[HIGH COURT OF AUSTRALIA.]

MILLS AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

MILLS AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, 1937, *Oct.* 26-28.

1938, *Feb.* 17.

Latham C.J., Rich, Starke, Dixon and Evatt JJ.

Company—Management—Powers of directors—Directors' resolution—Effect of resolution—Directors' interest increased—Bona fides of directors—Articles of association—Powers conferred on directors—Powers conferred on shareholders—Parallel powers.

Private International Law—Foreign corporation—Court's power to control internal management.

The directors of a company passed a resolution which increased the voting power of one of the directors but which was believed by the directors to be in the best interests of the company.

Held that the mere fact that one of the directors derived some benefit from the passing of the resolution did not invalidate it when it was passed in good faith.

The criterion of the validity of a resolution of directors of a company considered.

Per Dixon J.: The power of a State court to interfere in the internal management of a company incorporated in another State considered.

Pursuant to sec. 11 of the *Companies Act* 1899 (N.S.W.) the articles of association of a company contained a provision which expressly authorized the directors to increase the capital of the company. Another article provided that all shares should be under the control of the company and should be issued,

allotted, placed under option, or otherwise disposed of, on such terms and conditions and at such times as the company should by extraordinary resolution direct.

Held that the latter article did not override the powers of the directors to increase the capital of the company.

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria Ainslie Mills, Jean Purves Price and Mary Denistoun Ainslie Maslin, who sued on behalf of themselves and all shareholders in Charles Mills (Uardry) Ltd. (other than the defendants Mills and Birtchnell), claimed against Andrew Agnew Neilson Mills, Samuel Charles Birtchnell and Charles Mills (Uardry) Ltd. a declaration that a resolution passed by certain directors of the company was invalid. The terms of the resolution are set out in the judgment of *Starke* J. hereunder. The resolution was challenged upon two grounds: (1) that it was not passed bona fide in the interests of the company but was passed in the interests of the defendant Andrew Agnew Neilson Mills, who was the managing director of the company, with the intention of securing to him continued control of the operations of the company; (2) that the resolution was not authorized by the articles of association and was *ultra vires* of the directors. The company was incorporated in New South Wales. Its articles of association contained the following provisions:—

"6. All shares shall . . . be under the control of the company and shall be issued allotted placed under option or otherwise disposed of on such terms and conditions and at such times as the company by extraordinary resolution as defined by sub-section (2) of section 130 of the *Companies Act* 1899 shall direct."

"25. The company may from time to time increase its capital by the creation of new shares.

"26. Such new shares shall be of such amount and shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as the directors shall determine and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company and with a special or without any right of voting.

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"27. Except so far as otherwise provided by the conditions of issue or by these articles any capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the same provisions as shares in the original capital.

"28. The company may from time to time by special resolution reduce its capital in any manner allowed by law and the company may cancel shares which at the date of the resolution in that behalf have not been taken or agreed to be taken by any person or which have been forfeited and diminish the amount of its share capital by the amount of the shares so cancelled.

"29. Any of the original shares for the time being unissued and any new shares from time to time to be created may from time to time be issued with any such guarantee or any such rights of preference whether in respect of dividend or of repayment of capital or both or any such other special privilege or advantage over any shares previously issued or then about to be issued or at such a premium or with such deferred right as compared with any shares previously issued or then about to be issued or subject to any such conditions or provisions and with any such right or without any right of voting and generally on such terms as the directors may from time to time determine."

"48. If there be joint holders one only of such holders shall be entitled to vote in respect of such shares and in case more than one of such joint holders be present at a meeting personally or by proxy the vote of the senior who tenders a vote whether in person or by proxy shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register."

"72. The management and control of the business and affairs of the company shall be vested in the directors who (in addition to the powers and authorities by these articles expressly conferred upon them) may pay all costs and expenses of and incidental to the incorporation flotation and registration of the company and may increase the capital of the company and exercise all such powers and do all such acts and things as are within the scope of the memorandum of association of the company and are not by statute expressly directed or required to be exercised or done by the company

in general meeting. Without prejudice to the foregoing the directors may from time to time at their discretion raise or borrow any sum or sums of money for the company alone or jointly with any person or persons and may secure the repayment of such moneys or any debts liabilities contracts or obligations undertaken or incurred by the company in such manner and upon such terms and conditions in all respects as they think fit and in particular by mortgages upon the lands and property of the company or by the issue or reissue of debentures or debenture stock charged upon all or any part of the property of the company (both present and future) including its uncalled capital for the time being."

"74. The directors shall before declaring any dividend except the dividend to preference shareholders provided for by article 76 hereof set aside out of such of the profits of the company as shall remain after providing sufficient to pay the said dividend to preference shareholders such sums as they think proper as a reserve fund to meet contingencies and/or for equalizing dividends and/or for repairing improving and maintaining any property of the company and/or for acquiring other property and/or for or towards payment of any debts or liabilities owing or secured on any property of the company or any interest thereon and generally for such purposes as the directors shall in their discretion think conducive to the interests of the company and invest the several sums so set aside or any of them or any part thereof upon such investments (other than shares of the company) as they may think fit or deposit or deal with the same or any of them or any part thereof in such manner as the directors shall think advantageous and decide and from time to time deal with and vary such investments and dispose of all or any part thereof for the benefit of the company and divide the reserve funds into such special funds as they think fit with full power at any time or times and from time to time to employ the assets constituting the reserve fund or any of them not only for any of the objects or purposes of such reserve fund but generally for such objects or purposes (including the carrying on of the business of the company) as the directors shall in their discretion think conducive to the interests of the company and that without being bound to keep the same separate from the other assets."

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"76. The 46,000 shares of £1 each in the original capital of the company shall be divided into 11,500 preference shares of £1 each and 34,500 ordinary shares of £1 each and the said preference shares shall confer the right to a fixed cumulative preferential dividend of a total amount of £2,500 in each year to be paid or distributed from time to time as the directors think fit to or amongst the holders for the time being of the said preference shares ratably and in proportion to the number of such preference shares held by them respectively. If in any year the net profits of the company shall not amount to £2,500 then and in every such case the whole of the net profits for that year shall be distributed as aforesaid amongst the holders for the time being of the said preference shares with the right to such holders to resort to the surplus net profits of the company over and above £2,500 per annum for any succeeding year or years to make up the deficiency of dividend to them in any year or years and to have such surplus net profits or so much thereof as shall in each case be required to make up such deficiency distributed amongst them as aforesaid. Other than as in this clause aforesaid the said preference shares shall not be entitled to participate any further in the profits of the company and such preference shares shall not in a winding up have any preferential claim on any capital assets of the company but shall rank in that respect with ordinary shares.

"77. Subject as hereinbefore provided in reference to a reserve fund and the rights of preference shareholders the profits of the company shall be employed dealt with or distributed at the discretion of the directors.

"78. Subject as aforesaid the directors may from time to time if and when they think fit declare a dividend or interim dividend to be paid to the members according to the amounts paid up for the time being on their respective shares."

"80. When declaring a dividend the directors may direct payment of same wholly or in part by the distribution of specific assets and in particular of shares debentures or debenture stock of the company or shares debentures or debenture stock of any other company or in any one or more of such ways and when any difficulty arises in regard to the distribution they may settle the same as they think expedient and in particular may issue fractional certificates and

may fix the value for distribution of such specific assets or any part thereof and may determine that cash payments shall be made to or by any members upon the footing of the value so fixed in order to adjust the rights of all parties and may vest any such specific assets in trustees upon such trusts for the persons entitled to the dividend as may seem expedient to the directors."

Lowe J. gave judgment for the defendants.

From that decision the plaintiffs appealed to the High Court.

Further facts are stated in the judgments hereunder.

Herring K.C. (with him *Hudson*), for the appellants. The resolution of 17th September 1936 proposing to issue shares in satisfaction of the accumulated profits amounting to £86,250 involved the exercise of discretionary powers, and was equivalent to a capitalization of the reserves; its effect was to alter the voting power of Neilson Mills, who voted for it. That resolution was *ultra vires* of the directors; alternatively, it was passed for the purpose of increasing the voting power of Neilson Mills and was not a bona-fide exercise of the directors' powers. This was a matter which required very careful consideration and should not have been rushed through in a few days (*In re Bridgewater Navigation Co.* (1)). Art. 6 puts all shares under the control of the company, not under the control of the directors or even under the control of a majority of shareholders. As soon as the resolution capitalizing the reserves was passed and the shares were issued the whole balance of voting power and the rights of shareholders in a winding up were fundamentally altered. Art. 6 was introduced to prevent anything of that kind happening. Its purpose was to prevent the powers of the preference shareholders being interfered with, and it was inserted to prevent the very thing happening which has happened here. The articles of association should be read as a whole, and, if possible, effect should be given to every part of them. Art. 72 should be read as referring to the external aspect of the company, and, so read, there is nothing which enables the directors to override art. 6 (*Mosely* v. *Koffyfontein Mines Ltd.* (2)). Arts. 25-29 can be read consistently with art. 6 (*Campbell* v. *Rofe* (3)). Art. 80 must also be read in conjunction with art. 6. On

(1) (1891) 2 Ch. 317.
(2) (1911) 1 Ch. 73, at p. 84; (1911) A.C. 409.
(3) (1933) A.C. 91; 48 C.L.R. 258.

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the proper construction of the articles the directors had no power to do what they did here. There was not a bona-fide exercise of the power. All the powers were discretionary, and the exercise of a power cannot be upheld when there has entered into the mind of the director his own personal advantage. The power to issue shares is for the company's benefit and should not be used for the purpose of affecting the voting powers (*Bennett's Case* (1)). In this case the powers of the directors were not used bona fide for that purpose but were used for the benefit of Neilson Mills (*In re National Marine Insurance Co.* (*Gilbert's Case*) (2)). In the ordinary case in which a trustee is dealing with property he is precluded from making a profit, and as soon as it appears that there is a possibility of profit the transaction is avoided. It is sufficient, where you have a fiduciary power being exercised, if a personal interest in the person exercising it has played a part in inducing the decision. In such a case a court of equity will avoid the exercise of the power and will not inquire into the competing advantages and disadvantages (*Re Bell Bros. Ltd.* ; *Ex parte Hodgson* (3) ; *In re Alfred Shaw & Co. Ltd.* (*Hughes's Case*) (4) ; *In re Bede Steamship Co. Ltd.* (5) ; *Aberdeen Railway Co.* v. *Blakie Bros.* (6)). As soon as it is found that there is some personal interest in the individual exercising the power the court does not inquire further (*Punt* v. *Symons & Co. Ltd.* (7)). If these shares were issued with the immediate object of altering the voting powers, it could not be said that they were issued for the benefit of the company, and the trial judge found that this would not have been done but for that purpose (*Piercy* v. *S. Mills & Co. Ltd.* (8) ; *Cox* v. *Smail* (9), a case of fraudulent preference). The cases show that in order to invalidate the exercise of a power it is enough if the private interest was an actuating cause (*Richard Brady Franks Ltd.* v. *Price* (10) ; *Burns* v. *Siemens Bros. Dynamo Works Ltd.* (11)).

(1) (1854) 5 DeG. M. & G. 284, at p. 297 ; 43 E.R. 879, at p. 884.
(2) (1870) 5 Ch. App. 559.
(3) (1891) 65 L.T. 245.
(4) (1896) 21 V.L.R. 599, at p. 602 ; 17 A.L.T. 228, at p. 229.
(5) (1917) 1 Ch. 123.
(6) (1854) 1 Macq. 461, at p. 471.
(7) (1903) 2 Ch. 506.
(8) (1920) 1 Ch. 77, at p. 82.
(9) (1912) V.L.R. 274.
(10) (1937) 58 C.L.R. 112.
(11) (1919) 1 Ch. 225.

Wilbur Ham K.C. (with him *Tait*), for the respondents. What actuated Neilson Mills was a desire to get arrears of back pay to which he was entitled in 1929. He did not draw it then, but when he thought the reserves were large he put it to a general meeting which agreed to his taking it in 1936. There was no concealment of the foundation of the new stud by Neilson Mills. In fact he advertised it as founded on the Uardry stock, and it is an advantage to the parent stock to have subsidiary stocks in existence which are founded on it. The trial judge found that the conduct of Neilson Mills was bona fide throughout the whole transaction. The actual scheme of distribution of bonus shares was found by *Lowe* J. to have been honestly arrived at, and the resolution did not give Neilson Mills a majority of voting power. Neilson Mills was not unaware that the amendment would advantage him, but such advantage was only incidental to his main purpose to advantage the company (*Australian Metropolitan Life Assurance Co. Ltd.* v. *Ure* (1); *Gramophone and Typewriter Ltd.* v. *Stanley* (2); *Salmon* v. *Quin & Axtens Ltd.* (3); *Hirsche* v. *Sims* (4)). The last case draws a distinction which should be drawn in the present case. Mills has been put by the testator in the position in which his interest and his duty must conflict. What Mills wanted to do was to distribute the reserve; this was what he set out to do, and it could not be done without the bonus shares. It was the bonus shares that advantaged Mills, but the court is concerned only with the primary intention. *Abbotsford Hotel Ltd.* v. *Kingham* (5), *Punt* v. *Symons & Co. Ltd.* (6), *Fraser* v. *Whalley* (7) and *Piercy* v. *S. Mills & Co. Ltd.* (8) were cases in which the power was exercised for an immediate purpose which was unauthorized. The greatest weight should be given to the decision of the primary judge on the question of bona fides (*Richard Brady Franks Ltd.* v. *Price* (9)). To avoid the transaction you must find that the improper motive was what caused the conduct complained of (*Automatic Self Cleansing Filter Syndicate Co. Ltd.* v.

(1) (1923) 33 C.L.R. 199, at pp. 207, 208, 210, 211, 226.
(2) (1908) 2 K.B. 89.
(3) (1909) 1 Ch. 311; (1909) A.C. 442.
(4) (1894) A.C. 654, at pp. 660, 661.
(5) (1910) 101 L.T. 777; 102 L.T. 118.
(6) (1903) 2 Ch. 506, at pp. 508, 515 et seq.
(7) (1864) 2 Hem. & M. 10, at pp. 22, 28-30, 32; 71 E.R. 361, at pp. 366, 368-370.
(8) (1920) 1 Ch., at pp. 79, 80, 84.
(9) (1937) 58 C.L.R. 112.

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Cuninghame (1); *Salmon* v. *Quin & Axtens Ltd.* (2); *Gramophone and Typewriter Ltd.* v. *Stanley* (3)). On the question of *ultra vires* the decision of *Lowe* J. was correct. If there is any conflict between art. 6 and the subsequent articles which deal specifically with the increase of capital, the latter should govern. Art. 6 refers to original capital (*Palmer's Company Precedents*, 14th ed., vol. I. (1931), pp. 594, 595, 599, 600). Art. 6 is referable only to the original capital and was not intended to apply to new shares. The later articles deal with further issued capital.

Herring K.C., in reply. Art. 6 is a restricting article regulating the powers the company would ordinarily have: it does not confer a power upon the company.

Cur. adv. vult.

1938, Feb. 17.

LATHAM C.J. This is an appeal from a judgment of *Lowe* J. in an action in which the plaintiffs sued on behalf of themselves and all shareholders in Uardry Ltd. (other than the two personal defendants), claiming as against those defendants and the company a declaration that a certain resolution passed by certain directors of the company is invalid. The resolution was challenged upon two grounds: first, that it was not passed bona fide in the interests of the company but really in the interests of the defendant Andrew Agnew Neilson Mills (who was the managing director of the company) with the intention of securing to him continued control of the operations of the company; secondly, that the resolution was not authorized by the articles of association and was *ultra vires* the directors. The learned judge gave judgment for the defendants.

The controversy arises out of the relations between Ainslie Mills, who is a director of the company and a large shareholder, and the defendant Neilson Mills, who is his uncle. Neilson Mills has been the managing director of the company for many years and has managed it with conspicuous success. Ainslie Mills is his nephew. When he attained the age of twenty-five years he became the owner

(1) (1906) 2 Ch. 34, at pp. 42, 43. (2) (1909) 1 Ch. 311; (1909) A.C. 442.
(3) (1908) 2 K.B., at pp. 105, 106.

of a large number of shares. He secured the appointment of himself as a director of the company. Relations between Ainslie Mills and his uncle have for some years been very unpleasant and difficult, and it is evident that there has been bitter feeling on both sides.

The resolution which is challenged is a resolution of the directors of the company. The directors are Neilson Mills and Ainslie Mills (both of whom are large shareholders) and the defendant Birtchnell (who, though a director, is not a shareholder). The company is a family company, and its shares are held by the personal plaintiffs, by Miss Winifred M. Mills, the defendant Neilson Mills in his own interest, and by Neilson Mills and others as trustees for certain members of the family. Two of these trusts have been referred to as the Ainslie Mills trust and the Price trust. There is one shareholder, Miss Winifred M. Mills, who is not a party to the action. She has generally voted with Neilson Mills. Neilson Mills was entitled under the articles of association to exercise the vote of the trustees in the two trusts mentioned, and, when these shares were taken into account, controlled a majority of votes, if Miss Mills supported him. The interest of Neilson Mills was mainly in ordinary shares, whereas the interest of Ainslie Mills was mainly in preference shares. There were 34,500 ordinary shares, each with one vote, and 11,500 preference shares, each with three votes.

The resolution of the directors which is challenged was carried by Neilson Mills and Birtchnell against the vote of the plaintiff Ainslie Mills. The resolution declared that the whole of the accumulated profits standing to the credit of the reserve account was not required as reserves and that, as the profits belonged solely to the ordinary shareholders, a sum of £86,250 should be distributed thereout by way of dividends on ordinary shares and that the dividends should be paid and satisfied by the issue to the holders of ordinary shares of 86,250 new ordinary shares fully paid up and that for this purpose the capital of the company should be increased by the creation of 86,250 new ordinary shares of £1 each.

The interests of those concerned in the company were affected by this resolution in varying ways. The passing of the resolution did not affect the dividends which the preference shareholders would receive, because they were entitled only to a cumulative preferential

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dividend of £2,500 per annum. The dividends upon ordinary shares were not affected. As between them and the preference shareholders the position was the same as before—the ordinary shareholders came in for dividend after the preference shareholders. Each ordinary shareholder maintained his proportionate share in the capital of the company represented by the ordinary shares because he received five new shares for every two ordinary shares held by him. Thus, the dividend rights of ordinary shareholders *inter se* were not affected. The relative rights of the two classes of shareholders upon a winding up were, however, profoundly affected by the resolution, because the articles of association provided, in article 76, that the preference shares should not in a winding up have any preferential claim on the assets of the company, but that they "should rank in that respect with ordinary shares." Thus the resolution greatly improved the position of ordinary shareholders if a winding up should take place. Further, the resolution affected the voting power of the shareholders, because a large increase was made in the number of ordinary shares, while the number of preference shares remained unchanged. Neilson Mills had, as already stated, been trustee of two trusts, but immediately before the resolution was passed on 7th September 1936 he had, under pressure, agreed to retire from these trusts, and therefore in the future he would not have been in a position to exercise voting power in respect of the trust shares. The result of the resolution, if it is effective, is that he will continue to be in as strong a position with respect to voting power as if he had not retired from the trusts. It is contended on behalf of the plaintiffs that the object of Neilson Mills and of Birtchnell, who always supported Neilson Mills in matters affecting the management of the company, was not really to promote the interests of the company, but to preserve for Neilson Mills the same position in respect to voting power (which had always in fact been a dominant position) as he had held before his enforced resignation of his position as trustee.

The evidence shows that Neilson Mills had for many years controlled the company in effect as if it were his own business, and had done so with the concurrence of those interested, who had appreciated his excellent and most successful management. With the entry of

Ainslie Mills upon the scene, however, the position changed. Ainslie Mills was very critical of his uncle's management, and it is plain that Neilson Mills resented the attitude of the younger man.

I propose to consider first the contention that the resolution was not passed bona fide in the interests of the company.

Where the interests of individuals are divergent and conflicting, where personal feeling is acute, and where the parties immediately concerned give oral evidence, the trial judge is in a position which enables him to estimate the weight and value of evidence much more effectively than any court of appeal can possibly do. Where so much depends upon the character, personal motives and interests of individual persons, the finding of a trial judge should not be disturbed unless there are strong and compelling reasons for taking a different view. In this case the learned trial judge has made scrupulously careful and precise findings of fact. There is plainly evidence to support them. In my opinion, they should be accepted by this court without hesitation.

The only question which I conceive arises upon this branch of the case is the question of the legal significance and effect of the findings of fact which have been made. The learned judge asked the question whether the resolution was passed in the interests of the company. He expanded this question by asking: "Was it passed in the honest exercise of the directors' discretion, to distribute reserves which were no longer needed, or was it passed with the sole view of creating voting power which would inure for the benefit of Neilson Mills and those supporting him?" I think that the form of this question is not entirely appropriate. In fact, reserves were not distributed in consequence of the resolution. All that was done by the resolution was to distribute new shares to the ordinary shareholders in proportion to their existing shares. The assets in the reserve fund were retained in the business. Further, the alternatives which this question submits for consideration are not completely exhaustive. A resolution may have been passed honestly in the exercise of the directors' discretion but also with the view of creating voting power to which it was thought that ordinary shareholders, in view of the relative extent of their interest in the assets of the company, were fairly entitled. Again, even though the view of

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the directors in passing the resolution was not *solely* that of creating voting power which could be used by them as desired, yet, if the substantial object of the directors was to bring about this result, the resolution might be held to be invalid.

But, although his Honour has asked the question in the particular form stated, his findings of fact are not confined to answers to this question. His Honour accepted the evidence for the defendants as to the reasons which brought about the passing of the resolution. He went on to say in his judgment that " while I accept the evidence to the extent which I have mentioned (that is as to the honest initiation and abandonment of one proposal and the honest final acceptance of the proposal embodied in the resolution) I feel no doubt whatever that the particular form which this resolution finally assumed and the time at which it was adopted were due to the resignation of Neilson Mills as a trustee of the Ainslie Mills and the Price trusts." His Honour expressed his conclusion in the following words :—" I think the scheme of distribution as actually carried out in the resolution was honestly arrived at, and I think that those who voted in favour of it thought it to be in the best interests of the company, and I also think that that was their main reason for passing that resolution. But I think, and I find, that neither Neilson Mills nor Birtchnell was at all unconscious of the effect that that resolution would have in altering the voting power. The resolution when carried into effect did not give a majority to Neilson Mills. He probably hoped that it would make a majority easier. That being the conclusion at which I have arrived, it seems to me that the law, as I have stated it, does not invalidate that resolution. In my opinion, where the main purpose is such as I have indicated the resolution is valid." There is, as I have said, no doubt that there was evidence which, when accepted by the trial judge, entitled him to make these findings of fact. The question is whether upon the findings of fact set out his Honour's conclusion that the resolution was valid is correct.

It has been argued for the appellants that these findings entitle them to judgment. It is urged that the rule laid down by the cases is that directors must act always and solely in the interests of the company and never in their own interests. It is clear that, if it is

established that the directors did not act bona fide in the interests of the company, the court in a properly constituted action will set aside their resolution. Thus, if directors issue shares only for the purpose of conserving their own power, the resolution creating the shares will be set aside or an injunction will be granted to prevent the holding of a proposed meeting (*Fraser* v. *Whalley* (1); *Punt* v. *Symons & Co. Ltd.* (2); *Piercy* v. *S. Mills & Co. Ltd.* (3)). But before the exercise of a discretionary power by directors will be interfered with by the court it must be proved by the complaining party that they have acted from an improper motive or arbitrarily and capriciously (*In re Gresham Life Assurance Society*; *Ex parte Penney* (4); *Richard Brady Franks Ltd.* v. *Price* (5); *Australian and Metropolitan Life Assurance Co. Ltd.* v. *Ure* (6)).

It must, however, be recognized that as a general rule, though not invariably (as, for example, in the case of Birtchnell in this case), directors have an interest as shareholders in the company of which they are directors. Most sets of articles of association actually require the directors to have such an interest, and it is generally desired by shareholders that directors should have a substantial interest in the company so that their interests may be identified with those of the shareholders of the company. Ordinarily, therefore, in promoting the interests of the company, a director will also promote his own interests. I do not read the general phrases which are to be found in the authorities with reference to the obligations of directors to act solely in the interests of the company as meaning that they are prohibited from acting in any matter where their own interests are affected by what they do in their capacity as directors. Very many actions of directors who are shareholders, perhaps all of them, have a direct or indirect relation to their own interests. It would be ignoring realities and creating impossibilities in the administration of companies to require that directors should not advert to or consider in any way the effect of a particular decision upon their own interests as shareholders. A rule which laid down such a principle would paralyse the management of companies in

(1) (1864) 2 Hem. & M. 10; 71 E.R. 361.
(2) (1903) 2 Ch. 506.
(3) (1920) 1 Ch. 77.
(4) (1872) 8 Ch. App. 446.
(5) (1937) 58 C.L.R. 112.
(6) (1923) 33 C.L.R. 199.

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many directions. Accordingly, the judicial observations which suggest that directors should consider only the interests of the company and never their own interests should not be pressed to a limit which would create a quite impossible position.

Directors are required to act not only in matters which affect the relations of the company to persons who are not members of the company but also in relation to matters which affect the rights of shareholders *inter se*. Where there are preference and ordinary shares a particular decision may be of such a character that it must necessarily affect adversely the interests of one class of shareholders and benefit the interests of another class. In such a case it is difficult to apply the test of acting in the interests of the company. The question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between different classes of shareholders. Where such a case arises some other test than that of "the interests of the company" must be applied, and the test must be applied with knowledge of the fact already mentioned that the law permits directors, and by virtue of provisions in articles of association often requires them, to hold shares, ordinary or preference, as the case may be. A director who holds one or both classes of such shares is not, in my opinion, required by the law to live in an unreal region of detached altruism and to act in a vague mood of ideal abstraction from obvious facts which must be present to the mind of any honest and intelligent man when he exercises his powers as a director. It would be setting up an impossible standard to hold that, if an action of a director were affected in any degree by the fact that he was a preference or ordinary shareholder, his action was invalid and should be set aside. There is high authority which, in my opinion, supports the view which I have expressed. In the case of *Hirsche* v. *Sims* (1) their Lordships of the Privy Council said with reference to directors whose action was challenged: "If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with *dolus malus* or breach of trust merely because in promoting the interest of the company they were also promoting

(1) (1894) A.C. 654, at pp. 660, 661.

their own." The question is: What was "the moving cause" of the action of the directors? (See per Lord *Shaw* in *Hindle* v. *John Cotton Ltd.* (1)). If this principle is applied to the findings of the learned judge, his decision upon this aspect of the case is seen to be right.

The second question which is raised depends entirely upon the construction of the articles of association, which are expressed in such terms as to create much uncertainty in interpretation. Identical or overlapping powers are conferred by the articles upon the company and upon the directors of the company, and it is difficult to arrive at a completely satisfactory interpretation of all the articles taken together. Art. 6 provides that all shares except the original shares shall be under the control of the company and that they shall be issued, allotted, placed under option or otherwise disposed of under such terms and conditions and at such times as the company by extraordinary resolution directs. Art. 25 provides that the company may from time to time increase its capital by the creation of new shares, while art. 72 provides (*inter alia*) that the directors may increase the capital of the company. Art. 26 provides that new shares created by the company (referred to in art. 25) shall be of such amount and shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as the directors shall determine. Other articles entitle the directors to establish and invest a reserve fund, to manage the reserve fund, and to declare dividends. Art. 80 provides that, when declaring a dividend, the directors may direct payment thereof wholly or in part by the distribution of specific assets and, in particular, of shares, debentures or debenture stock of the company, &c.

Thus, both the company and the directors can create new shares. The company by extraordinary resolution may determine the terms and conditions upon which such shares are to be issued. The directors may also determine the conditions upon which any shares created by the company may be issued. Further, the directors may declare dividends and may direct that a dividend be paid by the distribution of shares in the company.

(1) (1919) 56 Sc.L.R. 625.

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The position, therefore, is that it is possible to find articles of association which in terms authorize the directors to do precisely what they have done, namely, to create new shares, to declare a dividend, to direct that the dividend be paid by the distribution of the shares, and to deal with the reserve fund by applying it in payment for new shares. On the other hand, it is contended that art. 6 requires an extraordinary resolution of the company before any new shares can be issued, allotted or otherwise disposed of, and that this article also requires that the terms and conditions of issue &c. shall be determined by such a resolution. If the articles to which I have referred are all read as conferring powers upon the company or the directors, some practical inconveniences might arise if the shareholders and the directors differed in policy, but there would be no necessary inconsistency between the articles. There would simply be duplicate coexisting powers. If, on the other hand, the articles are construed as imposing limitations upon the exercise of general powers (such, for example, as a power to create and issue new shares) so that, for example, the directors could not distribute new shares by way of dividend without an extraordinary resolution of the company, the result would be that the powers expressly conferred upon the directors would be ineffective in practice. The directors would not be able to do what the articles in express terms state that they may do, unless the shareholders concurred by an extraordinary resolution. I am of opinion, though I confess not without some doubt, that the former construction is that which should be adopted and that the articles which in terms authorize the directors to do what they have done should not be limited by requiring an extraordinary resolution to the same effect under art. 6. Accordingly, I am of opinion that the resolution of the directors was not invalid and that the action under it was effectively authorized.

I am, therefore, of opinion that the appeal should be dismissed.

RICH J. This appeal is an incident in a lamentable dispute among the members of a family company, which with conspicuous success has conducted a well-known sheep station devoted to the production of stud sheep. How far a preoccupation in protracted and expensive litigation is consistent with the continued improvement in the type

of stud rams bred under the management of the company is a matter which time will tell. But the manner in which the hitherto successful direction of the company is now being attacked in this and concurrent litigation suggests, according to ordinary experience of such matters, that the business from which the company's profits arise is not likely to flourish in the future unless common sense is substituted for the *cacoethes litigandi*.

Our business, however, is the commonplace duty of construing some rather confused articles of association and of saying whether a resolution passed in purported pursuance of powers expressed to be conferred on the board of directors is invalid on the ground that it was animated by an improper purpose. The resolution in question is for the increase of capital by the creation of five new ordinary shares for every two ordinary shares in the then existing capital of the company and for their distribution as fully paid bonus shares by way of dividend out of reserves of trading profit. The directors by whose votes this resolution was passed say that they adopted it because they thought profits should be capitalized so as to be distributed amongst ordinary shareholders in the event of liquidation, an event which they began to fear in consequence of the dissensions in the company. The appellants who attack the validity of the resolution say, on the other hand, that it was not adopted bona fide in the interests of the company but for the purpose of maintaining a numerical majority of votes in the managing director and those likely to support him. The question, however, whether the power to increase share capital and issue bonus shares lies with the directors or is restricted to a general meeting of the company is logically anterior to the question of fact whether the power has been fraudulently abused. The location of the power depends upon the construction of the memorandum and articles of association. The memorandum complies with sec. 7 (*e*) of the *Companies Act* 1899 (N.S.W.) and states the amount of capital divided into shares of a certain fixed amount. The articles include a regulation under sec. 11 of this Act authorizing the company to increase its capital. If there were nothing more, this would suffice to enable the directors under the general powers conferred upon them to exercise on behalf

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of the company its power of increasing its capital (See *Campbell's Case* (1); *Palmer's Company Precedents*, 12th ed. (1922), vol. I., p. 657). The articles include a general power of directors similar to that of which in *Campbell* v. *Rofe* (2) Lord *Thankerton*, in delivering the decision of the Privy Council, says that their Lordships would be prepared to hold that it clearly delegated "to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed, and that such delegation would include power to issue preference shares." The memorandum of association includes an unusual statement in relation to the issue of capital. The provision is as follows: "Any shares of which the capital of the company may from time to time consist may be divided into classes and may be issued with any preferential, special, deferred or qualified rights, privileges or conditions attached to them according as may be prescribed by the articles of association of the company or duly decided upon by the company or its directors." The distinction between a due decision by the company and one by its directors seems to prelude a distinction in the articles of association, which, as I read them, confer parallel powers in this matter upon the shareholders and upon the board of directors. The articles which confer power upon the board of directors are, to my mind, very clear in granting to them ample authority to increase capital and to distribute paid-up shares by way of dividend. It is not necessary to quote these articles. They are articles 25 and 26 read together, 29, 72, 74, 77, 78 and 80.

It is said, however, that the prima-facie effect of these articles must be modified because of an article expressed to give control of all shares to the company and requiring that they shall be dealt with upon such terms and conditions and at such times as the company shall direct by extraordinary resolution. I shall not set out this article, which is numbered 6. The argument founded upon it is that, to give any effect to it, it is necessary to treat the express power given to the directors to issue, allot and dispose of share capital as subject to a prior extraordinary resolution fixing the terms, conditions and times or in some other way sanctioning the transaction. This

(1) (1873) 9 Ch. App. 1.

(2) (1933) A.C., at p. 99; 48 C.L.R., at p. 265.

appears to me to be a fallacious application of the general rule by which judges are exhorted to attempt to give effect to every part of a document and reconcile its inconsistencies. When the draftsman put in the very clear powers of the directors, I have not the least doubt that he was led to do so by a desire that the directors should have these powers unqualified and unfettered by any condition precedent to their exercise. When he put in art. 6, I have similarly no doubt that he was guided by the opinion that it would be a good thing if by extraordinary resolution the shareholders could exercise the power that that article specified. He may well have perceived that by its exercise the shareholders might overrule or restrain in anticipation the action of the directors, but I do not think that he ever dreamt that the directors could not move in the exercise of their particular power until the shareholders allowed them. In other words, these powers are parallel powers. Accordingly, I think that the directors were armed with the necessary power to create, allot and issue the bonus shares. The validity of the directors' resolution, therefore, must depend on the question whether they exercised the power in good faith for the purpose for which the power was given. This question is not unlike that with which we dealt in *Richard Brady Franks Ltd.* v. *Price* (1). I repeat the observations I there made upon the criterion of validity. They are as follows :—" The last objection to the judgment under appeal was that the power had not been exercised by the directors ' bona fide for the benefit of the company as a whole.' At the hearing before the learned judge the plaintiff accepted the onus of proving this proposition. The phrase ' bona fide for the benefit of the company as a whole ' no doubt tends to become a cant expression in these matters but is not yet a shibboleth. Many of the cases which illustrate this ' phrase ' relate to the alteration of articles of association by shareholders in general meeting. No court ' should consider itself fettered by the form of words, as if it were a phrase in an Act of Parliament which must be accepted and construed as it stands ' (*Shuttleworth* v. *Cox Brothers & Co.* (*Maidenhead*) (2)). But the learned judge found that ' the evidence as a whole preponderates in favour of the view that in regard to the issue of debentures the

(1) (1937) 58 C.L.R. 112.

(2) (1927) 2 K.B. 9, at p. 26.

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directors acted in the interests of the company and of the general body of shareholders and not in the interests of the proposed debenture holders ' and found this issue of fact against the plaintiff. In order to succeed in a case like the present the plaintiff must prove the equivalent of fraud or bad faith. In *Hirsche* v. *Sims* (1) the Earl of *Selborne* formulated a test which seems applicable to the present case as follows : ' If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with *dolus malus* or breach of trust merely because in promoting the interest of the company they were also promoting their own.' Upon such a question an opportunity of seeing the parties concerned is a matter of special importance in arriving at a conclusion " (2). In the present case on the facts there appear to have been only two sensible purposes or reasons which could have prompted the capitalization of profits and distribution of shares. One purpose was within the power, the other was outside it. The purpose within the power was to confer upon ordinary shareholders a title to the fund *pro tanto* representing reserves of profits. The illegitimate purpose was to maintain the strength of the voting power likely to be used on the side of the directors concerned. The learned primary judge, *Lowe* J., heard at considerable length a cross-examination of the managing director and a cross-examination of the other director who supported the resolution. Each of them swore that their reason was that first stated—the legitimate reason. The learned judge appears to me plainly to have accepted their evidence. In a desire fairly to furnish the appellant with an opportunity of challenging his conclusion *Lowe* J. has stated his view of the attitude of the directors with some refinement. The appellant has availed himself to the full of the opportunity given to him and has made an attempt full of valiance and acumen to discover in the words of the judgment a finding that the directors' motives included a desire to increase voting strength. I am not impressed with the psychological subtleties which this argument attributes to the directors, and, having read the whole of the evidence and considered the reasons of *Lowe* J. in the light thereof, I am clearly of

(1) (1894) A.C., at pp. 660, 661. (2) (1937) 58 C.L.R., at pp. 138, 139.

opinion that his judgment means that the reason of the resolution was the desire of the directors to give ordinary shareholders a title to part of the reserve of profits and that except for this reason the resolution would never have been passed. This appears to me to be enough to show that the resolution was validly passed.

I think the appeal should be dismissed.

STARKE J. This action was brought in the Supreme Court of Victoria and sought declarations that a resolution passed by the directors of Charles Mills (Uardry) Ltd. on 7th September 1936 was invalid and not binding upon the company and its members and that any allotment and/or issue of shares made pursuant to the resolution was invalid and should be set aside and ancillary relief. The action was dismissed and an appeal is now brought to this court.

The company is a family company and was incorporated in 1915 in New South Wales, and its principal objects were to acquire from Charles Mills the " Uardry " station and the stock and other assets connected therewith and the business conducted on the station and to carry on, *inter alia*, the business of station owners, graziers, pastoralists and stock breeders.

The station and other assets were duly acquired, and the company has since its incorporation carried on and still carries on the business of pastoralists and stock breeders on the station. The original capital of the company was £46,000, divided into 46,000 shares of one pound each, of which 11,500 were preference shares and 34,500 ordinary shares. The preference shares conferred a right to a fixed cumulative preferential dividend of a total amount of £2,500 in each year, to be distributed amongst the holders for the time being of the preference shares ratably and in proportion to the number of preference shares held by them respectively. Other than as aforesaid the preference shares were not entitled to participate any further in the profits of the company, and such preference shares had not in a winding up any preferential claim on any capital assets but ranked in that respect with ordinary shares.

All the shares, other than four hereinafter mentioned, were allotted and issued to members of the Mills family. The preference shares were allotted to Mrs. Margaret Ainslie Mills, the wife of Charles Mills.

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Mrs. Mills and the respondent Neilson Mills were the first directors of the company. Neilson Mills was the first managing director. Both, under the articles of association, held office for life. About 1927 Mrs. Mills died and two other directors were appointed; one, W. A. Mills, has since died, but the other, Birtchnell, a respondent to this appeal, is still alive and acting.

In April of 1935 the appellant Ainslie Mills was appointed a director to fill the vacancy caused by the death of W. A. Mills. The management of the business was in the hands of the respondent Neilson Mills, and it was extraordinarily efficient and successful, and there are many minutes of the company expressing high appreciation of his able management. Between 1916 and 1937 all mortgages and debts taken over by the company, and amounting to £63,000, were discharged. About £280,000 was distributed in dividends to the preferential and ordinary shareholders, and a reserve of about £140,000 was accumulated out of profits, of which £70,000 to £80,000 appears to have been invested in the purchase of "Burrabogie" station adjoining "Uardry."

On 7th September 1936 a directors' meeting was held and the resolution, which is now attacked was passed. The directors Neilson Mills and Birtchnell—respondents here—voted in favour of the resolution, and Ainslie Mills—an appellant here—voted against it. The resolution was as follows: "That in view of the improvement in the company's position and the passing of the worst of the financial depression, it is considered that the whole of the accumulated profits standing to the credit of reserve account are now not required as reserves; and that, as they belong solely to the ordinary shareholders and, if a liquidation of the company, as has been suggested, took place, such ordinary shareholders would not alone participate in their distribution, the sum of £86,250 part of such accumulated profits should be distributed by way of dividend on ordinary shares; and accordingly that a dividend amounting in the aggregate to the said sum of £86,250 be and is hereby declared out of such accumulated profits, and that the said dividend be paid and satisfied by the issue to holders of ordinary shares of 86,250 new ordinary shares fully paid up, being five of such new shares for every two ordinary shares held by them; and that for this purpose the capital of

the company be and is hereby increased from £46,000 to £132,250 by the creation of 86,250 new ordinary shares of £1 each ; and that any difficulty arising in the distribution of the said shares be settled by issuing fractional certificates or otherwise as the directors may hereafter determine ; and that the secretary be instructed to make out share certificates for such shares and that the same be sealed and that a proper contract to be filed in accordance with the *Companies Act* be entered into and that Samuel Charles Birtchnell is hereby appointed to sign such contract on behalf of the persons entitled to the dividend."

The grounds of the attack upon this resolution, argued in this court, were :—1. It is not within the authority of the directors conferred on them by the articles of association of the company. 2. It was not passed bona fide in the interests of the company but in the interests and for the purposes of Neilson Mills with the sole object and intention of creating voting power and controlling the company.

The first ground depends upon the proper construction of the articles of association, which, unfortunately, are not as clear as is desirable. The *Companies Act* 1899 (N.S.W.), sec. 11, gives the company power to increase its capital by the issue of new shares of such amount as it thinks expedient, and it was conceded during the argument that there is no provision in the legislation of New South Wales, as there is in the English Act of 1929, sec. 50 (2), providing that the power to increase must be exercised by the company in general meeting.

The relevant articles are, I think, arts. 6, 25, 26, 27, 72 and 80. Art. 25 provides that the company may from time to time increase its capital by the creation of new shares, and art. 72 contains an express provision that the directors may increase the capital of the company. These provisions deal with the creation of new shares (*Koffyfontein Mines Ltd.* v. *Mosely* (1)). Art. 6, however, provides that all shares (other than those mentioned in the agreement for the purchase of " Uardry ") shall be under the control of the company and shall be issued, allotted and placed under option or otherwise on such terms and conditions and at such times as the company by

(1) (1911) 1 Ch. 73 ; (1911) A.C. 409.

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extraordinary resolution as defined by sub-sec. 2 of sec. 130 of the *Companies Act* shall direct.

The shares originally issued were issued and allotted to members of the family of Charles Mills under the agreement mentioned other than about four shares, which I gather from the memorandum of association were issued to representatives of the solicitors preparing the purchase agreement. So art. 6 had little scope for operation except in the case of an increase of share capital. But art. 26 dealt with the issue of new shares on an increase of capital. It provided that such new shares shall be of such amount and shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as the directors shall determine and, in particular, such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company and with a special or without any right of voting.

Art. 27 provides that capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the same provisions as shares in the original capital except so far as otherwise provided by the conditions of issue or the articles of association.

Some reliance is placed upon the use of the words " issued, allotted and placed " in art. 6, whilst in art. 26 the word used is " issued." But I attach no importance to the difference in language. Neither the word " allotted " nor " issued " has, I think, any technical meaning. " Broadly speaking," said *Stirling* J. (1), an allotment " is an appropriation by the directors . . . of shares to a particular person " : the acceptance by the company of an offer. An issue of shares takes place when a shareholder has been put completely in the possession of his shares. " Shares may have been issued which have been allotted but for which no certificates have ever been issued and on the other hand shares as to which a resolution to allot has been made may not have been issued " (*Buckley* on *Companies*, 7th ed. (1897) p. 612). The conclusion is more one of fact than of law (*Levy* v. *Abercorris Slate and Slab Co.* (2) ; *Spitzel* v. *Chinese Corporation Ltd.* (3) ; *Blyth's Case* (4) ; *Clarke's Case* (5) ; *In re Perth Electric Tramways Ltd.* ;

(1) (1899) 80 L.T., at p. 351.
(2) (1887) 37 Ch. D. 260, at p. 264.
(3) (1899) 80 L.T. 347.
(4) (1876) 4 Ch. D. 140.
(5) (1878) 8 Ch. D. 635.

Lyons v. *Tramways Syndicate* (1); *Buckley* on *Companies*, 7th ed. (1897), p. 612).

The proper construction of the articles therefore depends upon other considerations and upon the intention disclosed by the articles of association. It is true that art. 6 refers to "all shares," but art. 27 explicitly and expressly provides for the mode of the issue of new shares and of their amount and the terms and conditions upon which they shall be issued and gives in itself an authority to issue new shares, concurrent though it may be with the authority conferred by art. 6.

Art. 72 does not, I think, afford much assistance in the construction of the articles. If art. 6 controlled the issue of new shares, I should not think that its express provisions for an extraordinary resolution would be affected by art. 72; whilst, if arts. 25 and 26 are the controlling articles as to the creation and issue of new shares, then art. 72 but reinforces them (Cf. *Campbell* v. *Rofe* (2)). Art. 80 empowers the directors, when declaring a dividend, to direct payment in shares of the company.

In my opinion, therefore, the resolution of the directors of 7th September 1936 was within their powers and is valid.

That part of the resolution which declares a dividend of £86,250 out of accumulated profits to be paid and satisfied by the issue to the shareholders of ordinary shares of 86,250 new ordinary shares fully paid up, being five of such new shares for every two ordinary shares held by them, is warranted by arts. 78, 80 and 74. The latter part of the resolution increasing the capital of the company by the creation of new shares is warranted by arts. 25, 26 and 72.

The other ground of attack must now be considered: namely, that the resolution of 7th September 1936 was not passed bona fide and in the interests of the company. Directors in the exercise of their powers are in a fiduciary position and must exercise those powers for the benefit of the company. So, directors are not entitled to exercise their powers merely for the purpose of maintaining control over the affairs of the company or merely for the purpose of defeating the wishes of the majority of shareholders (*Piercy* v. *S. Mills & Co. Ltd.* (3)).

(1) (1906) 2 Ch. 216.
(2) (1933) A.C. 91; 48 C.L.R. 258.
(3) (1920) 1 Ch. 77.

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The resolution of the directors of 7th September 1936 does not, on its face, appear improper. All preference dividends had been provided in due course, and there remained in the hands of the company a reserve of some £140,000 accumulated out of profits and available for distribution. Prima facie the directors had authority to apply this accumulated reserve in such manner as they considered advantageous and beneficial to the interests of the company and its members. Unfortunately, behind the resolution there is a long story of disagreement between Neilson Mills and Ainslie Mills, his nephew, which need not be related in detail. Suffice it to say that about the year 1934 Ainslie Mills heard that Nielson Mills had established or proposed to establish a rival stud to that of "Uardry" on a property known as "Pembelgong" close to "Uardry." "Pembelgong" belonged to Neilson Mills. It had for many years been leased to the "Uardry" company, but the lease was not renewed, I think in 1934. It is undoubted that Neilson Mills did establish a stud of his own at "Pembelgong" and that he purchased rams and sheep from "Uardry" for that purpose in the names of agents. Further, in 1936, notice was given of an extraordinary meeting of the company to consider a resolution that the directors pay Neilson Mills the sum of £7,250 representing the undrawn portion of the salary authorized by previous resolution to be paid to him as managing director. A resolution had in fact been passed in 1929 at an extraordinary general meeting of the company that the salary of Neilson Mills as managing director should be £3,500 per annum and that he receive a fee of £500 per annum as a director. But during years of depression Neilson Mills had not drawn all the salary granted by this resolution and now proposed to draw the balance. Ainslie Mills challenged Neilson Mills's right to establish and manage a rival stud and also the payment of the undrawn salary, which, as it did not appear in the accounts of the company, Ainslie Mills considered as abandoned.

In these objections he was supported by Mr. George Aitken, who was a co-trustee of Neilson Mills of certain shares in the company, known as "Mrs. Price's Trust" and "Ainslie Mills' Trust." But, despite the objection, a resolution was carried at an extraordinary

general meeting of the company by a majority of 3,488 votes that the directors pay to Neilson Mills the sum of £7,250, undrawn salary. The voting power in respect of the shares in " Mrs. Price's Trust " and " Ainslie Mills' Trust " were not used, but, if they had been cast against the resolution, it would have been lost.

Art. 48 provided that, in the case of joint holders of shares, the vote of the member standing first in the register should be accepted to the exclusion of the votes of other joint holders. And Neilson Mills stood first on the register in respect of the shares in the " Price Trust " and the " Ainslie Mills' Trust " and did not use the voting powers in respect of those shares. Thus were the shares in these trusts deprived of their voting power. Suggestions were made that Neilson Mills should retire from these trusts, and action was threatened. Ultimately Neilson Mills agreed to and did retire from these trusts. But this was followed in September 1936 by the calling of directors' meetings to consider and decide how the accumulated profits of the company should be dealt with. And on 7th September 1936 the challenged resolution was passed by the majority of the directors; Neilson Mills and Birtchnell voted for the resolution and Ainslie Mills against it.

The appellants suggest that the resolution was not passed bona fide in the interests of the company but to increase the voting power of Neilson Mills in order that he might protect himself from any attack in respect of the establishment of a rival stud on " Pembelgong " and the payment to him of undrawn salary and also to prevent the removal of Birtchnell from his office as a director. On the other hand, Neilson Mills and Birtchnell defended the resolution on these grounds: the preference shareholders were entitled to a fixed cumulative preferential dividend so long as the company carried on business, but in case of a winding up preference shareholders were entitled to rank *pari passu* with ordinary shareholders in any distribution of assets. The latter position would be unfair to ordinary shareholders, who were really entitled to the accumulated profits and would have received them if larger dividends had been declared.

The voting power in the company before and after the resolution of 7th September 1936 may thus be stated :—

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	Before	After
Neilson Mills	16,868 votes	47,531 votes
His son Andrew (an infant for whom Neilson Mills was trustee)	3,296 ,,	8,662 ,,
Mrs. Price	3,910 ,,	5,060 ,,
Ainslie Mills	22,194 ,,	28,809 ,,
Mrs. Maslin	1,648 ,,	2,895 ,,
Mrs. Bell	1,648 ,,	2,895 ,,
Miss Mills	9,430 ,,	24,380 ,,
"Ainslie Mills' Trust" ..	4,485 ,,	15,698 ,,
"Mrs. Price's Trust" ..	5,250 ,,	19,320 ,,
Totals	69,000 (in round figures)	155,250 ,,

It is clear on these figures that the voting power of Neilson Mills was largely increased, but it did not give him control of the company unless some other shareholder supported him. It was suggested that he relied upon the support of Miss Mills. I see no reason for thinking that Miss Mills will vote otherwise than as she sees her own interests. It may well be that she places great reliance upon her brother, Neilson Mills, whose management of "Uardry" has been so successful. But the circumstances as a whole are suspicious and somewhat disconcerting. The establishment of the rival stud at "Pembelgong" is hard to defend and gives rise to the suspicion of Ainslie Mills and, perhaps, of Mr. George Aitken, that the resolution of 7th September 1936, carried by Neilson Mills and Birtchnell, was more for the interest of Neilson Mills than any interest of the company or its members. Again, Birtchnell may be a very good accountant and secretary, but he appears wholly to lack that independence of character and judgment which one expects of a director. He seems blindly to support Neilson Mills in all his actions, and that as regards "Pembelgong" is open to question. A more independent mind might, I think, have prevented some of the unfortunate disagreements and charges that have been made in this case. However, *Lowe* J. in his usual careful manner has weighed all the facts and this was his conclusion :—"I think the scheme of distribution as actually

carried out in the resolution was honestly arrived at and I think those who voted in favour of it thought it to be in the best interests of the company and I also think that that was their main reason for passing the resolution. But I think and I find that neither Neilson Mills nor Birtchnell was at all unconscious of the effect that that resolution would have in altering the voting power. The resolution, when carried into effect, did not give a majority to Neilson Mills. He probably hoped it would make the matter easier." The learned judge saw and heard the various parties and their witnesses and is in a much better position than any court of appeal to reach a just conclusion. I accept his finding unhesitatingly and with confidence in its justice and propriety. " If," said the Judicial Committee of the Privy Council in *Hirsche* v. *Sims* (1), " the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with *dolus malus* or breach of trust merely because in promoting the interest of the company they were also promoting their own."

The result is that this appeal should be dismissed.

DIXON J. Under the articles of association of the respondent company, at a poll of its members preference shares carry three votes each and ordinary shares one vote each. It is a family company which under the management of the respondent Neilson Mills has carried on the breeding of stud sheep with much profit to its shareholders. Neilson Mills occupies for life the position of managing director, and the board consists of him, the secretary of the company, who is not a shareholder, and the appellant Ainslie Mills, who is a nephew of Neilson Mills. Ainslie Mills is a young man who is conducting a revolt against his uncle's control of the company's affairs. As matters stood up to 28th August 1936 his uncle was able to withstand his insurgence because his uncle controlled shares carrying votes exceeding the greatest number of votes likely to be cast in favour of any proposal made by Ainslie Mills to which he might object. But a large number of votes so controlled by Neilson Mills belonged to shares held by him as a trustee under three several

(1) (1894) A.C., at pp. 660, 661.

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settlements. The beneficiaries under two of these trusts might be considered to be ranged on Ainslie Mills' side in the family division. As a result of pressure exerted by, or at the instigation of, Ainslie Mills his uncle, on 28th August 1936, consented to retire from these two trusts. If the votes attached to the shares held under the trusts in question were cast in favour of any ordinary resolution proposed by Ainslie Mills and opposed by his uncle Neilson Mills and the members who so far had supported Ainslie Mills voted for the resolution, then it would be passed notwithstanding that Neilson Mills should continue to carry with him the votes of a sister, named Winifred, who so far had voted in accordance with his views. Neilson Mills' prospective retirement from the trusteeship of the two settlements was therefore calculated to inspire his nephew with a hope that his opposition to his uncle might become more formidable. But before he actually resigned, Neilson Mills, at a meeting of directors held on 7th September 1936, proposed a resolution for the distribution among the ordinary shareholders of 86,250 fully paid ordinary shares of £1 as bonus shares paid up out of reserves of undistributed profit. Having regard to the manner in which the holdings of ordinary and of preference shares were respectively distributed among the family, the result of the allotment of 86,250 more ordinary shares among the ordinary shareholders would be to leave Neilson Mills in a position, if, but only if, his sister Winifred voted with him, to pass or defeat any ordinary resolution notwithstanding that the votes attached to the shares belonging to the two trusts should be cast against him. Ainslie Mills voted against the resolution, which, however, was passed by the votes of the other two members of the board.

On 9th September 1936 he issued the writ in the present action, suing on behalf of himself and all other shareholders in the company except his uncle and claiming a declaration that the resolution was invalid and an injunction restraining any action upon it. In fact, however, the resolution had been acted upon on the same day as the issue of the writ and the names of the shareholders had been entered in the share register in respect of the new shares and the certificates sealed and executed.

The company is incorporated in New South Wales, and, in common with all other matters affecting the membership and organization of the corporation, the validity of the allotment and issue of its share capital is governed by the law of that State. The action was, nevertheless, brought in the Supreme Court of Victoria.

The first question which naturally suggests itself is whether the Supreme Court of Victoria can and ought so to interfere in the internal management of a " foreign corporation " and to pass upon the validity of the issue or allotment of part of its share capital. It is not a question, however, in which the parties manifested any interest, and it has not been argued.

A dogmatic assertion has long stood in *Westlake* that the English court will not interfere in the internal disputes of foreign corporations (*Westlake*, *Private International Law*, 7th ed. (1925), sec. 302). So far as English authority goes, the statement is based upon the not very solid foundation of Lord *Romilly's* decision in *Sudlow* v. *Dutch Rhenish Railway Co.* (1). In the United States, however, there is a body of authority which works out a principle. The principle is stated as follows by Professor *J. H. Beale* in his *Conflict of Laws* (1935), sec. 192, I., p. 885, vol. 2 :—" In dealing with the internal affairs of a foreign corporation the courts may have complete jurisdiction over the parties ; both the corporation itself and its officers may be subject to the jurisdiction of the courts : the lack of jurisdiction which may be claimed, therefore, is of the somewhat vague thing called jurisdiction of the subject matter. This phrase in this connection indicates that a court which has entire power to issue orders refrains from doing so for some reason connected with the nature of the contention. A court may decline to act from a lack of power to enforce its decrees, or because the court of some other jurisdiction is better entitled to settle the dispute. In the case of a foreign corporation, both these reasons exist to prevent a regulation of its internal affairs by a foreign court. But these considerations, it will be noticed, apply only in the case of an exercise of discretionary jurisdiction ; the granting of an equitable remedy or of a prerogative writ." This means, I think, that where, owing to its authority over the persons concerned, a court of equity may be able by remedies *in personam*

(1) (1855) 21 Beav. 43 ; 52 E.R. 774.

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to control the corporators and perhaps the corporation, it will not assume jurisdiction to deal with the constitution or internal management of a foreign corporation except on special grounds which in the particular case exclude the application of the principle of *forum non conveniens*. But a somewhat wider statement of the doctrine of the American cases has been made in the Supreme Court of the United States in *Rogers* v. *Guaranty Trust Co. of New York* (1), where *Butler* J. collects and states the effect of the decided cases. Omitting the citations, what he says is as follows :—" It has long been settled doctrine that a court—State or Federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicil. . . . While the district court " (i.e., in the instant case) " had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. . . . It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. . . . Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicil as appropriate tribunals for the determination of the particular case " (2).

I should have thought that there was a good deal to be said against the Supreme Court of Victoria exerting an authority to declare invalid the steps taken by the directors of the New South Wales company now in question to issue further capital and to capitalize profits to answer the liability on the shares. But, as the matter was not argued and as the conclusion at which I have arrived upon the validity of the resolution makes it unnecessary to deal with it, I shall not pursue the question whether it was not the proper course for the Supreme Court to decline to determine the matter.

(1) (1932) 288 U.S. 123 ; 77 Law. Ed. 652.

(2) (1932) 288 U.S., at pp. 130, 131 ; 77 Law. Ed., at pp. 656, 657.

The first ground upon which the validity of the resolution for the issue of bonus shares was attacked is that, upon the proper interpretation of the articles of association of the company, they did not empower the directors to make the necessary increase of capital and to issue the shares. The contention is that the authority of a general meeting is necessary to enable the directors to do what they have resolved upon.

Power to increase capital is taken pursuant to sec. 11 of the New South Wales *Companies Act* 1899. This is done by art. 25, which says that the company may from time to time increase its capital by the creation of new shares. The article is silent upon the question whether the power so taken by the company is to be exercised on its behalf by the members or the directors, but the question is expressly dealt with by arts. 26 and 72. Art. 72, which vests the general management and control of the business and affairs of the company in the directors and enables them to exercise all powers and do all such things as are within the scope of the memorandum, expressly authorizes the directors to increase the capital of the company. Art. 26 gives the directors the power of determining the amount of the new shares, the terms and conditions upon which they shall be issued and the rights and privileges which shall be annexed thereto. The directors are given complete control of reserves of profit and of the declaration of dividend (arts. 74, 77 and 78). Then art. 80 empowers them to direct payment of a dividend by the distribution of shares of the company.

If these articles stood alone and were not qualified or abridged by any other provision, it is almost needless to say that there could be no doubt whatever of their sufficiency to authorize the creation by the directors of new capital and its distribution by them as bonus shares paid up out of the reserves of profit. Every step is specifically authorized by the articles in express terms : increase of capital, distribution of the reserves as dividends, distribution of shares as payment of dividend. The resolution of the directors, the text of which it has been thought unnecessary to set out, follows these steps. The difficulty arises entirely, as it seems to me, from a general article which occurs in the early part of the articles of association. It is art. 6, which provides that all shares shall

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(subject to an immaterial exception) be under the control of the company and shall be issued, allotted, placed under option, or otherwise disposed of, on such terms and conditions and at such times as the company by extraordinary resolution shall direct. If this means that the terms, conditions and times upon and at which the shares shall be issued, allotted, &c., shall be determined by the authority of an extraordinary resolution and by no other authority, then the article is directly contradictory of art. 26 in relation to new capital. Upon ordinary principles the special provision relating to new capital would prevail over the general and the apparent contradiction would be so removed. But, in any case, I do not think that art. 6 prevents full effect being given to the articles I have already quoted. It must be remembered that we are dealing with a document containing a collection of powers, authorities and directions for the governance and guidance of shareholders and directors in all the contingencies which the future may produce. The preparation of articles often consists in the adoption of one well-known provision or type of provision after another in order to supply a source of power or authority in case it should be required. The intention of the framers is not carried out by seeking to reconcile apparent inconsistencies, redundancies, repetitions and repugnancies and obtaining coherence and symmetry by qualifying or restricting an intention expressed in one article by an intention implied by another. As a rule, power is sought and is taken by articles intended to be cumulative or alternative one upon or with another. Where an express power is given in clear words it is more probably intended to take effect according to its tenor, although at the expense of an intention of a restrictive nature implied or even expressed by another article.

In the present case, I think art. 6 can only be completely reconciled with the articles I have mentioned by treating it as meaning that, if an extraordinary resolution is passed, then it shall control the terms, &c., of issue, &c., of shares and shall prevail over the powers otherwise residing in the directors. It is susceptible of this interpretation, which, perhaps, should be adopted. But, however this may be, I do not see how the very clearly expressed special powers of the directors to increase capital, to determine the conditions

of its issue and to distribute shares as dividends can be overridden by the general provision contained in art. 6. For this reason, I think that such a resolution as that passed fell within the powers conferred on the directors by the articles of the company.

The appellants, however, deny that the resolution amounted to a valid exercise of these powers. They maintain that it was proposed and adopted for no purpose which fell within the scope of the powers in question, but in order to achieve a collateral and extraneous object. The object which the appellants ascribe to the directors who proposed and supported the resolution is that of maintaining the voting strength which otherwise the resignation of Neilson Mills from the two trusts would impair.

Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power. It is only one application of the general doctrine expressed by Lord *Northington* in *Aleyn* v. *Belchier* (1) : " No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void."

Upon the facts of the present case, or at all events upon the expressions used by *Lowe* J. in stating his findings, it may be thought that a question arises whether there must be an entire exclusion of all reasons, motives or aims on the part of the directors, and all of them, which are not relevant to the purpose of a particular power. When the law makes the object, view or purpose of a man, or of a body of men, the test of the validity of their acts, it necessarily opens up the possibility of an almost infinite analysis of the fears and desires, proximate and remote, which, in truth, form the compound motives usually animating human conduct. But logically possible as such an analysis may seem, it would be impracticable to adopt it as a means of determining the validity of the resolutions arrived at by a body of directors, resolutions which otherwise are ostensibly within their powers. The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special

(1) (1758) 1 Eden 132, at p. 138 ; 28 E.R. 634, at p. 637.

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power of appointment. It must, as it seems to me, take the substantial object the accomplishment of which formed the real ground of the board's action. If this is within the scope of the power, then the power has been validly exercised. But if, except for some ulterior and illegitimate object, the power would not have been exercised, that which has been attempted as an ostensible exercise of the power will be void, notwithstanding that the directors may incidentally bring about a result which is within the purpose of the power and which they consider desirable.

In the present case the circumstances attending the resolution to issue bonus shares in satisfaction of a dividend upon the ordinary shares suggest at first sight that the real object was to give to ordinary shareholders such an increase in their voting power that Neilson Mills with the help of his sister Winifred might retain the means of defeating or of passing any ordinary resolution proposed at a shareholders' meeting. But Neilson Mills swore in the witness box that the reason why he proposed the resolution was that he considered that accumulations of profit ought not upon a winding up to be distributed ratably among holders of preference and of ordinary shares, but ought to be divided among ordinary shareholders only, and that he feared that a winding up might be a consequence of the attempts of Ainslie Mills to displace his control of the company. He gave a more or less circumstantial account of the genesis and cause of the proposal to distribute the company's reserves or accumulations of profit, and in all he said he was substantially supported by the evidence of his fellow director who with him formed the majority in favour of the resolution. What I hope has been a complete examination of the evidence has led me to the conclusion that there is nothing inherently incredible or improbable about his story, and it is at least clear that *Lowe* J., who heard his evidence and that of his fellow director, did not disbelieve either of them. The picture presented is in some respects incomplete, because by common consent some very important negotiations which resulted in Neilson Mills' agreeing to retire from the two trusts were treated as inadmissible in evidence because they were conducted without prejudice. Further, evidence was not given of

some conversations which Neilson Mills appears to have had, particularly with his lawyers, because it was regarded as inadmissible on one ground or another. The picture too was blurred by a great quantity of evidence extracted in the cross-examination of Neilson Mills which, however important to the parties in view of other litigation, had but a remote bearing on the issues raised in the present proceedings. But, although these are matters tending to make the account of the transaction given by Neilson Mills less coherent and satisfactory than perhaps it otherwise might have proved, they ought not to be allowed to weigh against its acceptance. Indeed, it may be said in his favour that without a full understanding of the entire course of events it would be both improper and unsafe to find that he had not acted bona fide for the purpose which he claimed. As I read the judgment of *Lowe* J., he found that Neilson Mills and the director supporting him had some time before decided provisionally that the reserves of profit or a large part of them should be distributed by way of dividend in cash, which meant that they would be divided amongst the ordinary shareholders, but that, because of difficulties in selling a portion of the land to raise the money or of some other difficulty, they did not carry out their intention. His Honour then found, I think, that, because his resignation as a trustee might mean the impairment of the completeness of his control of the company, Neilson Mills before actually resigning adopted the course of capitalizing the profits and thus appropriating them to the holders of ordinary shares. I understand his Honour to mean this when he says that the particular form which the resolution finally assumed and the time at which it was adopted were due to the resignation of Neilson Mills as a trustee of the two trusts. It is not unnatural that Neilson Mills should decide that before handing over his shares he would take the steps necessary to ensure that the ordinary shareholders would get the greater part of the accumulated profits, and, as at that time the only form in which it could be done was capitalization, the time and form of the resolution might well be said to be due to the resignation. But his Honour definitely held that the two directors thought the resolution to be in the best interests of the company and that was their main reason for passing it. Although " the best interests of the company "

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is an indefinite phrase, its meaning admits of little doubt. There were two rival explanations of the resolution. On the one hand, it was said to have been adopted for the purpose of maintaining voting strength and, on the other, for the purpose of protecting ordinary shareholders. As no third purpose has ever been suggested, the finding must mean that the main reason of the directors was the desire to secure the benefit to ordinary shareholders of the greater part of the reserves of profits in the event of liquidation. When his Honour goes on to say that the two directors were not unconscious of the effect of the resolution in altering voting power and that Neilson Mills probably hoped that it would make a majority easier, he is far from finding that an actuating motive for the resolution was the desire to maintain voting strength. The statement does no more than to ascribe an appreciation of one incidental consequence and a hope that it might occur. But, whether I have correctly interpreted the meaning of *Lowe* J. or not, it remains true that the appellant failed to obtain from the learned judge any finding which would make the resolution invalid on the ground that it was not adopted bona fide for a purpose within the power. Upon the materials before us we could not arrive at such a finding for ourselves, and I can see no ground for a rehearing of the action.

The appeal, accordingly, could not succeed. In my opinion it should be dismissed with costs.

EVATT J. I have read the judgment of my brother *Rich*, and I agree with it.

Appeal dismissed with costs.

Solicitors for the appellants, *Hedderwick, Fookes & Alston.*
Solicitors for the respondents, *Blake & Riggall.*

H. D. W.