustee either to sign a transfer without getting himself registered, or to transfer after getting himself

(1) (1929) V.L.R. 140, at p. 142.

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registered (*In re Smith, Knight & Co.* (*Weston's Case*) (1); *In re W. Key & Son Ltd.* (2); *Lindley* on *Companies*, 6th ed., vol. I., pp. 748, 749).

[ISAACS J. *In re London and Provincial Telegraph Co.* (3) shows that a trustee has a right *in rem* to have his equitable right perfected by registration and changed into a legal right.]

In re Bentham Mills Spinning Co. (4) shows that articles giving power to refuse to permit registration do not refer to transmission on insolvency. [Counsel referred to the *Insolvency Act* 1915, secs. 141 (3) and (4), 154, 166.] The only way to acquire the legal estate is by registration (*Companies Act* 1915, sec. 29). Sec. 31 (2) of the *Companies Act* contains a definition of "member," and sec. 34 (3) says that no notice of any trust shall be shown on the register. Sec. 39 (1) gives power to the Court to rectify the register. *Weston's Case* (1) shows that the assignee has a right to be registered. *Page Wood* L.J. in that case (5) indicates that there is an unlimited right of a shareholder to dispose of his interest unless a clause is contained in the articles limiting the right of disposal. *Weston's Case* shows that the position is not as laid down by *Irvine* C.J. The *Companies Act* provides a means to transfer shares, and in the absence of any restriction there is an absolute right in the assignee to be registered. A restriction in an article which puts an assignee in insolvency in an invidious position may be bad (*Buckley* on the *Companies Acts*, 10th ed., pp. 37, 38). In the absence of any restriction in the articles the assignee in insolvency has an absolute right to be registered. In *Key & Sons' Case* (6) the distinction is drawn between transfers and transmissions, and also in *In re Bentham Mills Spinning Co.* (7). The assignee in insolvency is not bound simply to sit down with the equitable title only, but is entitled to have that equitable title perfected by being registered as the legal owner of the shares.

Fullagar, for the respondent. The position in such cases as this is put in *Halsbury's Laws of England*, vol. v., p. 170, where it is said: "A member in the case of his bankruptcy ceases to

(1) (1868) L.R. 4 Ch. 20.
(2) (1902) 1 Ch. 467.
(3) (1870) L.R. 9 Eq. 653, at p. 656.
(4) (1879) 11 Ch. D. 900.
(5) (1868) L.R. 4 Ch., at pp. 26, 27.
(6) (1902) 1 Ch., at pp. 474, 475.
(7) (1879) 11 Ch. D., at p. 904.

be such when the trustee is registered as a member in his place, as he can be, if the articles permit it." *Bentham Mills Spinning Case* (1) was decided as turning on the terms of the article in question in that case, namely, art. 13 of Table A. Clause 22 of Table A of the *Companies Act* 1915 gives to any person becoming entitled to a share in consequence of the insolvency of a member the right either to be registered as a member in respect of the share, or, instead of becoming registered himself, the right to make such transfer of the share as the insolvent person could have made. But the provisions of Table A are excluded by the present articles. The owner of a share in a company has two rights—a proprietary right, the ownership of a chose in action, namely, his right to benefits accruing from time to time and to a share in the property of the company on winding up, and also a personal right analogous to membership of a partnership, namely, his right, as a member to vote, to receive notices, to attend meetings, and generally to take part on the management of the company. As in the case of a partnership, the former right only is transferred by the *Insolvency Act* to the assignee; therefore, in the absence of express provision on the subject, the assignee is not entitled to be registered. The assignee has to establish a right, and it must either be based on contract or implied by law or in equity. As far as the insolvency legislation is concerned, it has only to deal with shares as property. In the ordinary case a shareholder has not only a right in property, but he has trading relations with other persons, and by virtue of that relation he has certain rights of regulation in the affairs of the company, and, if he becomes insolvent, he simply transfers his property to the assignee, who gets nothing more than the proprietary right in the shares. So far as rights against the company are concerned they are controlled by the articles and the *Companies Act*, and, unless the articles give the assignee in insolvency a right to be registered, he has no such right. The assignee in insolvency is not an equitable owner, but a statutory owner. In the case of the insolvency of one partner, his assignee would not become a partner of the continuing partner; and an analogous rule applies to companies.

(1) (1879) 11 Ch. D. 900.

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[KNOX C.J. referred to *Borland's Trustee* v. *Steel Brothers & Co.* (1), per *Farwell* L.J.]

Sec. 154 of the *Insolvency Act* would be unnecessary if the assignee in insolvency had the right to be put on the register. There can be no half-way house between these two positions—that either the assignee takes all the rights under the shares and has the right to be registered with a corresponding liability to be registered against his will, or else the statute, which gives the assignee the power only to transfer the shares without any right to be registered, is alone to be looked at.

Ham K.C., in reply. There is no analogy between partnership and the membership of a company (*Buckley* on the *Companies Acts*, 10th ed., p. 593; *Companies Act* 1915, sec. 36).

Cur. adv. vult.

Dec. 12. The following written judgments were delivered :—

KNOX C.J. The appellant is the assignee of the insolvent estate of Ernest Dean, who at the date of his insolvency was the holder of 7,034 fully paid shares in the respondent Company. Certificates for 4,500 of these shares have come into the hands of the appellant as assignee of the insolvent, and certificates for the remaining 2,534 shares are held as security by creditors of the insolvent. A request by the appellant to the Company to have his name entered on the register of members as the holder of all the fully paid-up shares shown on the register as belonging to the insolvent having been refused, the appellant applied to the Supreme Court of Victoria for an order that the register of members should be rectified by inserting therein the name of the appellant as the holder of 7,034 or alternatively of 4,500 fully paid-up shares. The application was dismissed, and the appellant now appeals from that order. Sec. 166 of the *Insolvency Act* 1915 provides that every order placing an estate under sequestration in the hands of an assignee (as the sequestration order in this case did) shall vest in such assignee absolutely the property of the insolvent of or to which he is then seised, possessed

(1) (1901) 1 Ch. 279, at p. 288.

or entitled. By sec. 154 it is provided that where any portion of the property of the insolvent consists of shares transferable in the books of any company the right to transfer such property shall be absolutely vested in the assignee. "Property" is defined by sec. 4 of the Act as including every description of property whether real or personal. By sec. 29 (1) of the *Companies Act* 1915 it is provided that the shares or other interest of any member in a company shall be personal estate transferable in manner provided by the articles of the company.

The articles of the respondent Company contain no provision restricting the right of an assignee in insolvency to become registered as a member by transmission, though art. 32 provides that registration of a person becoming entitled to shares on the death of a member is subject to the consent of the directors, which they are under no obligation to give. Nor do the articles contain any provision authorizing or recognizing the right of an assignee in insolvency to become registered by transmission as a member. So far as I can find, the only articles in which the assignee of an insolvent is mentioned are 40, 128 and 129, which appear to me to contain nothing relevant to the determination of the question for decision in this case. Art. 29, in my opinion, does not apply because it deals only with the "transfer" of shares, and it is clear from the provisions of art. 28, and from the heading to arts. 26-41 that "transfer" should not in this context be read as including "transmission." The real question is whether an assignee has the right to be registered as a member subject only to the restrictions, if any, imposed by the articles, or whether he has no right to be so registered except so far as it may be conferred on him by the articles. We have not been referred to, nor have I been able to find, any decision precisely in point, but the observations of *Page Wood* L.J. in *Weston's Case* (1) have some bearing on the matter. In that case, after pointing out that the position of a shareholder in a company differs from that of a partner in that the former can retire at once by transferring his shares, he says:—"In the absence of any such restriction"—i.e., a restriction contained in the articles—"I think it is perfectly plain that the *Companies Act* 1862, in the 22nd section,

(1) (1868) L.R. 4 Ch., at p. 27.

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gives a power of transferring shares. . . . I apprehend the shares are transferable by virtue of the statute, and that the province of the articles is to point out the mode in which they shall be transferred, and the limitations (if any) to which a shareholder shall be subjected before he can transfer. . . . I think . . . that the shares are at once transferable . . . unless something is found to the contrary in the articles of association." These observations seem to indicate that the assignee in insolvency has a right to be registered as a member in respect of shares standing in the name of the insolvent subject only to the restrictions, if any, imposed by the articles. I have pointed out that no such restrictions are to be found in the articles of this Company.

In my opinion the true view is that the assignee of an insolvent member of a company is entitled to have his name placed on the register of members subject to the restrictions, if any, imposed by the articles of association, and as no such restrictions are imposed by the articles in this case I think the appellant is entitled to the relief he claims, at any rate in respect of the 4,500 shares the certificates of which are in his hands.

ISAACS J. This is not the case of a transfer of shares. In such a case the general principle of law is clear. It is stated on high authority, in *In re Discoverers Finance Corporation Ltd.—Lindlar's Case* (1), where *Buckley* L.J. (for *Cozens-Hardy* M.R., *Fletcher Moulton* L.J. and himself) says that "in the absence of restrictions in the articles the shareholder has by virtue of the statute the right to transfer his shares"; and he adds: "It was the policy of these Acts to give a free right of disposition, leaving it to the regulations of the company to impose such restrictions upon its exercise as might be desired." But that establishes merely the right of a member, the owner of a share, to alienate his property as he pleases unless by his social contract he has limited his prima facie right. The present case depends on further considerations. An assignee in insolvency under the insolvency law of Victoria, whom I may now conveniently refer to as a trustee in bankruptcy, does not take from the member exercising his rights under the Companies Act,

(1) (1910) 1 Ch. 312, at pp. 316, 317.

and the question here is not how far the trustee as a member can deal with his property. It is as to the right of the trustee in bankruptcy to insist on registration of himself as a member of the Company. Obviously different considerations arise. Sec. 166 of the *Insolvency Act* of Victoria, like all enactments of that nature, vests in the trustee, as I term him, absolutely the property of the insolvent — that means, of course, for the same interest, legal and equitable as the insolvent possessed (see per *Collins* J. in *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London and China* (1). Subject to some special provisions, such as reputed ownership and other instances mentioned in the Act, the trustee stands in the shoes of the insolvent with respect to his property. As to shares in a limited company, the insolvent being bound by the social contract, so is the trustee, except so far as the insolvency law overrides it. The company cannot deny the force of the section in the *Insolvency Act*, vesting in the trustee the property in the shares.

The Company in the present case does not controvert that proposition, but it maintains, that unless by the articles, provision is made entitling a trustee in bankruptcy to be registered, the trustee has no right to registration but must be content with the ordinary property rights resulting from the share. The right to vote, and so take part in the management of the company, that is, in the common concern of the shareholders, is dependent on membership, which connotes registration. And the right to vote is itself a right of property (*Pender* v. *Lushington* (2)); so that on principle the doctrine of *Lindlar's Case* (3) ought to apply. For although the trustee's right to the shares does not arise by a transfer from the shareholder, yet it is, as *Jessel* M.R. said in *Seear* v. *Lawson* (4), "a statutory transfer . . . one single transfer, so to say, from the bankrupt to the trustee," and the reasoning in *Lindlar's Case* applies just as cogently for the benefit of the creditors as it does for the benefit of the solvent shareholder desiring to transfer. And so I find it has been considered. For instance, in *In re W. Key & Son Ltd.* (5) it is said by *Byrne* J.: "Prima facie, the right

(1) (1897) 1 Q.B. 55, at p. 63.
(2) (1877) 6 Ch. D. 70.
(3) (1910) 1 Ch. 312.
(4) (1880) 15 Ch. D. 426, at p. 433.
(5) (1902) 1 Ch., at p. 474.

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of a person taking by transmission is to be entered upon the register in the same way as his predecessor in title was entered, and to have the certificate in the same form as that of his predecessor in title." Again, in *Wise* v. *Lansdell* (1) *Astbury* J. said:—"Wise himself before his bankruptcy had the right to vote beneficially in respect of his shares. The right to place himself in a position to exercise that voting power, subject to the rights of the mortgagees, passed to the trustees *under secs.* 38 *and* 53, although he clearly could not exercise it, or attempt to do so, unless and until he had had the name of the bankrupt removed from the register, and his own name substituted." It will be observed that the trustee's right to be registered is rested in the passage quoted on the sections in the *Bankruptcy Act*, which merely vest the property in the trustee and correspond to secs. 141 and 166 of the Victorian Act. Qualifications, if any, of that prima facie right must be found in the memorandum or articles of the Company. No restriction is there found. On the contrary art. 40 is a tacit recognition of the trustee's right to sell and transfer the shares. While, therefore, it is true the mere vesting of the bankrupt's shares in the trustee does not make the trustee a shareholder, he may, if he chooses and unless some valid restriction exist, insist on becoming a shareholder. It is at this point and with much respect my conclusion differs from that of the learned Chief Justice from whom this appeal comes.

The appeal, therefore, should in my opinion be allowed.

STARKE J. The point in this case is whether the assignee of an insolvent is entitled to be placed upon the register of members of a company in respect of fully paid-up shares registered in the name of the insolvent and owned by him. "A share is . . . an interest made up of various rights conferred by the contract contained in the articles of association" of the company (*Buckley* on the *Companies Acts*, 8th ed., p. 31. It is personal estate, transferable in manner provided by the articles of the company (*Companies Act* 1915, sec. 29). And, in the absence of restriction in the articles, the shareholders have a free right of transfer (*Weston's Case* (2)). This property vests, by force of the *Insolvency Act*, in the assignee

(1) (1921) 1 Ch. 420, at pp. 428, 429. (2) (1868) L.R. 4 Ch. 20.

(*Insolvency Act* 1915, secs. 103, 154, 166). Usually, the articles of association of a company provide that any person becoming entitled to shares in consequence of death or insolvency may, upon proof of his title, be registered as a member in respect of such shares, or transfer such shares. (See *Palmer's Company Precedents*, 12th ed., Part I., pp. 651-652; and cf. *Companies Act* 1915, sec. 34.) The articles of association in the present case (art. 32) make such a provision in the case of any person becoming entitled to a share in consequence of the death of any member, but none in the case of an assignee or trustee in insolvency. So the point must be decided on principle.

The right of a person becoming entitled to a share in a company, whether he be a transferee, or an executor, or an administrator, or an assignee, is to succeed to the interest of his predecessor, comprising the various rights conferred by the contract contained in the articles of association—the rights to transfer, to vote and take part in the management of the company, to receive dividends, and so forth. And these rights are, prima facie, absolute, though, as we have seen, they may be restricted by the articles. But such persons do not, *ipso facto*, become members of the company. To exercise some, if not all, of the rights attaching to their shares, they must have their names entered on the register of members. And if to exercise and avail themselves of such rights they must be registered, then it follows, in my opinion—subject to any restriction in the articles—that they must be entitled to registration as an incident of their property. Executors, trustees, and assignees and trustees in insolvency do not often claim to be registered as members of a company, because notice of trusts may not be entered on the register, and registration as members may involve them in personal liability. But they may have the shares transferred into their own names if they so desire (*City of Glasgow Bank in Liquidation—Buchan's Case* (1)).

The learned Chief Justice of the Supreme Court of Victoria relied upon the provisions of art. 29, empowering the directors in their discretion, and without assigning any reason therefor, to refuse to register the transfer of any share to any person whom they should

(1) (1879) 4 App. Cas. 547, 549, at p. 588.

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not approve as transferee. But what is involved in the present case is not a transfer within the meaning of that article, but a transmission of rights by force of the *Insolvency Act* (*In re Bentham Mills Spinning Co.* (1)), and the article is therefore inapplicable.

The appeal should be allowed, and an order made in the terms of the notice of motion.

Appeal allowed. Order of the Supreme Court discharged. Order that the register of the Company be rectified by inserting therein the name of the appellant as the holder of 4,500 *fully paid ordinary shares therein, and that scrip for such shares be issued to the appellant in his own name.*

Solicitors for the appellant, *R. E. Lewis & Beacham Kiddle.*
Solicitors for the respondent, *Blake & Riggall.*

H. D. W.

(1) (1879) 11 Ch. D. 900.