*Privy Council Appeals Nos. 107 and 108 of 1917.*

**The Canada National Fire Insurance Company** - *Appellants,*

*v.*

**Hutchings and Another** - - - - *Respondents.*

**The Great West Permanent Loan Company** - *Appellants,*

*v.*

**Hutchings and Others** - - - - - *Respondents.*

*Consolidated Appeals*

FROM

**THE COURT OF APPEAL FOR MANITOBA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JANUARY, 1918.

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*Present at the Hearing:*

LORD PARKER OF WADDINGTON.
LORD SUMNER.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

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The first-mentioned action is brought by transferor and transferee of a parcel of fully paid-up shares in the Company against the Insurance Company; the second action is also a joint action by two transferors and the transferee of two parcels of fully paid-up shares in the Company against the Loan Company.

It is the same transferee in both cases, and the same point that is, whether the Directors of either Company have an absolute power of refusing to approve and register transfers of fully paid-up shares regular in form and regularly presented to them.

It appears that in the first instance application was made upon motion for prerogative writs of mandamus; but that upon some question arising as to the propriety of this form of remedy, the applications for these writs were by consent converted into actions, statements of claim being delivered setting forth the facts, and claiming as relief a mandamus or an order in the nature of a mandamus commanding either defendant Company to register the transferee as the owner of the shares in question.

Some formal evidence was given; but, again by consent,

the actions were heard upon motion for judgment without further pleadings, it being agreed that the matter was one entirely of law.

Both Companies were constituted by Special Acts incorporating Part II of "The Companies Act, 1906" (cap. 79 of the Dominion Statutes).

Except as incorporating the General Act, the Special Acts are of no importance in this case.

The material clauses of the General Act are as follows :—

"BY-LAWS.

"132. The Directors may from time to time make by-laws, not contrary to law or to the Special Act or to this part, for—

"(*a.*) The regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock ;

"(*b.*) The declaration and payment of dividends ;

"(*c.*) The number of the Directors, their term of service, the amount of their stock qualification, and their remuneration, if any ;

"(*d.*) The appointment, functions, duties, and removal of all agents, officers, and servants of the Company, the security to be given by them to the Company, and their remuneration ;

"(*e.*) The time and place for the holding of the Annual Meeting of the Company, the calling of meetings (regular and special) of the Board of Directors and of the Company, the quorum at meetings of the Directors and of the Company, the requirements as to proxies, and the procedure in all things at such meetings ;

"(*f.*) The imposition and recovery of all penalties and forfeitures admitting of regulation by by-laws ; and

"(*g.*) The conduct in all other particulars of the affairs of the Company.

"133. The Directors may from time to time repeal, amend, or re-enact any such by-law, provided that every such by-law, repeal, amendment, or re-enactment, unless in the meantime confirmed at a general meeting of the Company duly called for that purpose, shall only have force until the next annual meeting of the Company, and in default of confirmation thereat shall from the time of such default cease to have force or effect."

"CAPITAL STOCK AND CALLS THEREON.

"138. The stock of the Company shall be personal estate, and shall be transferable in such manner only and subject to such conditions and restrictions as are prescribed by this part, or by the Special Act, or the by-laws of the Company."

"143. No share shall be transferable until all previous calls thereon have been fully paid, or until it is declared forfeited for non-payment of a call or calls thereon.

"BOOKS OF THE COMPANY.

"144. The Company shall cause a book or books to be kept by the secretary, or by some other officer specially charged with that duty, wherein shall be kept recorded—

"(*e.*) All transfers of stock in their order as presented to the Company for entry, with the date and other particulars of each transfer, and the date of the entry thereof.

"145. The Directors may allow, or refuse to allow, the entry in any such book of any transfer of stock whereof the whole amount has not been paid.

"146. No transfer of stock, unless made by sale under execution, or under the decree, order, or judgment of a court of competent jurisdiction, shall be valid for any purpose whatsoever, until entry thereof has been duly made in such book or books. . . . . ."

At the time of the presentation of the transfers for registration, the by-law of the Insurance Company relating to the transfer of shares was in the following terms :—

"ARTICLE VII.

"(*a.*) Shares in the capital stock of the Company shall be transferable only on the books of the Company by the owner in person, or by attorney, on surrender of the certificates of stock properly endorsed.

"(*b.*) Transfers and allotment of shares shall not be valid unless approved by the Board of Directors."

And the by-law of the Loan Company was in the following terms :—

"ARTICLE III.

"This stock shall be issued subject to the following conditions :—

"(*a.*) That the holder of this stock will be paid the semi-annual dividends that may be declared from time to time by the Board of Directors.

"(*b.*) Said dividends shall be payable on the 1st day of January and July of each year.

"(*c.*) That said stock shall be non-withdrawable, but may be sold, and such transfers must be recorded in the books of the Company.

"Assignment of stock shall not be valid unless approved and endorsed by the Board of Directors and accompanied by a transfer fee of 1·00 dollar. The assignment shall be accompanied by the stock certificate."

These by-laws had been confirmed by the shareholders in their respective Companies, and were in force when the transfers were presented for registration.

After the receipt of the transfers, a meeting of the Directors of each of the Companies was held, and the by-laws were then amended by the addition in each case of the following words :—

"For greater certainty, but not so as to restrict anything herein contained, or/and in addition thereto, the Directors may refuse to register any transfer of stock heretofore or hereafter made upon which the Company has a lien; and the Directors, without assigning any reason, may refuse to register any transfer of stock heretofore or hereafter made, whether fully paid-up stock or not, to a person of whom they do not approve."

These amendments, however, were never brought before or confirmed by the shareholders of either of the Companies; and counsel for the appellants admitted that he could not place reliance upon them.

Upon the actions coming on for hearing the Judge of first instance (Galt, J.) decided in favour of the plaintiffs, and ordered the defendant Companies to register the transfers, make the necessary entries, and issue the proper certificates. And upon appeal the Court of Appeal (Howell, C.J.A., and Perdue and Cameron, J.J.A.) confirmed these decisions.

The question now raised upon appeal from the Court of Appeal is one of some importance, in the solution of which their Lordships have been greatly assisted by counsel.

There are two branches of it: (1) Did the by-law in the case of either Company warrant the Directors in their refusal? (2) If so, was the by-law valid?

At the time that the cases were before the Courts in Manitoba the amendments to the by-laws had not come up before the shareholders for confirmation, and the Courts below appear to have proceeded upon the footing that they were provisionally in force.

If this were so still, there would only be one matter for enquiry, Were the by-laws valid?

But now that the amendments have not been confirmed, and after the admission of counsel for the appellants, both matters have to be considered.

Upon the whole it will be best to give first consideration to the point upon which the Courts below decided, the validity of a by-law supposing it to warrant the Directors in absolutely refusing to register a transfer of fully paid-up shares, regular in form and regularly presented.

In the argument for the appellants stress was laid upon the line of English decisions upon cases of this nature arising under the Joint-Stock Companies Acts.

There is, however, for the present purpose no analogy between Companies in the United Kingdom which are formed by contract, whether it be under Deed of Settlement or under Memorandum and Articles of Association to which the Registrar of Joint-Stock Companies necessarily assents if the documents are regular in form, and Canadian Companies which are formed under the Canadian Companies Act, either by Letters Patent or by Special Act.

A nearer resemblance would be found in the Companies Clauses Act, 1845.

But it is wiser to look at the Canadian legislation as complete in itself and unaffected by British jurisprudence.

The Canadian Companies, at any rate those created under Part II of the General Act by Special Act, are pure creatures of statute, and their powers and duties are to be found in the two Acts.

There being nothing material in the Special Act, their Lordships look to the General Act, and especially to Sections 132 and 138.

The latter section provides that stock shall be personal estate and transferable.

No doubt the stock is transferable "in such manner only,

and subject to such restrictions and conditions as are prescribed by this part" (of the Act) "or by the Special Act or the by-laws of the Company" (S. 138).

This provision, however, is not to be construed as empowering the Company to make restrictive by-laws.

The power to make by-laws is in section 132, and it is confined in this matter to by-laws regulating ". . . . the transfer of stock."

Regulation does not mean restriction, still less subjection, to an arbitrary veto.

The words in section 138 should be construed "reddendo singula singulis," and so construed mean subject to such restrictions as are imposed by the General or the Special Act and in such manner as prescribed by the by-laws.

The word "condition" is perhaps ambiguous. If the condition is to effect substantive limitation, it would go with "restriction"; if formal, with "manner."

That a power of regulation does not extend to restriction was well stated by Macmahon J. in *Re* Imperial Starch Company (10 O.L.R. at p. 25) in language which was adopted in a later case, and which their Lordships would repeat.

> "The statute gives the Company power to pass by-laws 'regulating the transfer' of stock: that is: how and in what manner and with what formalities it is to be transferred. But the Imperial Starch Company has passed a by-law virtually empowering the Directors to prohibit the transfer of stock, that is, unless the Directors approve of the transfer it cannot be made in the books of the Company. This, in effect, would prevent a holder of fully paid-up shares in the Company from selling and realising on his stock, because no purchaser could be found, if registration as owner could be prevented at the caprice of the directorate."

And they are of opinion that the Court of Appeal for Ontario came to the right conclusion in *Re* Good and Jacob Y. Shantz, Son, and Co. (Limited), 23 O.L.R., p. 544.

The reasoning of the Judges who were in the majority in that case is substantially the same as that of Macmahon J. in *Re* Imperial Starch Company; and it is in that case that his words are adopted by Garrow J.A.

It is to be observed that Jacob Y. Shantz, Son, and Co. (Limited) was a Company formed under Letters Patent by virtue of Part I of the Companies Act, and not by Special Act in accordance with Part II. But so far as there is any difference, the argument against assuming that a Company formed under the Companies Act has any other powers than those expressly given to it is stronger in the case of a Company incorporated by Special Act than in the case of a Company incorporated by Letters Patent.

The conclusion is that a by-law purporting to impose such a restriction upon transfer as would be imposed if the Directors had a power of veto would be *ultra vires*; and further that it would interfere with that transferability of stock which is an

ordinary incident to personal property, and which is provided for in the General Act.

This is the conclusion at which correctly, in their Lordships opinion, the Courts of Manitoba have arrived.

If therefore the by-laws of these two Companies purport to give such a power of veto they cannot stand.

This is the matter of general interest, to which alone the Courts below addressed themselves, and which has accordingly been dealt with by their Lordships in the first instance.

But now that it is admitted that the amendments are not to be regarded, it may be that the by-laws upon a true construction do not purport to impose any such restriction.

There is a slight difference in the language as between the two Companies, but it is not material.

Both require transfers to be approved, and to be recorded in the books of the Company.

This leaves to the Directors certain matters upon which they have to exercise a judgment.

They are by section 143 to refuse to register if a call is unpaid. They have under section 145 a discretion in the case of stock not fully paid up.

They are entitled to take precautions against forged transfers. If the shareholder on the books is dead or has become bankrupt, they have to see that the title has duly devolved upon the transferor before they register his transfer.

The usual form of assignment in these Companies is by transfer endorsed on the certificate. The Directors may require a transfer in this form, or satisfactory explanation and indemnity in case of a departure from it.

They could refuse to register a transfer to an alien enemy. They may, and in the case of one of the two Companies they do, require a reasonable fee.

On the whole, the Directors have the powers and duties conferred by sections 143 and 145, and they have to see to matters of title and conveyance.

A by-law requiring their approval is properly construed as meaning that they are to be satisfied in respect of matters which are within their province.

So construed, as it should be, *ut res magis valeat quam pereat*, it is a valid by-law ; but one which gives no warrant for the imposition of a veto.

On both grounds, therefore, because the action of the two Companies in refusing to register these transfers was not supported by their by-laws, and because if it were so supported the by-laws would be invalid, this appeal fails.

It was pressed upon their Lordships that there are classes of companies in which it is highly important that directors should have such a power of veto ; and this consideration had weight with the two learned Judges who formed the minority in Good's case. It may well be so.

There are decided cases in the English Courts which show

that such a power may be lawfully reserved on the occasion of the constitution of the Company; and a sufficient number of such cases to show that the power has been found convenient in use.

But if it is to be introduced under the Canadian Legislature, it must be in the Letters Patent or in the Special Act.

Their Lordships will therefore humbly recommend to His Majesty that these consolidated appeals should be dismissed with costs.

# In the Privy Council.

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**THE CANADA NATIONAL FIRE INSURANCE COMPANY**

*v.*

**HUTCHINGS AND ANOTHER.**

**THE GREAT WEST PERMANENT LOAN COMPANY**

*v.*

**HUTCHINGS AND OTHERS.**

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DELIVERED BY

SIR WALTER PHILLIMORE, BART.

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