[HIGH COURT OF AUSTRALIA.]

NGURLI LIMITED AND ANOTHER . . APPELLANTS;
DEFENDANTS,

AND

McCANN AND ANOTHER . . . . RESPONDENTS;
PLAINTIFFS,

CARINYA LIMITED AND ANOTHER . . APPELLANTS;
DEFENDANTS,

AND

McCANN AND ANOTHER . . . . RESPONDENTS;
PLAINTIFFS,

FITZROY LIMITED AND ANOTHER . . APPELLANTS;
DEFENDANTS,

AND

McCANN AND ANOTHER . . . . RESPONDENTS;
PLAINTIFFS,

MYALL LIMITED AND ANOTHER . . APPELLANTS;
DEFENDANTS,

AND

McCANN AND ANOTHER . . . . RESPONDENTS;
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May*, 12, 13, 14, 15;

SYDNEY, *July* 3.

Williams A.C.J., Fullagar and Kitto JJ.

Companies—Fiduciary position of director in relation to issue of new shares—Validity of allotment benefiting director to detriment of minority shareholders—Right of minority to sue in their own names.

C. held a substantial number of shares in S. Ltd. In order to avoid income tax, he formed four companies, one of which was N. Ltd. The only assets of N. Ltd. were 2,000 shares in S. Ltd. sold to it by C., the purchase price being left outstanding as an unsecured debt owing to C. which bore no interest.

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Of the nominal capital of N. Ltd. (10,000 £1 shares), only sixty-one shares were issued—one to C., thirty to C.'s daughter M. and thirty to M.'s daughter. Under the articles of association of N. Ltd., C.'s share was the "Life Governor's Share" and gave complete control of the company to C. and after his death to his personal representatives so long as the share remained in the name of C. or his personal representatives.

N. Ltd., on receipt of dividends from S. Ltd., did not itself distribute dividends but paid undistributed profits' tax, using the balance to reduce the debt to C. During his lifetime, C. appointed H. a director of N. Ltd. and H., on C.'s death, became entitled to the life governor's share and to the debt owed by N. Ltd. to C. In order to secure to H. the controlling voting power, meetings of N. Ltd. were held which resulted in the liquidation of its debt to C.'s estate by the payment of the balance of £4,199; the issue at par of 4,199 shares of £1 each, of which 4,198 were allotted to C.'s personal representatives and one to H., with the intention that subsequently the 4,198 should be transferred to H.; and the declaration of a dividend of £598 which was distributed on the basis of the shareholdings as they existed after the allotment of the 4,199 shares.

In so acting, H. had received advice from an officer of the trustee company appointed by C. as his executor and trustee, the secretary of N. Ltd. and the auditor of N. Ltd. and S. Ltd. The evidence showed that these advisers considered H.'s benefit only and did not consider the interests of M. and her daughter.

Held that H. had committed a breach of his fiduciary duty to consider the interests of the company as a whole.

Held, further, that in the circumstances M.'s executor and M.'s daughter as minority shareholders were entitled to sue in their own names to remedy the breach of trust.

The decision of the Supreme Court of South Australia (Full Court), *McCann* v. *Ngurli Ltd.* (1953) S.A.S.R. 233, affirmed.

APPEAL from the Supreme Court of South Australia.

In June 1947, Clifford Michell Southcott (referred to in the headnote as C.), who was a substantial shareholder in the prosperous engineering company of Southcott Ltd. (referred to in the headnote as S. Ltd.), caused four companies to be incorporated for the purpose of avoiding income tax. These companies were Ngurli Ltd. (referred to in the headnote as N. Ltd.), Carinya Ltd., Fitzroy Ltd., and Myall Ltd. The facts relating to each of these companies were substantially the same, and are set out in the headnote.

William Francis James McCann, the executor of the will of Mildred McCann deceased (referred to in the headnote as M.) and Mildred Alison Powell, the daughter of Mildred McCann, commenced actions in the Supreme Court of South Australia against each of

the four companies and Elder's Trustee and Executor Co. Ltd. personally and as executor of the will of Clifford Michell Southcott deceased and of the will of Horace Southcott deceased (referred to in the headnote as H.). They claimed that the allotment of one share to Horace Southcott and 4,198 shares to the executor of the will of Clifford Michell Southcott deceased in each of the four holding companies was not made in good faith, nor in the best interests of the companies, but was made by Horace Southcott with the fraudulent intention of benefiting himself to the detriment of the executor of the will of Mildred McCann deceased and Mildred Alison Powell as the remaining shareholders. The particulars stated that Horace Southcott in making these allotments intended to reduce the value of each share in the holding companies from £26 14s. 5d. or some higher figure to £1 7s. 1d. or thereabouts and thereby reduce the total value of the shares of the executor of the will of Mildred McCann deceased and Mildred Alison Powell in all by £1,522 0s. 7d. or some higher figure and thereby increase the total value of the interests of Horace Southcott by £1,522 0s. 7d. or some higher figure.

The trial judge, *Mayo* J., thought that the allotment of the four groups of 4,199 shares was invalid because the shares required to raise the new capital should have been issued at a premium. He said that the issue at par could not be treated as being for the benefit or the intended benefit of any of the holding companies and found that, in deciding to issue the shares at par, Horace Southcott intended to benefit his own interests regardless of the consequences to other shareholders. His Honour, though, was of opinion that it was a wrong done to the companies and not to the individual shareholders, and therefore was justiciable only in a suit in which the companies were plaintiffs. He, accordingly, dismissed the actions.

On appeal, the Full Court of the Supreme Court of South Australia set aside the order of *Mayo* J. and declared that the issue and allotment of the 4,199 shares in each of the companies was invalid. It ordered that the allotments be set aside, that the share registers of the companies be rectified accordingly, and that each of the companies acknowledge indebtedness to Elder's Trustee and Executor Co. Ltd. as the executor of the will of Clifford Southcott deceased, in the sum of £4,199 (1).

From this decision the respondents appealed to the High Court.

E. Phillips Q.C. and *K. L. Ward* Q.C. (with them *J. F. Astley* and *K. L. Litchfield*), for the appellants.

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E. Phillips Q.C. The type of proceeding adopted in this case, namely, by individual shareholders as distinguished from the company itself, is available only in the case of fraud: *Dutton* v. *Gorton* (1); *Burland* v. *Earle* (2); *British America Nickel Corporation Ltd.* v. *M. J. O'Brien Ltd.* (3); *Dominion Cotton Mills Co. Ltd.* v. *Amyot* (4). The wide powers given by the articles of association would have led Horace Southcott to believe that he had virtually complete control of the companies, thus negativing fraud. The fraud charged must be distinctly stated, and fresh charges may not be brought for the first time on appeal: *Kerr, Fraud and Mistake*, 7th ed. (1952), p. 644. The onus is on the plaintiffs to establish that the motive for the issue of the shares was improper. The issue of shares to directors at par, even though their value is greater, is not necessarily invalid: *Ving* v. *Robertson & Woodcock Ltd.* (5). Directors may validly take action in respect of their company which also benefits themselves: *Mills* v. *Mills* (6); *Peters' American Delicacy Co. Ltd.* v. *Heath* (7). An effective meeting of creditors may in appropriate circumstances be constituted by one person: *East* v. *Bennett Bros. Ltd.* (8); *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain) Ltd.* (9). [He referred also to *Hirsche* v. *Sims* (10).]

K. L. Ward Q.C. The onus of proof is on the plaintiffs: *Richard Brady Franks Ltd.* v. *Price* (11). If the effect of the evidence is that Horace Southcott could honestly think that what he did was in the interests of the companies, then, even though it promoted his own interests, his action cannot be attacked. The shareholders, not the court, manage the affairs of a company, unless their conduct is clearly unreasonable: *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* (12). This principle was applied to directors in *Mills* v. *Mills* (13). [He referred also to *Cook* v. *Deeks* (14).]

A. K. Sangster, for the respondents. Directors' powers are of a fiduciary nature and as such are subject to general equitable rules: *Mills* v. *Mills* (15); *Aleyn* v. *Belchier* (16); *Nocton* v. *Ashburton* (17);

(1) (1917) 23 C.L.R. 362, esp. at p. 371.
(2) (1902) A.C. 83, at pp. 93-94.
(3) (1927) A.C. 369.
(4) (1912) A.C. 546, at pp. 552-553.
(5) (1912) 56 S.J. 412.
(6) (1938) 60 C.L.R. 150, at p. 162.
(7) (1939) 61 C.L.R. 457, at pp. 512-513.
(8) (1911) 1 Ch. 163.
(9) (1916) 2 A.C. 307.
(10) (1894) A.C. 654.
(11) (1937) 58 C.L.R. 112, at pp. 135, 138.
(12) (1927) 2 K.B. 9, at pp. 18, 22, 23, 26.
(13) (1938) 60 C.L.R. 150, at p. 169.
(14) (1916) 1 A.C. 554, at p. 563.
(15) (1938) 60 C.L.R. 150, at p. 185.
(16) (1758) 1 Eden 132 [28 E.R. 634].
(17) (1914) A.C. 932, at pp. 951, 952, 954, 955, 956.

Hanbury, Modern Equity, 6th ed. (1952), pp. 678-680; *Dutton* v. *Gorton* (1). Tests of the propriety of the actions of directors are to be found in *Mills* v. *Mills* (2); *Australian Metropolitan Life Assurance Co. Ltd.* v. *Ure* (3); *Piercey* v. *S. Mills & Co. Ltd.* (4); *Grant* v. *John Grant & Sons Pty. Ltd.* (5); *Gore-Brown, Joint Stock Companies*, 40th ed. (1946), p. 423; *Palmer, Company Law*, 19th ed. (1949), p. 84. Failure to act in good faith in the best interests of their company renders the action of directors void, and not merely voidable: *Mills* v. *Mills* (6); *Australian Metropolitan Life Assurance Co. Ltd.* v. *Ure* (7); *Richard Brady Franks Pty. Ltd.* v. *Price* (8). The question arises whether the companies could ratify the director's acts complained of by the plaintiffs, because, if so, there is a tendency on the part of courts to say that a company should be left to manage its own affairs. But a court of equity will not permit a person who in his capacity as director has committed an equitable fraud to take the benefit of his action by means of his voting power at a general meeting: *Gore-Brown, Joint Stock Companies*, 40th ed. (1946), pp. 421, 422; *Palmer, Company Law*, 19th ed. (1949), p. 230; *Palmer, Company Precedents*, 16th ed. (1951), Pt. I, p. 1039; *Cook* v. *Deeks* (9); *Allen* v. *Gold Reefs of West Africa Ltd.* (10); *Peters' American Delicacy Co. Ltd.* v. *Heath* (11). The proper finding is that Horace Southcott intended to benefit himself at the expense of the other shareholders and that he intended to use his powers as director for a purpose contrary to his duty, and the issue of shares by the companies should accordingly be held invalid.

K. L. Ward Q.C., in reply.

Cur. adv. vult.

July 8.

THE COURT delivered the following written judgment:—

This is an appeal by the defendants from an order of the Full Supreme Court of South Australia reversing on appeal the judgment of the learned trial judge, *Mayo* J. *Mayo* J. dismissed the suit. The Full Court allowed the appeal and declared that the issue and allotment of 4,199 shares in each of the defendant companies Ngurli Ltd., Carinya Ltd., Fitzroy Ltd. and Myall Ltd., on 20th December

(1) (1917) 23 C.L.R. 362, esp. at pp. 394, 395.
(2) (1938) 60 C.L.R. 150.
(3) (1923) 33 C.L.R. 199, at pp. 218-219.
(4) (1920) 1 Ch. 77.
(5) (1950) 82 C.L.R. 1, at pp. 20, 32, 45.
(6) (1938) 60 C.L.R. 150, at pp. 185, 186.
(7) (1923) 33 C.L.R. 199.
(8) (1937) 58 C.L.R. 112.
(9) (1916) 1 A.C. 554, at p. 564.
(10) (1900) 1 Ch. 656, at p. 671.
(11) (1939) 61 C.L.R. 457, at pp. 482, 495, 502.

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1948, was invalid. It ordered that the allotments be set aside, that the share registers of these companies be rectified accordingly, and that each of these companies acknowledge indebtedness to the defendant Elder's Trustee and Executor Co. Ltd. as the executor of the will of Clifford Southcott deceased in the sum of £4,199.

The question at issue in the suit is whether allotments of 4,199 shares of £1 each made on 20th December 1948 in each of the defendant companies, other than the trustee company, which we shall call the holding companies, were valid allotments. The plaintiffs claim that these allotments were not made in good faith, nor in the best interests of the holding companies, but were made by Horace Southcott with the fraudulent intention of benefiting himself to the detriment of the plaintiffs as the remaining shareholders. In their particulars they state that Horace Southcott in making these allotments intended to reduce the value of each share in the holding companies from £26 14s. 5d. or some higher figure to £1 7s. 1d. or thereabouts and thereby reduce the total value of the plaintiffs' shares in all by £1,522 0s. 7d. or some higher figure and thereby increase the total value of the interests (both direct and through the estate of Clifford Southcott deceased) of Horace Southcott by the last named £1,522 0s. 7d. or some higher figure.

The plaintiff W. F. J. McCann is the executor of the will of his wife Mildred McCann who died on 25th May 1948. Her maiden name was Southcott. W. B. Southcott, Clifford Southcott and Horace Southcott were her brothers. They were the principal shareholders in a prosperous family engineering concern which, in 1919, was incorporated as Southcott Ltd. It had three subsidiary companies. In 1935 all four companies became private companies within the meaning of the *Companies Act* 1934 (S.A.). At the beginning of 1947 each brother held 8,548 shares in Southcott Ltd. and Horace and Clifford were equitably entitled to half the 5,548 shares held by another brother L. Southcott which they had purchased for £2 10s. 0d. per share. At the beginning of 1947 the total issued capital of Southcott Ltd. was £33,000 divided into 33,000 shares of £1 each consisting of these shares and 1,808 shares held by an employee, A. R. B. Sorrell. W. B. Southcott died on 6th April 1947. His shares were valued for State succession duty and Federal estate duty purposes at £3 1s. 3d. per share. On 2nd February 1948, Southcott Ltd. issued 7,000 new shares of £1 each at par. On 19th November 1948 this company issued 10,000 further shares of £1 each at par.

In June 1947, Clifford Southcott caused the four holding companies to be incorporated. They each had a nominal capital of £10,000

divided into 10,000 shares of £1 each, but in each company only sixty-one shares were issued all of which were paid for by Clifford. One of these shares was allotted to him, this share being the share for which he subscribed the memorandum of association numbered 1, called in the articles the "Life Governor's Share". The other sixty were allotted as to thirty to Mrs. McCann and thirty to her daughter, the other plaintiff, Alison McCann, now Mrs. Powell. It is no longer contended that the allotments of these sixty shares were not intended to be gifts to Mrs. and Miss McCann. They each became, upon allotment, the absolute legal and beneficial owners of thirty shares in each of the holding companies. Clifford Southcott sold 2,000 of his shares in Southcott Ltd. to each of these companies at £2 10s. per share. These shares were the only assets they ever acquired. Clifford did not take up on their behalf the proportion of the new shares to which they became entitled when the 7,000 new shares were issued on 2nd February 1948. The purchase money for the 2,000 shares was left outstanding as an unsecured non-interest-bearing debt owing by each company to him. Four similar companies were also formed by Horace Southcott and he sold 2,000 of his shares in Southcott Ltd. to each of these companies, but the plaintiffs never held any shares in these companies and we are not concerned with them, except in so far, if at all, as the different manner in which Horace dealt with the unsecured debts owing to him by these companies can throw any light on the real purpose he had in mind when he allotted the shares in the holding companies on 20th December 1948. The holding companies were formed to avoid income tax. It was expected that they would receive dividends on the shares they held in Southcott Ltd. from time to time. If they did not in their turn distribute the amounts they received less certain allowable deductions amongst their shareholders they would become liable to pay undistributed profits' tax under Pt. III, Div. 7, of the *Income Tax Assessment Act* 1936-1947 equal to the tax which would have been payable by the shareholders if these amounts had been distributed to them by way of dividend. Since Mrs. McCann and Miss McCann had very little income the additional tax in their case would be small and the holding companies would only have to pay a small undistributed profits' tax. After paying this tax the balance of the dividends received by these companies from Southcott Ltd. would be tax free and would be available to reduce their indebtedness to Clifford Southcott for the purchase of the shares, and this would be a payment to him of capital and not income. Dividends were received by the holding companies from time to time from Southcott Ltd.

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and were so applied. Clifford Southcott appointed Horace Southcott a director of the holding companies on 29th June 1948. Clifford Southcott died on 17th September 1948. At that date the debts of the holding companies had been reduced in the above manner to £4,199.

They are companies having articles of association the effect of which was to give Clifford Southcott complete control during his lifetime and to give his personal representatives, so long as the No. 1 share remained registered in the name of Clifford Southcott or of his personal representatives, complete control after his death. The share No. 1 enabled Clifford in general meeting to exercise four times the votes of the other members of the company so that he could carry any special or extraordinary resolution. He was appointed governing director and as such could exercise all the powers of the directors. He could be sole director or he could appoint other directors but in the latter case the other directors were subject to his control and were bound to conform to his directions and could be removed by him. Upon his death, so long as the life governor's share stood in his name or in the name of his personal representatives, the latter could exercise all the voting rights attached to the life governor's share and could appoint and remove a governing director. The shares were under the control of the directors who were empowered to allot them at a premium or at par or a discount, but all new issues were required first to be offered to Clifford Southcott or to his personal representatives so long as they held the life governor's share. He or his personal representatives could take up the whole or any portion of the shares so offered and could direct to whom the shares not taken up should then be offered, whether members of the company or not. No transfer of any shares could be made until the shares to be transferred were first offered to Clifford Southcott whilst he was still living and should be the holder of the No. 1 share or to his personal representatives if he should then be dead and this share was still registered either in his name or in the name of his personal representatives. The directors had power from time to time to declare and pay such dividends to the members as in their judgment the position of the company justified, the dividends to be declared and paid according to the amount paid upon the shares.

Clifford Southcott by his will appointed the trustee company his executor and trustee and bequeathed the No. 1 share in each company and these debts of £4,199 to Horace Southcott. Probate was granted to the trustee company on 1st December 1948. Clifford's

shares in Southcott Ltd. were valued for the purposes of State succession and Federal estate duties at £2 18s. a share.

The financial position of the holding companies on 30th June 1948, may be illustrated by taking the Myall Company as an example. This company still owned 2,000 shares in Southcott Ltd. and there were accumulated profits of £795 1s., representing £800 received from Southcott Ltd. in dividends, £200 having been received on 30th June 1947, and £600 during the year ending 30th June 1948, less £4 19s. paid for income tax and certain expenses. But most of the actual cash had been used to reduce the debt to Clifford Southcott and the company only had £28 17s. 7d. cash in hand. On 1st December 1948, Southcott Ltd. declared a dividend of £1,500 out of which each holding company received £60 bringing the accumulated profits of the Myall Company up to £855 1s. The financial position of the other holding companies was approximately the same. After Clifford's death Mr. L. G. Birbeck, a trust officer of the trustee company, who was in charge of his estate, found in the minutes of the holding companies the following resolution which Clifford had attempted to pass as a special resolution at a purported shareholders' meeting held on 22nd September 1947, at which he was the only shareholder present: Resolved that the articles of association be amended by inserting the following clause—"Notwithstanding anything hereinbefore contained, the special rights and powers which attach to the life governor's share as set out in these articles shall attach to that share even when such share is held by the person to whom it is transferred by the said Clifford M. Southcott pursuant to direction contained in his will". Birbeck thought, it would seem rightly, that this resolution was invalid for want of a quorum. It would in any event be impossible for Clifford Southcott to transfer the share to anyone else after his death and no reliance was placed on the resolution during the argument. Birbeck also noticed that the right of appointing the governing director and exercising the four to one voting power in general meetings attached to the No. 1 share only so long as that share was in the name of Clifford Southcott or his personal representatives, so that when the trustee company transferred the share to Horace Southcott the latter would become an ordinary shareholder holding only one share in each of the holding companies and would lose the controlling voting power. This caused Birbeck to consult the trustee company's solicitors as to whether a general meeting should be called to pass a valid special resolution giving Horace Southcott control of the holding companies. He was advised by them that there was no need to call a general meeting because

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Horace's control could equally well be secured by issuing new shares to the trustee company in liquidation of the debts of £4,199 and then, at the appropriate time, transferring these shares to Horace Southcott. Birbeck reported this advice to Horace.

As we have said, on 19th November 1948, Southcott Ltd. issued 10,000 new shares of £1 each at par. Horace, on behalf of the holding companies, he being the sole director, declined to take up the shares offered to them. On 24th November 1948, an amended *Income Tax Assessment Act* was passed which came into force on 22nd December 1948. It varied the previous law relating to undistributed profits of private companies in several respects. This caused Horace's accountants to consider it advisable to declare dividends out of the accumulated profits of the holding companies before the Act came into operation or at the latest before 31st December 1948. If Horace did this whilst the McCanns still held sixty sixty-firsts of the issued shares, they would become entitled to that proportion of the dividends and he would only become entitled to one sixty-first. On 17th December 1948, the trustee company as Clifford Southcott's personal representatives executed a document appointing Horace Southcott to be the governing director of each holding company. He was, as we have said, already an ordinary director having been so appointed by Clifford Southcott on 29th June 1948.

On the same day (17th December 1948) the trustee company drew cheques in favour of the holding companies for £4,198 in anticipation of the allotment of the shares hereinafter mentioned.

On 20th December 1948, Horace Southcott addressed a letter to the manager of the trustee company in the following terms :—

" re Estate Clifford Michell Southcott, Decd.

Under the will of the abovenamed deceased I am bequeathed the deceased's one share in the capital of each of the companies known as Myall Limited, Ngurli Limited, Fitzroy Limited and Carinya Limited, which, in each case, is numbered (1) and is known as the Life Governor's Share.

There are also bequeathed to me all sums standing to the credit of the deceased with the said Companies, and such sums comprise a deposit of £4,199 in the case of each of the four companies concerned.

I request and direct that in exercise of the powers vested in you under the respective Articles of Association of Myall Limited, Ngurli Limited, Fitzroy Limited and Carinya Limited, as the executor of the will of the late Clifford Michell Southcott, you appoint me Governing Director of each of the four companies.

Upon such appointment being made, it is my intention as the Governing Director of each of the Companies to take the necessary action to capitalise the deposits referred to above, and in this connection your Company, as the executor of the Will of the said Clifford Michell Southcott, deceased, will be offered the right to subscribe 4,199 shares in each of the companies at 20/- each. In the case of each Company you will be tendered repayment of the deposit of £4,199 bequeathed to me under the said Will.

I request and direct that upon the offer of the shares as aforesaid you will accept 4,198 of such shares and will nominate me as the person to whom the remaining one share shall be offered, pursuant to the Articles of Association of the said Companies. I further request and direct that you will utilise £4,198 of the funds received from each Company, upon repayment of the deposits as aforesaid, to subscribe in the name of the Estate of Clifford Michell Southcott, deceased, the shares accepted by you in conformity with the foregoing request and direction, and upon the subscription of such shares the same shall be held in place of and in substitution for £4,198 of each of the deposits bequeathed to me under the said Will.

In consideration of you complying with the foregoing requests and directions, I for myself and my executors, administrators and assigns agree to indemnify you from and against all actions, claims, costs and proceedings in any way arising out of or in consequence of such compliance as aforesaid, and to keep you so indemnified".

On the same day (20th December 1948) Horace Southcott as governing director purported to hold three directors' meetings. Besides himself there were present at the first meeting the holding companies' secretary, Mr. Morison, and Mr. Walch, the auditor of Southcott Ltd. and the holding companies.

At this meeting Horace as governing director directed that the amount of £4,199 owing to Clifford Southcott's estate be paid to the trustee company and that the secretary draw a cheque for that amount forthwith. He then directed that 4,199 shares in the holding companies first be offered to the trustee company as the holder of the life governor's share and that the secretary make the offer to them forthwith. That concluded the first meeting.

A second meeting of directors was held later in the day, the same persons being present. The secretary advised that he had received a letter from the trustee company exercising its right to take up 4,198 shares out of the 4,199 offered and nominating Horace Southcott to take up the remaining one share. The secretary also reported that Horace Southcott had advised by letter that he wished to take up the one share offered to him by the trustee company.

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The governing director resolved that the shares be allotted pursuant to the acceptance referred to in the foregoing and the secretary was instructed to lodge a return of allotments with the registrar of companies within the time allowed. The shares were to be allotted as follows: executor of the will of the late Clifford Southcott 4,198; Horace Southcott 1; total 4,199. That concluded the second meeting.

A third meeting of directors was then held, the same persons being again present. The secretary reported that the return of allotments had been prepared and would be lodged with the registrar of companies within thirty days. He also reported that letters of allotment had been handed to the trustee company and to Horace Southcott. The share certificates would be compiled and handed to them later on in exchange for the letter of allotment. The governing director further resolved to declare a dividend amounting to £598, such dividend to be paid wholly and exclusively out of the dividends received from Southcott Ltd., this dividend being subject to rebate pursuant to s. 107, *Income Tax Assessment Act*. The secretary was instructed to credit the accounts of shareholders immediately and to advise each one the amount to which he was entitled, making arrangements for the payment of the dividend at a later date. That concluded the third meeting. According to Morison, Birbeck was also present at some stage of the meetings, if not all the time.

The dividend, which was at the rate approximately of 2s. 10d. a share on 4,260 shares, was credited as to £589 8s. 4d. to the trustee company, as to 2s. 10d. to Horace Southcott, as to £4 4s. 5d. to Mrs. McCann's estate and as to £4 4s. 5d. to Alison McCann.

On the same day each holding company's cheque for £4,199 was paid to the trustee company in discharge of the debt due to Clifford Southcott's estate and the trustee company gave to each holding company its cheque for £4,198 for the shares allotted to it and Horace Southcott paid £1 for the share allotted to him.

On the next day, 21st December 1948, the secretary of the holding companies wrote to Mrs. McCann's executor and to Alison McCann advising that £4 4s. 5d. had been credited to each of them by way of dividend in the books of the holding companies but nothing was said as to the total amount of the dividends declared or as to the issue of the 4,199 shares. The plaintiff executor was under a duty to include the thirty shares allotted to Mrs. McCann in each holding company as part of Mrs. McCann's estate for the purpose of State succession and Federal estate duty but did nothing until April 1949. He then handed the letters from

the secretary of the holding companies of 21st December 1948, to Miss Linn, a partner in his firm, who was handling his wife's estate and instructed her to make inquiries as to the value of the shares. Correspondence and interviews between Miss Linn and the secretary of the holding companies and between her and Messrs. Crase, the manager of the investment department of the trustee company, and Birbeck who were handling Clifford's estate followed. It was not until the end of September 1949, that Miss Linn was informed of the issue of the 4,199 shares. She was also informed at about the same time that Federal gift duty would have to be paid on the shares on a value of £17 11s. 2d., and that the shares formed part of Clifford's notional estate for the purpose of Federal estate duty and had been assessed for that purpose at the same value as the No. 1 share, that is, £26 14s. 5d. a share. Finally, Mrs. McCann's estate was assessed upon her shares in the holding companies at a value of £26 14s. 5d. a share both for State succession duty and Federal estate duty, the total value of the shares being £3,207. This value was reached by valuing the two thousand shares held by each holding company in Southcott Ltd. at £2 18s. a share, adding the cash in hand, and deducting the amount of the debt. The balance was divided by sixty-one, the total number of issued shares at Clifford's death. It was thus a purely arithmetical calculation based on the surplus of assets over liabilities and a real attempt to value the shares would, of course, involve far more research than this. But the fact that the trustee company to Horace's knowledge accepted this value for the purposes of Federal estate duty is not without significance in the search for the real purpose which caused him to issue the 4,199 shares in the holding companies. In issuing the 4,199 shares the articles of association had in all respects been complied with. The power to issue these shares resided in Horace. The shares had first to be offered to the trustee company and it accepted 4,198 of the shares. The trustee company had the right to nominate the offeree of any shares it did not accept and it exercised this right and nominated Horace as the allottee of the remaining share. Horace was the legatee of each No. 1 share, and of the debts of £4,199. He was not bound to leave these debts outstanding. He was entitled to call for an assignment and sue to recover them. If the new shares were duly issued the debts would be discharged by setting them off against the liability on the shares. There was in fact an exchange of cheques. The trustee company was applying for the new shares as trustee for Horace and upon allotment would hold the shares paid for with his money on trust for him. Horace was entitled to have his debt paid. If

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he enforced his rights of action against the holding companies they would have either to raise the necessary moneys to discharge the debts or go into liquidation. They had ample unissued nominal capital to raise the money by issuing further shares and in this way the debt could be completely discharged.

But the powers conferred on shareholders in general meeting and on directors by the articles of association of companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purpose. "The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power", per Lord *Parker* in *Vatcher* v. *Paull* (1). "The Court will not allow him" (that is the appointor) "to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power", per *Hatherley* L.C. in *Topham* v. *Duke of Portland* (2). Voting powers conferred on shareholders and powers conferred on directors by the articles of association of companies must be used bona fide for the benefit of the company as a whole. In *Greenhalgh* v. *Arderne Cinemas Ltd.* (3), *Evershed* M.R., in a case relating to a special resolution altering the articles of association, said: "In the first place, I think it is now plain that 'bona fide for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. The second thing is that the phrase, 'the company as a whole,' does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit" (4). There are two lines of cases in which it has been held that the courts will interfere to prevent the abuse of powers conferred by articles of association. One instance is where it is necessary to prevent an abuse by the majority of the powers

(1) (1915) A.C. 372, at p. 378.
(2) (1869) 5 Ch. App. 40, at p. 59.
(3) (1951) Ch. 286.
(4) (1951) Ch., at p. 291.

conferred upon a company in general meeting. The other instance is where it is necessary to prevent an abuse by the directors of the powers conferred on them by the articles. The court is more ready to interfere in the second than it is in the first instance. Shareholders even where they are also directors are not trustees of their votes and as individuals in general meetings can usually exercise their votes for their own benefit. But there is a limit even in general meetings to the extent to which the majority may exercise their votes for their own benefit. That limit is expressed in the classic passage from the judgment of *Lindley* M.R. in *Allen* v. *Gold Reefs of West Africa* (1). The power of a three-fourths majority to alter the articles of association must, Lord *Lindley* said, "like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bonâ fide for the benefit of the company as a whole, and it must not be exceeded" (2). The extent of the power of such a majority to alter the articles is fully discussed in this Court in *Peters' American Delicacy Co. Ltd.* v. *Heath* (3). Nor can the majority of shareholders exercise their voting power in general meeting so as to commit a fraud on the minority. They must not exercise their vote so as to appropriate to themselves or some of themselves property, advantages or rights which belong to the company. In *Cook* v. *Deeks* (4) Lord *Buckmaster*, delivering the judgment of the Privy Council, pointed out that: "Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Works* (5)" (6). The powers entrusted to the directors by the articles of association to be exercised on behalf of the company are fiduciary powers. In *Peters' American Delicacy Co. Ltd.* v. *Heath* (7) *Latham* C.J. pointed out that where the validity of acts of directors exercising a fiduciary power is questioned, a higher standard would be required than in the case of shareholders who did not, in voting at a general meeting, exercise any power of a fiduciary nature. In the present case we are concerned with the exercise by Horace Southcott of his fiduciary power as a director to issue new shares. The boundary between the proper and improper use of such a power is discussed in this Court in *Mills* v. *Mills* (8). The power must be used bona fide for the purpose for which it

(1) (1900) 1 Ch. 656, at p. 671.
(2) (1900) 1 Ch., at p. 671.
(3) (1939) 61 C.L.R. 457.
(4) (1916) 1 A.C. 554.
(5) (1874) L.R. 9 Ch. 350.
(6) (1916) 1 A.C., at pp. 564-565.
(7) (1939) 61 C.L.R. 457, at p. 482.
(8) (1938) 60 C.L.R. 150.

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was conferred, that is to say, to raise sufficient capital for the benefit of the company as a whole. It must not be used under the cloak of such a purpose for the real purpose of benefiting some shareholders or their friends at the expense of other shareholders or so that some shareholders or their friends will wrest control of the company from the other shareholders. In the present case Horace Southcott was the donee of this fiduciary power. It was still a fiduciary power although he could issue the new shares to the trustee company, if it agreed to accept them on trust for himself to the exclusion of the McCanns. He could take advantage of the power to benefit himself if such a benefit was incidental to a bona-fide exercise of the power but he could not use the power ostensibly to benefit the company but really to benefit himself at the expense of the McCanns. In *Hirsche* v. *Sims* (1), Lord *Selborne* said: "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" (2). In *Mills* v. *Mills* (3) the present Chief Justice said: "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* (4): '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'" (5). The interests of the McCanns, who held sixty of the sixty-one issued shares in each holding company, were interests which Horace was bound to take into account in deciding whether it would be in the interests of the corporators as a whole to liquidate the debts of £4,199 by the issue of new shares at par. It is unfortunate that he died on 8th October 1949, before the hearing of the suit, and that his evidence was not available, but there is ample evidence, we think, to support the inference drawn by both *Mayo* J. and the Full Supreme Court that Horace, on 20th December 1948, was intent only upon advancing his own interests and left the interests of the McCanns completely out of account. He was not thinking of what would benefit the corporators as a whole. He was thinking only of what would benefit himself.

(1) (1894) A.C. 654.
(2) (1894) A.C., at pp. 600-601.
(3) (1938) 60 C.L.R. 150.
(4) (1758) 1 Eden 132, at p. 138 [28 E.R. 634, at p. 637].
(5) (1938) 60 C.L.R., at p. 185.

Mayo J., after valuing the shares in Southcott Ltd. at £2 12s. 6d., thought that the allotment of the 4,199 shares was invalid because the shares required to raise the new capital should have been issued at a premium. He said that an issue at par could not be treated as being for the benefit or the intended benefit of any of the holding companies and found that in deciding to issue the shares at par Horace intended to benefit his own interests regardless of the consequences to the other shareholders. *Mayo* J. would have granted the plaintiffs some relief had he not thought that this improper purpose only made the issue irregular and that this irregularity was one that could be cured by the company in general meeting. Accordingly, applying the rule in *Foss* v. *Harbottle* (1) and *Mozley* v. *Alston* (2) it was a wrong done to the company and not to the individual shareholders and of such a nature that only the company and not the individual shareholders could complain and therefore only justiciable in a suit in which the company was the plaintiff.

The Full Court paid a great deal of attention to the fact that the new shares were issued before the dividend was declared. They thought that this was oppressive to the McCanns for the only way they had of paying the gift and death duties amounting in each case to £337 was from dividends or by a sale of the shares and this would mean that they only received a small fraction of the dividend instead of sixty sixty-firsts of it and their shares were greatly reduced in value. *Ligertwood* J. found that the new issue, instead of furthering the interests of members as a body, favoured and was intended to favour one shareholder, namely, Horace Southcott, at the expense of the remaining two. He held that the issue was of a fraudulent character in the sense that it was done deliberately by Horace in his own interests to the detriment of the McCanns and in the circumstances was oppressive towards them. He said : " The issue was made in breach of Horace Southcott's fiduciary relationship to the holding company and its shareholders considered as a whole, and, in my opinion, was beyond his powers as a director " (3).

There is no direct evidence of the purpose which led Horace to capitalise the debts of £4,199. It is a matter of inference from all the circumstances. But it is clear that Horace received advice on the matter from others, particularly from Birbeck and to a lesser degree from Crase and Walch. It is equally clear from the following extracts from the evidence of Morison, the secretary of

(1) (1843) 2 Hare 461 [67 E.R. 189].
(2) (1847) 1 Ph. 790 [41 E.R. 833].
(3) (1953) S.A.S.R. 233, at p. 254.

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Southcott Ltd. and of the holding companies, who was in his confidence, that Horace acted on this advice. "Question: Taking point at the date of the death of C. M. Southcott—from then onwards until Horace died—did he to your knowledge obtain advice from various officers of Elder's Trustee Company and from you and from Mr. Walch about the four investment companies of C. M. Southcott's? To his Honour: Answer: I was present at the time. Question: Those officers of Elder's Trustee Company included the General Manager Mr. Wade, Mr. Birbeck and Mr. Crase? Answer: I don't know about Mr. Wade, but Mr. Birbeck and Mr. Crase. Question: Before the meeting of 20/12/48 had there been discussions at which you were present between Horace Southcott, representatives of Elder's Trustee Company, and Mr. Walch about taking the course which was taken on the 20/12/48? Answer: Yes. I was present at them. Question: Did Mr. Horace Southcott in carrying out what was done on the 20/12/48 act contrary to any views expressed by any of those gentlemen? Answer: No. Question: To your knowledge who of those same gentlemen knew what was going on at the meeting of 20/12/48? (Minute Book—Ex. E27—Shown to Witness). Answer: There were two or three meetings held on that day. According to the Minute Book there were present Mr. H. Southcott, the Governing Director and the Secretary, Mr. D. C. Morison. That applies to all three of the meetings on that day. Mr. Walch of Steele, Calder, Slade & Walch was also present at all those meetings throughout all the business that was done—and at some stage, if not all the time, Mr. Birbeck of Elder's Trustee Company was also present. As Secretary I, after the first meeting gave a formal notice of the issue of the large parcel of shares to Elder's Trustee Company and Elder's Trustee Company in turn before the final meeting indicated that they would take the whole of those shares. Question: Are you able to say whether or not from start to finish Mr. Horace Southcott acted in accordance with the advice of Mr. Walch of Messrs. Steele, Calder, Slade and Walch? Answer: Yes. Question: And as far as Mr. Birbeck was concerned, are you able to say the same thing—that what he did was in accordance with advice of Mr. Walch and/or Mr. Birbeck? Answer: Yes. To his Honour: What he did was in accordance with the advice of both of them".

There is no reason to doubt that this advice was honestly given, but all these advisers approached the problem from the wrong angle. They all regarded the holding companies as companies formed by Clifford for the purpose of avoiding taxation and for his own sole benefit and never regarded the McCanns as having

any real beneficial stake in them. Consequently they only considered Horace's interests and what would be for Horace's benefit, and never considered whether what was proposed to be done would be fair and reasonable in the interests of the McCanns. Birbeck admitted that he considered that what benefited Horace benefited the companies and that he did not consider or discuss with Horace the interests of the McCanns at all. He said that he considered that in view of the articles of association in regard to the rights attached to the life governor's share, "the real value of ordinary shareholders' shares was inconsiderable, almost nothing".

"Question: You considered that the power of the life governor and his rights completely obliterated the rights of anybody else? Answer: Well, that close to that that it did not matter. Question: Were those matters you have just mentioned discussed with Horace Southcott? Answer: Yes, I can't remember the details—but they were discussed fully. I don't know whether the value of the shares were discussed at that time. Question: As far as you know the discussions that took place—whether between you and Horace Southcott or between you and anybody else—in regard to the transactions before 20th December 1948 included no reference at all either to the McCanns or their shares? Answer: That is correct. Question: Did you regard the interests of these companies —Myall Limited and the others and the interests of Horace Southcott as identical? Answer: Virtually, I did. What benefited the companies qua Horace Southcott would benefit Horace Southcott and what benefited Horace Southcott qua the companies would benefit the companies. Question: And in that situation you did not consider the McCanns at all, did you? Answer: No, I did not".

Crase's attitude was to the same effect. "Question: Have you made a valuation of the shares in these smaller investment companies? Answer: No. Actually there wasn't a valuation made; it was an arithmetic calculation arrived at from the value of Southcott's shares. Question: Have you any opinion as to the real value—as a selling proposition of the shares in the investment companies? Answer: Yes, I'm quite sure that in view of the articles giving the governing director overwhelming voting rights and the power to issue shares all of which might be taken by himself that no investor would be interested in the shares at anything in excess of par, and I think it would be extremely difficult to find anyone to buy them, even at that price. Question: Do I understand that your valuation was affected by your acceptance of the position that the governing director was entitled to exercise all or any

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of his powers qua the shares directly for his own personal benefit? Answer: Yes, you might say that. Question: I take it, on the view you take of the governing director's powers, he had what might be called a benevolent dominion over the whole of the assets of the company? Answer: That is so. Question: So, in your view, his present and latent rights would probably be equated to the surplus assets of the company? Answer: That is so, particularly when you bear in mind the reasons for which the companies were formed. Question: Do you suggest that that adds to the life governor's powers or qualifies them? Answer: I always understood that they were formed for taxation purposes—I don't know whether that would alter their value; I don't suppose it would. Question: If that is the position that seems to reduce the value of any of the other shares to practically nil? Answer: That is so. Question: Your opinion in that regard is based mainly on what the governing director could do in his own favour? Answer: Yes. Question: And, to take a specific example, including the view that he might issue a large number of additional shares to himself? Answer: Yes. Question: But doesn't your view depend on whether he has the right to issue them to himself at par or some other figure irrespective of whether that action might reduce the value of the other shares already issued. Isn't that another implication in your view? Answer: That's another 'curly' one. I think, if I can answer that question in my own words—I think that the issue to himself of shares at par would reduce the value of the other shares. Is that what you want? Question: A part of it. The other part of it is that your opinion of the value of the shares other than the governing director's share is based on your view that the governing director might issue shares to himself at par and thereby reduce the value of the other shares? Answer: Yes".

With such advisers Horace could hardly fail to misconceive the nature of his fiduciary duty. It was almost inevitable that he would consider that he could do anything for his own benefit that was authorized by a literal reading of the articles of association, and that he would regard the holding companies as his own property and have regard solely to his own interests and disregard those of the McCanns. But he was the person entrusted with the power and it is immaterial whether he acted on the advice of others or his own initiative. If, in fact, he exercised the power for an ulterior purpose it would not be in law a bona-fide exercise thereof. It would be a fraud on the power for Horace to decide to capitalise the debts

of £4,199 not because he truly and reasonably believed it would be for the benefit of the corporators as a whole that the financial position of the holding companies should be stabilised, but because he desired to have the same control over these companies as a shareholder as Clifford had as the holder of the No. 1 share. It is clear that Horace knew that the time within which he could convert the debts into shares and obtain complete control of the companies was short because it would end when the No. 1 shares were transferred to him. He had been advised by Birbeck, acting on the advice of the trustee company's solicitors, that this was the simplest way to obtain such control. The articles of association authorized him to issue the shares at par and he could therefore convert the debts into 4,199 new shares. He would thereby become the holder of 4,200 shares in an issued capital of 4,260 shares or in other words the holder of over ninety-eight per cent of the issued capital of the holding companies and, in a practical sense, beneficially entitled to the 2,000 shares in Southcott Ltd. owned by each of these companies. Accordingly, by issuing the shares at par, Horace would receive the maximum benefits he could obtain from converting the debts into shares and would acquire the right to receive practically the whole of any dividends that might be declared from time to time. The trustee company had no power under Clifford Southcott's will to invest the trust funds in shares in the holding companies. They could only invest the sums of £4,199 which they held on behalf of Horace in these companies at his request. Horace was the person solely entitled to decide whether to issue fresh capital or not and on what terms and had a pre-emptive right to take up the new shares if they were issued. He was placed in a position where his interest and duty could easily conflict and he should have been most careful to see that his decision to issue the new shares was actuated by an intention to benefit the corporators as a whole and not to benefit himself alone: *Hordern* v. *Hordern* (1).

The onus, of course, lies on the plaintiffs to prove that Horace used the power for an ulterior purpose, that is to say to prove, in the words of the present Chief Justice in *Mills* v. *Mills* (2): "The substantial object the accomplishment of which formed the real ground of the board's" (here Horace's) "action" (3). Both *Mayo* J. and the Full Supreme Court drew the inference that Horace acted in bad faith. In the circumstances he could hardly hope to

(1) (1910) A.C. 465, at p. 475.
(2) (1938) 60 C.L.R. 150.
(3) (1938) 60 C.L.R., at p. 186.

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escape this inference when we consider his conduct. He kept the proceedings on 20th December 1948, secret from the McCanns, although it must be usual for directors at least to inform the existing shareholders of a proposal to issue fresh capital. It does not seem likely that he ever considered whether it would be to the advantage of the corporators to finance the payment of the debts wholly or partially in some other manner. Nor is it likely that he ever considered whether it would be fair and reasonable, having regard to the interests of the McCanns, to issue the shares at par, or whether it would only be fair and reasonable to issue them at a premium. None of these matters appears to have been raised or discussed at the meetings held on 20th December 1948. The whole scheme was cut and dried and the meetings were pure formalities. It was cut and dried because its authors all believed, as Birbeck said, that the interests of the holding companies and of Horace were virtually identical or, as Crase said, that Horace's present and latent rights could be equated to the surplus assets of the holding companies. The only fair inference from all the circumstances is that the meetings were held to carry into effect a scheme designed for Horace's sole benefit and adopted by him.

There is further, though less important, evidence which lends support to the inference that Horace was thinking only of himself. It would have been advantageous for the holding companies to have taken up their proportion of the new issue of 10,000 shares by Southcott Ltd. on 19th November 1948. It might have been difficult for them to provide the purchase money but it was not necessarily impossible and the McCanns might at least have been consulted. Horace benefited considerably because the new shares were worth at least £2 and probably considerably more. Clifford had bequeathed all his shares in Southcott Ltd. to Horace so that, by refusing to take up the new issue on behalf of the holding companies, Horace was able to take them up himself. Another straw in the wind is the fact that Horace did not find it necessary to convert the debts into shares in the four holding companies he had formed himself. If it was necessary to capitalise the debts of the holding companies formed by Clifford to stabilize their financial position, it would appear to follow that it was equally necessary to stabilize the financial position of Horace's companies. The fact that Horace capitalised one series of debts and not the other assists the inference that his real purpose was to acquire control of the former companies and swamp their capital and not to stabilize them.

He was misled by his advisers into believing he had simply to study his own interests. The advice may have been very palatable as it appears that at least from May 1948 there had been a feud between the McCanns and himself. Be that as it may, hostility between a trustee and his beneficiaries does not lessen the burden of a trustee's fiduciary obligations. He regarded the McCanns' holdings of sixty sixty-firsts of the issued capital as worthless, although they must have increased in value as the debts diminished, and at Clifford's death one-fifth of the debts had been discharged, although the shares they held had the same rights to participate in dividends or in a winding-up as the No. 1 shares and the same value had been placed on them as on these shares for the purposes of duty. Although Horace had pre-emptive rights over the new issue he was bound, in deciding to issue the new shares and the terms upon which they were to be issued, to take the interests of the McCanns into account and in failing to do so he committed a breach of his fiduciary duty to consider the interests of the companies as a whole.

In these circumstances the plaintiffs have a clear right to sue in their own names to remedy the breach of trust. They are entitled to a declaration that the allotment of the 4,199 shares was invalid and should be set aside and to an order for the rectification of the register. They have individual statutory rights to have the register rectified under s. 124 of the *Companies Act* 1934-1952 (S.A.) (*Grant* v. *John Grant & Sons Pty. Ltd.* (1)). Apart from statute the case is one which falls squarely within the words of Lord *Davey* in *Burland* v. *Earle* (2), that where the acts complained of are of a fraudulent character the minority can sue where the persons against whom the relief is sought hold and control the majority of shares in the company and will not permit an action to be brought in the name of the company. Attempts were made by the trustee company after the death of Horace to have the issues confirmed in general meeting. The question arose whether there was a quorum present but it is unnecessary to decide it. As we have said, a shareholder is not a trustee of his vote and can use it to advance his own interests at a general meeting. But even in general meeting a majority of shareholders cannot exercise their votes for the purpose of appropriating to themselves property or advantages which belong to the company for that would be for the majority to oppress the minority. The right to issue new capital is an advantage which belongs to the company. Any attempt by directors or by the

(1) (1950) 82 C.L.R. 1.

(2) (1902) A.C. 83, at p. 93.

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company to exercise this right not for the benefit of the company as a whole but so as to benefit the majority to the detriment of the minority could be restrained in a suit brought by the minority against the company and the majority: *Cook* v. *Deeks* (1).

For these reasons we must dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellants, *Finlayson, Phillips, Astley & Hayward.*

Solicitors for the respondents, *Moulden & Sons.*

B. H.

(1) (1916) 1 A.C. 554.