1926

*May 19.
*Dec. 15.

THE ONTARIO JOCKEY CLUB LIMITED (DEFENDANT) ..... } APPELLANT;

AND

SAMUEL McBRIDE (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Company—Transfer of shares—By-law restricting right of transfer—Alleged agreement of shareholder to observe provisions of by-law—The Ontario Companies Act, 1907, ch. 34.

A company's by-law purporting to disable any shareholder from transferring his shares to anyone not already a shareholder until the company had had an opportunity of finding a purchaser as in the by-law provided, was held not to be within the company's powers under *The Ontario Companies Act,* as it stood in November, 1910, when the by-law was passed. *Canada National Fire Insur. Co.* v. *Hutchings,* [1918] A.C. 451, applied. It was further held that the transfer of the share in question was not shown to be affected by an undertaking to observe the terms of the by-law; and the transferee was entitled to have the share registered in his name. Idington J. dissented.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 97) affirmed in the result, Idington J. dissenting.

Semble, had the company established such an undertaking as aforesaid on the part of the registered shareholder in respect of the share in question, the plaintiff, who claimed as transferee from a transferee of such registered shareholder, might not (even apart from the principle of *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.,* [1926] A.C. 108) have been able to force the company to register him as the holder of the share.

APPEAL by the defendant company from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing judgment of Lennox J (2), upheld the plaintiff's claim to be registered as a shareholder of the defendant company. The facts of the case are sufficiently stated in the judgments now reported.

W. Nesbitt K.C. and *F. W. Fisher* for the appellant.

H. J. Scott K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1925) 58 Ont. L.R. 97. Leave to appeal to the Supreme Court of Canada was granted by the Appellate Division. In this connection, see *Ontario Jockey Club* v. *McBride* [1926] S.C.R. 291.

(2) (1924) 26 Ont. W.N. 399.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—On the 23rd of June, 1922, one Orpen professed to sell to the plaintiff, who is the respondent in this appeal, a share in the capital stock of the appellant club, The Ontario Jockey Club Limited, which Orpen had previously purchased from Mr. Charles Millar. The respondent having applied to have the share registered in his name, and the right to registration having been denied, this action was brought to establish that right. Registration was refused on the ground that by by-law of the club no. 37, passed on the 24th of November, 1910, Millar, who was the registered owner of eight shares, was disabled from transferring any one of his shares to Orpen or to the respondent, neither of whom was a shareholder, until an opportunity had first been given to the club to find a purchaser for it. Other grounds of justification are now advanced for the action of the club, which will have to be discussed, but it is convenient first to take up the question raised touching this by-law, which, if it was passed in a valid exercise of the club's powers, has unquestionably the effect contended for.

The point seems to be concluded by the judgment of their Lordships of the Judicial Committee delivered by Lord Phillimore in *Canada National Fire Insurance Co.* v. *Hutchings* (1). The provisions of the Canadian *Companies Act* which were there examined and applied (R.S.C. 1906, c. 79, ss. 132 and 138), are not distinguishable from the pertinent provisions of *The Ontario Companies Act* as they stood at the time the by-law was passed; and it seems to follow from their Lordships' observations, at pp. 456 and 457, that s. 48 of *The Ontario Companies Act* of 1907, which was in force in November, 1910, by which the shares of companies governed by it are made

> transferable on the books of the company in such manner and subject to such conditions and restrictions as by this Act, the special Act, the Letters Patent or by-laws of the company may be prescribed,

must be read with s. 87, from which the power to make by-laws in relation to the transfer of shares is derived, and

(1) [1918] A.C., 451.

1926

ONTARIO JOCKEY CLUB LTD. v. MCBRIDE.

Duff J.

which is there defined as a "power to regulate the transfer of shares"; a power which, in their Lordships' view as expressed on the pages mentioned, does not embrace authority to pass "restrictive by-laws." "Regulation does not mean restriction," it is laid down; and a sentence is cited from the judgment of MacMahon J. in *In Re Imperial Starch Co.* (1), and adopted by their Lordships, which is in these words:—

> 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.

This interpretation of language, almost identical with and differing from that of the Ontario Act only in respects quite immaterial, is, of course, binding on this court.

The appellant, however, advances the defence that Millar had entered into an agreement by which he undertook to observe the provisions of the by-law and by which, it is said, the terms of the by-law became in effect enforceable against him as the terms of a contract with the club. The examination of this point necessitates a word or two upon the history of the shares held by Millar at the time of his agreement with Orpen.

The Jockey Club was originally incorporated on the 20th of April, 1881, with a capital of $20,000, divided into 200 shares at $100 each. In 1910, supplementary Letters Patent were issued, increasing the capital from $20,000 to $200,000, divided into 200 shares at $1,000 each. In December, 1910, Mr. Millar received a stock certificate, no. 37, for 2 shares in the Ontario Jockey Club, and on the receipt of this certificate he signed an acknowledgment in these words:—

> I hereby acknowledge the receipt of Certificate No. 37, for two shares of the Capital Stock of The Ontario Jockey Club, and I hereby agree to accept the said shares, subject to the conditions contained in By-law Number 37 of the Club, passed on the twenty-fourth day of November, 1910; which require that before any Shareholder can transfer a share to any person not already a shareholder of the Club, notice shall first be given to the Club of the desire of such shareholder to sell his share and the Club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said by-law, or at any less price that may be fixed by the seller.

(1) (1905) 10 Ont. L.R. 22, at p. 25.

Subsequently, in 1916, supplementary Letters Patent were again issued, by which 400 shares of "new stock," of $1,000 each, were created, increasing the capital stock from $200,000 to $600,000. Of these 400 shares, each shareholder received two, for every share of the old stock held by him. Millar, as the holder of two shares, was entitled to, and received, four of the new issue. As affecting these additional four shares, Millar gave no express undertaking to observe the terms of the by-law. The stock certificates were never delivered to him, but the shares were allotted to him, and he became thereby the registered holder of them. At a later period, Millar acquired two additional shares by purchase, but the evidence tells us nothing as to the history of them.

In sum, Millar, when he agreed with Orpen to sell him one share, was the owner of two shares affected by his undertaking above set out, and of four shares affected by no undertaking, and also of two shares in relation to which we are not clearly informed whether any undertaking had or had not been given.

It follows that Millar, when he entered into his agreement with Orpen, had four shares with which he was free to deal, if the view above expressed is correct that the by-law was invalid as such, unless, apart from the express undertaking exacted by the club upon delivery of stock certificates, there was some agreement by conduct of the same or similar character affecting these four shares and binding upon Millar. It is sufficient to say that there is no evidence of facts from which such an agreement can properly be inferred. The shares of the "new stock" created by the supplementary Letters Patent in 1916 allotted to Millar were not created by a sub-division of the existing shares, and there appears to be no satisfactory ground for holding that Millar undertook by implication in accepting, in exercise of his plain rights, the additional shares, to observe, in relation to these shares, the terms of his undertaking as to the existing shares.

This is sufficient to dispose of the appeal. The Appellate Division proceeded on rather different grounds, which it is unnecessary to discuss; but it ought, perhaps, to be observed that, apart altogether from the principle of the

1926

ONTARIO JOCKEY CLUB LTD. v. MCBRIDE.

Duff J.

judgment in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* (1), had the appellant succeeded in establishing the existence of an agreement on the part of Millar, as alleged, the respondent (whose title, acquired from Millar through Orpen, could, before registration, be only an equitable one), would have found himself in difficulties in attempting to force the club to register a share transferred by Millar in violation of his undertaking to the club.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—This is an appeal by the Ontario Jockey Club Limited from a judgment of the Second Divisional Court of the Supreme Court of Ontario, dated 20th November, 1925 (2), and reversing the judgment of the Honourable Mr. Justice Lennox at the trial (3).

By the judgment after the trial the plaintiff's claim for a declaration that he is a shareholder of the defendant, the Ontario Jockey Club, and for other relief, was dismissed.

The appellant, the Ontario Jockey Club, was incorporated by Letters Patent under *The Ontario Companies Act*, bearing date 29th April, 1881, with an authorized capital of $20,000 divided into two hundred shares of $100 each.

On the 10th November, 1910, whilst the original charter was still in force, and before any supplementary patent, above referred to, had issued, by-law no. 37 was passed at a meeting of the appellant's committee, and ratified at the annual general meeting, held 30th November, 1910.

The first two clauses of said by-law are as follows:—

(1) Save as hereinafter provided, no shares or interest in the Club shall at any time be transferred to any person not already a shareholder, until the Club has had an opportunity to find a purchaser for such share or interest as hereinafter provided.

(2) Any shareholder desiring to sell his share or shares (or any portion thereof) shall give notice in writing to the Club that he desires to sell and transfer the same, and such notice shall constitute the Club such shareholder's agent for the sale of such share or shares to any purchaser at a price to be ascertained as hereinafter provided or at any lower price that may be fixed by the shareholder desiring to sell.

The remaining four clauses are directed to specifying how the price is to be determined and the consequential results.

(1) [1926] A.C. 108; 42 T.L.R. 86.

(2) 58 Ont. L.R. 97.

(3) 26 Ont. W.N. 399.

This by-law is claimed to have been within the powers conferred by section 33 of *The Ontario Companies Act* as it stood at the time of its incorporation and substantially in all succeeding amendments of the said Act down to the time of the passing of said by-law.

And I submit that it is also so substantially so as it appears in the first subsection of section 56 of the Revised Statutes of Ontario in 1914, that any slight changes made do not affect its force so far as the questions raised herein are concerned.

And in pursuance thereof Mr. Charles Millar received stock certificate no. 37, dated 13th December, 1910, for two shares of the Ontario Jockey Club stock, and, at that date, attached his signature to the following declaration in the stock certificate book of said club:—

> I hereby acknowledge the receipt of Certificate Number 37, for two shares of the Capital Stock of The Ontario Jockey Club, and I hereby agree to accept the said shares, subject to the conditions contained in By-law Number 37 of the Club, passed on the twenty-fourth day of November, 1910; which require that before any shareholder can transfer a share to any person not already a shareholder of the Club, notice shall first be given to the Club of the desire of such shareholder to sell his share and the Club shall have the right to sell the same to a purchaser at a price to be ascertained according to the provisions of said By-law, or at any less price that may be fixed by the seller.
>
> (Signed) C. MILLAR.

It is in respect of said stock, referred to in said certificate as no. 37, that this suit was instituted by respondent to have an assignment thereof to him registered by the appellant in entire disregard of the said by-law.

I infer that the by-law had been observed ever since its passage, until the respondent had apparently bought or agreed to buy said shares in appellant's club.

The appellant is naturally anxious to know where it stands in light of such pretension unexpectedly set up by the respondent.

The respondent's action was, on the trial, dismissed by Mr. Justice Lennox by reason of failure to prove some step in the case whereby he was not called upon to pass upon the points of law now in question herein.

The Second Appellate Division for Ontario, having heard the case, after an amendment of the pleadings and relying on the authorities cited to them, allowed the appeal.

1926

ONTARIO JOCKEY CLUB LTD. v. MCBRIDE.

Idington J.

The recent decision of the Judicial Committee of the Privy Council in appeal in the case of *Lord Strathcona Steamship Company Limited* v. *Dominion Coal Company Limited* (1), having reversed the decision therein, given a year before in the court appealed from, rather decisively I imagine, disposes of the cases relied upon in the latter part of Mr. Justice Middleton's judgment herein, written on behalf of a unanimous court, from which this appeal is brought.

There is only one feature about which I am now in doubt herein, and that is the different attitude maintained by the respective counsel for appellant and respondent herein, in relation to the question of notice to the respondent of the agreement to which Mr. Millar has subscribed as set out in the copy thereof, above quoted by me, and of the said by-law upon which same is founded.

In the appellant's factum, at page 5 thereof, it is distinctly put forward as an admitted fact—subject to conditions—whatever that may mean.

In respondent's factum counsel stands out for the denial of notice.

I suspect there has been some understanding between counsel, followed by another misunderstanding, as it is of some importance, to the appellant at least, to have this appeal disposed of on the basis of knowledge or notice to respondent of the sort of agreement Mr. Millar signed.

I, therefore, proceed to dispose of this case, so far as I am concerned, upon the assumption of respondent having had notice.

It has been, until I observed this discrepancy, as it were, a matter of some concern to me, for I cannot understand how a purchaser from one who had not only subscribed to the agreement, I quote above, in the records of the appellant, but whose certificate of title to the shares in question has printed across it such absolute notice of assent thereto, and acceptance thereof, can manage to escape notice, unless going it blind.

An investigation of the law relative to constructive notice, might, in that event (but for the assumption I am proceeding upon), have been, in all its bearings on such a case, an unwelcome duty, for the case was not argued on all

(1) [1926] A.C. 108; 42 T.L.R. 86.

1926

ONTARIO JOCKEY CLUB LTD. v. McBRIDE.

Idington J.

its manifold bearings in this respect. As to the effect of subsection 2 of section 3 of the Ontario Act having any bearing on this case I am decidedly of the opinion that it had none.

That subsection, which was a distinct amendment, could not, or, at least in my opinion, should not, be interpreted so as to act retrospectively on transactions which had transpired before the amendment and therefore valid, unless, of course, the by-law was wholly void save so far as made the basis of an agreement as it was in Millar's case.

As I can dispose of this appeal on the grounds taken above without passing on the original validity of said by-law, quite independently of any contract, I do not definitely and finally express a decided opinion.

I may be permitted to say, however, that having, before reaching said conclusion, read and considered the cases cited as bearing on the question of the said validity, I found a wide distinction possible between all of said cases and this.

They all seemed to be by-laws or material which imposed an absolute veto independent of any other consideration given to the protection of the shareholder or his assignee.

This by-law is far from being quite so unreasonable. It seems to have been a well considered scheme for protecting appellant from being invaded with undesirable members, and, at the same time, protecting the shareholder from any loss he would be likely to suffer.

Of course I see two classes of cases impossible to provide for. For example, if a shareholder had a chance to sell at a price giving him more profit than there had been earned, and some gullible fellow was willing to run chances, there would be a loss of that chance.

Another case is that of a shareholder having a desire to give one of his family, or other friend, a gift; he may not do it unless he convinces the appellant that his friend is a good fellow and not to be shut out.

I am only making the various suggestions as to the absolute validity of the by-law without assent thereto on the part of the shareholder at his acquisition of a share, and have come to no definite opinion thereon. I have, however, for the reasons above assigned, come to the con-

1926

ONTARIO JOCKEY CLUB LTD. v. MCBRIDE.

Idington J.

clusion that this appeal should be allowed, but as to the question of costs, perhaps no need to pass thereupon.

There may be cases such as I suggest above in which the by-law might be held restrictive and hence *ultra vires*, but so far as the provision for an option at the price the shareholder wants, I do not think it more than a regulation of which notice must be imputed to the buyer.

Appeal dismissed with costs.

Solicitors for the appellant: *Ludwig & Ballantyne.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*