1882 EDWARD SMITH..... .....APPELLANT;

*Oct. 28.

AND

1883

*Jan. 12. THE BANK OF NOVA SCOTIA, ASSIGNEE, &c..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*The Banking Act* 34 *Vic., ch.* 5, *secs.* 19 *and* 58—*Rights of shareholders—Resolutions by directors and shareholders, not binding on absent shareholders—Equitable plea.*

Bank of *L.* brought an action against *S.*, the appellant, (defendant) as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him in that bank.

By the 7th plea, and for defence on equitable grounds the

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier and Henry and Gwynne, JJ.

being able to enforce payment of a debt due to it by a transferor before allowing him to part with his shares, and possibly with a view to control in cases where a transfer would work a wrong to the bank. The enactments, in which are specified the times when and the reasons for which the completion of a transfer may be refused, show that sec. 19 does not authorize an arbitrary refusal. Thus: sec. 28 authorizes a by-law for the closing of the transfer book during a certain time, not exceeding fifteen days before the payment of each semi-annual dividend; sec. 19 authorizes the bank to demand payment of any debt due by the transferor before the transfer; and sec. 59 saves the recourse of creditors against transferors on transfers made within one month of suspension.

The resolution of 26th June, 1873, cannot be alleged as a reason to justify the refusal to complete the transfer, for the following reasons:

(*a.*) It was a mere agreement between the assenting parties, of whom defendant was not one.

(*b.*) It was a resolution passed at a meeting at which defendant was not present, nor was there evidence of his being notified to attend. The record of the proceedings should not have been admitted in evidence, and being in evidence cannot prejudice defendant.

The equitable plea was proved, and the defendant was entitled to judgment in his favor, although he prayed for other relief as well. Rev. Stat. of *N. S.*, 4th series, ch. 94, sec. 162; also cases cited by *James*, J. in the court below.

Mr. *Gormully* for respondents:

The shares in question have never, in fact, been transferred by the appellant to the firm of *Almon & Mackintosh*, and the appellant is still the registered holder thereof and liable to the calls thereon.

1882

SMITH v. BANK OF NOVA SCOTIA.

It does not appear that any formal demand was ever made upon the board of directors by the appellant, or by his attorney, requiring the board to permit a transfer to be made. Even if there is evidence of such a demand, the appellant should have taken steps to compel the directors to comply therewith, and by his laches and delay he has precluded himself from equitable relief. The Supreme Court of *Nova Scotia* on its common law side has no power to give the relief demanded by the equitable plea pleaded herein. Under all the circumstances of the case—having regard to the understanding come to by the shareholders in 1873 and the position of the bank—the directors were justified in declining to permit the appellant to transfer his shares to *Almon & Mackintosh.*

RITCHIE, C. J.:—

The Chief Justice of the Supreme Court of *Nova Scotia* says:

> It may be that the statute intended that the directors of the bank should possess and exercise a discretion and control in the acceptance and registration of transfers of shares. But surely circumstances must exist calling for the exercise of such a discretion and justifying a refusal to accept and register transfers, in other words must there not be a reasonable cause for refusal? They surely cannot refuse to accept and register a transfer when no such reasonable cause exists.

Did not the directors, without reasonable or legitimate excuse, refuse to sign the transfer in this case?

The transfer was made in good faith to parties then in perfectly good credit and standing, whose financial standing is testified to as being first class by defendant *Smith*, against whom the manager of the bank says: "there was no claim or demand of the bank against defendant when the application for transfer was made," who states further, that by transfer books, "it appears that twenty shares were transferred on 28th June, 1873.

There were eighteen transfers accepted and registered between that date and the suspension of the bank These transfers represent about 2091 shares."

*Smith* was never notified of the refusals of the directors to register the transfer, nor was any claim made on him by the bank, nor was he required by the bank to discharge any debts or liabilities due by him to the bank, nor did any such exist, nor did the bank, nor do the now plaintiffs, claim that any such existed. But the bank, with full knowledge that the stock certificate and power of attorney had been transmitted to the manager to be acted on, retained possession of the same, and, as the manager says, "they remained in my possession as manager of the bank, until I handed them to the assignee after insolvency of the bank."

The defendant has nothing to do with any controversy that may arise between *Mackintosh* and *Almon*, and the plaintiffs; all he asks for is to be protected from this inequitable claim the plaintiffs are making against him, and against which the facts set forth, and proved, shew he is entitled to an absolute and perpetual injunction, this is all the relief the defendant asks for and can ever obtain, and, when obtained, does complete and final justice between the parties. With respect to the indebtedness of the bank to the bank of *Nova Scotia*, except so far as *Smith's* liability to *Black* was concerned, and from which liability he was released by *Black*, there clearly was no obligation on the part of *Smith*, as an individual shareholder, nor of any other shareholder, either to the bank of *Liverpool* or to the bank of *Nova Scotia*, beyond the indirect general liability of the shareholders to pay any legal call which might be made on the shareholders to meet the liabilities or to carry on the general business of the bank. I am of opinion to allow this appeal with costs.

1883

SMITH v. BANK OF NOVA SCOTIA.

STRONG, J.:

I am of opinion that this appeal must be allowed. It is clear that the shares were, by the express provisions of the 19th sec. of the Banking Act, transferable at the will of the holder, and the directors were bound to register the transfer unless there were debts or liabilities due by the shareholder to the bank. This was the *primâ facie* right of the appellant, and it therefore appears to me that the seventh plea was a good defence to the action, and I am at a loss to see upon what principle the evidence of the resolution and loan by the bank of *Nova Scotia* was admitted in the absence of any replication to that plea. Upon this ground alone the judgment of the court below should have been for the appellant.

The case has, however, been argued upon the facts as they appear in evidence, and I will therefore consider them. The resolution adopted at the shareholders' meeting (held on the 26th June, 1873) is, in its terms, an expression of opinion only, and must consequently be considered as a mere recommendation to such shareholders who were not present at the meeting, and is not to be construed as an assumption by those present to bind those who were absent without their assent.

But had it been otherwise, and had it in terms expressed the determination of the shareholders present to bind those who were absent not to transfer these shares until the proposed loan should be paid, it would in law be entirely ineffectual and *ultra vires* of those constituting the meeting, for the meeting might as well have endeavored to restrain the absent shareholders from parting with any of their other property as to have attempted to restrain them from exercising their statutory right of selling and transferring their shares in the bank. Then it is not shewn that the appellant ever

assented to these terms or that the loan was raised with his assent upon the agreement or understanding that he would not transfer his shares. It is true, that at a subsequent meeting held on the 28th January, 1874, at which appellant was present, the directors made a report that a loan had been obtained from the Bank of *Nova Scotia* in accordance with the resolution passed at the preceding meeting in June, but there is nothing in this report to shew that the loan was made by the bank upon the terms that shares should not be transferred, on the contrary it is expressly said "this credit was obtained only with the assistance of *C. H. Black*, Esq., who with others of the shareholders became sureties for $60,000 of the loan." So far from shewing that the appellant assented to his shares being bound, the latter part of this report, that portion which I have just quoted, seems to indicate that the loan had been made upon other security altogether, as in fact the evidence shows that it had. It is sufficient, however, to say that there is nothing to show that the appellant ever agreed not to deal with his shares. There being then no evidence that the appellant ever agreed to his shares being held in security for the loan, or that his right to transfer them should be fettered by any restriction, it is impossible to say that this transaction of the loan interfered with his right to make any transfer he might think proper. Then it has not been, and, on the evidence could not have been, disputed that the transfer to *Almon & Mackintosh* was in every respect *bonâ fide*, that it was intended to be a real and not a colorable transaction, and that the transferees were at the time persons in good credit and unobjectionable on the score of solvency and in every other respect. I mention this, not because I think that it would have made any difference, had the appellant proposed to transfer to persons wholly insolvent, but only to show

1883

SMITH v. BANK OF NOVA SCOTIA.

Strong, J.

how groundless was the objection of the directors to register the transfer. The legal result of this must be that the respondent, as now representing the Bank of *Liverpool*, must in equity, at least, if not at law also, be considered as estopped from insisting on treating the appellant as still a shareholder and sueing him for calls. This defence is properly pleaded by the 7th plea and is a good equitable defence. I share with Mr. Justice *James* the doubt, which he expresses, whether the very strict and narrow rules applied in *England* to equitable defences pleaded under the C. L. Procedure Act should be adopted with reference to such pleas in *Nova Scotia*, where both legal and equitable remedies are administered, not by two separate jurisdictions as in *England*, but by the same court and in the same forms of procedure. This is, however, a matter concerning the practice of the Supreme Court of *Nova Scotia* upon which I do not desire to express any decisive opinion. It seems, however, that even tested by the English cases there can be no objection to this plea as a good equitable defence, as it shews that the appellant would, if he had instituted a suit in equity for the purpose, have been entitled to an unconditional and perpetual injunction. The prayer which is unnecessarily added to the plea cannot have the effect of making the plea bad, if it appears from the averments that the appellant would have been entitled to have had the action restrained without the imposition of any condition, and this, I am clearly of opinion, would have been his strict right, although if a suit in equity had been instituted the plaintiff, as representing the bank, might have had some cross relief. The prayer may therefore be regarded as surplusage.

I have not thought myself called upon to write more fully in this case for the reason that all the questions arising have been treated with great ability in the

judgment of Mr. Justice *James* in the court below, with whom I, in all respects, agree.

1883

SMITH v. BANK OF NOVA SCOTIA.

The appeal must be allowed and the rule *nisi* for a new trial discharged with costs to the appellant in both courts.

FOURNIER, J., concurred.

HENRY, J.:

I concur in the views expressed by my learned colleagues. I think that in equity the transfer of the stock to *Almon* and *Mackintosh* would have been held as made and completed. The statute gave the stockholders in the bank of *Liverpool* the right, independently of any control over the directors, to transfer stock. The only reason they could have to refuse would be that the party was in debt to the bank. That is provided for, but I think that is the only reason, because the transfer of stock is provided for by power of attorney by the parties selling and purchasing, and requires no consent or other sanction of the directors. In this case the seller and purchaser did everything it was necessary to do to entitle them to a transfer in the books. This was a transaction not between creditor and debtor, but by the bank itself. It is the bank saying to these parties: You had the right to transfer this stock; you did all that the by-laws and the law required you to do on both sides; we did not allow you to do it, and we therefore hold you as against the other party. Now, the Act provides that the transferee shall be considered the owner of the stock. After that has been done—and it has virtually been done by the officer of the company, or would have been done formally but for the illegal interference of the directors —Mr. *Smith* had no reason to suppose he was any longer a shareholder in the company, and the first thing he

1883

SMITH v. BANK OF NOVA SCOTIA.

Henry, J.

knowsi s, that, after the failure of *Almon* and *Mackintosh*, he is called upon to pay up 10 per cent. on his capital. I think it would be neither legal nor equitable, and therefore I think the appeal should be allowed, and the original judgment and verdict given by Mr. Justice *James* of *Nova Scotia* should be maintained.

GWYNNE, J. :—

This is an action commenced upon the thirty-first day of May, A.D. 1879, by the Bank of *Liverpool*, a bank incorporated in the Province of *Nova Scotia* by the Dominion Statute 34 *Vict.*, ch. 42, subject to the provisions of the Act relating to banks and banking, 34 *Vict.*, ch. 5, against the defendant, *Edward Smith*, who in the writ and declaration filed in the cause is alleged to be a holder of twenty-five shares in the capital stock of the bank, and the action is for the recovery of two hundred and fifty dollars alleged to have become due on the 10th March, 1879, from him to the bank in respect of a call of ten dollars upon each of his said shares alleged to have been made by the bank upon him in respect of such shares.

To this action the defendant pleaded :

1st. That he never was indebted as alleged.

2nd. That he is not the holder of twenty-five or of any shares in the bank.

And among other pleas,

7th. (Which is the plea upon which the defence mainly rests) : For defence on equitable grounds the defendant says that before the said call the defendant made in good faith and for valid consideration a transfer and assignment of all the shares and stock which he had held in the capital stock of the said bank to a person authorized and qualified to receive the same, and the defendant and the transferee of the said shares or stock did all things which were necessary for the

valid and final transferring of the said shares, but the plaintiffs without reasonable or legal excuse and without reason refused to record such transfer or to register the name in the books of the said bank or to recognize the said transfer; and the plea concludes with a prayer that the said bank shall be compelled and decreed to make and complete the said transfer and to do all things required on its part to be done to make the said transfer valid and effectual, and that the said Bank of *Liverpool* be enjoined from further prosecution of this suit.

The appeal case brought before us does not shew that any special replication or any demurrer was fyled to any of the pleas, nor indeed is there entered upon it even a joinder in issue, but as the case has been tried we must assume that there was a joinder in issue upon the record.

Subsequently, and as it appears by the evidence, in the month of October, 1879, the bank became insolvent, and by an order of the Supreme Court of *Nova Scotia*, in which the action was pending, it was upon the 16th of February, 1880, ordered that the bank of *Nova Scotia*, assignee in insolvency of the plaintiffs, should have leave to intervene and to carry on and prosecute the suit against the defendant.

The case came down for trial before Mr. Justice *James* without a jury, and he, being of opinion that the equitable defence set up in the above seventh plea was established, rendered a verdict for the defendant. Upon a rule *nisi* to set aside the verdict, a majority of the learned judges of the Supreme Court of *Nova Scotia*, Mr Justice *James*, who tried the cause, dissenting, made the rule absolute for setting aside the verdict and granting a new trial. It is against this rule that this appeal is taken.

Now, the action having been commenced by the

1883

SMITH v. BANK OF NOVA SCOTIA.

Gwynne, J.

bank when a going concern and solvent must be considered by us wholly regardless of the fact that subsequently it became insolvent, and must be adjudicated upon according to the rights and interests of the bank and the defendant *inter se*, wholly irrespective of all consideration, whether or not under the circumstances appearing in evidence the defendant lies under any obligation or liability for any, and, if any, for what amount to any creditor of the bank under the provisions of the 58th sec. of the Act relating to banks and banking.

There seems to me, I confess, to be much force in the observations made by Mr. Justice *James* in his dissentient judgment to the effect that the difference between the jurisdiction of the Supreme Court of *Nova Scotia* and that of the English courts of common law, as they were constituted before the establishment of the High Court of Justice, divests the judgments of these common law courts as to the limits of their jurisdiction to entertain equitable defences to actions at law, of their applicability to cases of equitable defences pleaded to actions instituted in the Supreme Court of *Nova Scotia*, which is a Court of Equity as well as of Common Law, and has, therefore, the machinery necessary to give full effect to all decrees or orders it may make in respect of the equitable rights and interests of parties litigant which the English common law courts had not; but I do not think it necessary in this case to for many judgment upon this point, or to pursue the consideration of it further, because I entertain a clear conviction that, even within the rule, as laid down by the old English common law courts relating to equitable defences, the matter pleaded by the defendant to this action in his seventh plea, if established in evidence, is a good answer to the present action as a defence upon equitable grounds, if, indeed, it be not a good legal defence as well.

The rule to be collected from the cases is that a plea upon equitable grounds is a good defence when the equitable grounds relied upon are such as to entitle the defendant to relief in equity by an absolute unconditional injunction restraining the action, or, as it is sometimes expressed, when the common law judgment that the plaintiff take nothing by his writ, and that the defendant go thereof without day, would do complete and final justice between the parties in respect of the equitable grounds relied upon. *Mines Royal Society* v. *Magnay* (1); *Steele* v. *Haddock* (2); *Wodehouse* v. *Farebrother* (3); *Wood* v. *Dwarris* (4); *Luce* v. *Izod* (5); *Wake* v. *Harrop* (6); *Wakley* v. *Froggart* (7); *Solvency Mutual Guarantee Co.* v. *Freeman* (8); *Gee* v. *Smart* (9); *Allen* v. *Walker* (10).

In *Wake* v. *Harrop*, where the action was against agents who had signed a charter party thus: "For *A. Davidson & Co.*, of *Messina*. *J. C. Harrop & Co.*, agents," (treating the latter as principals,) the court held that under the circumstances pleaded, the defendants, *Harrop & Co.*, were entitled to an unconditional injunction restraining the action, and therefore the common law judgment *ut nil capiat* would do complete justice between the parties, and it being urged for the plaintiff that, as the plaintiff under the charter party as signed had no action against *Davidson & Co.*, all that the defendants could ask was a reformation of the contract, the court held that it was enough that under the equitable grounds pleaded it was inequitable for the plaintiff to sue the defendants, and that the court was not concerned with the objection that no person could

(1) 10 Ex. 489.
(2) 10 Ex. 643.
(3) 5 El. & Bl. 277.
(4) 11 Ex. 493.
(5) 1 H. & N. 245.
(6) 6 H. & N. 768, and in error 1 H. & C. 202.
(7) 2 H. & C. 69.
(8) 7 H. & N. 17.
(9) 8 El. & Bl. 313.
(10) L. R. 5 Ex. 187.

1883

SMITH v. BANK OF NOVA SCOTIA.

Gwynne, J.

be found liable to the plaintiff. In that case, *Bramwell*, B., and *Willes*, J., were of opinion that the plea was a good legal plea. But the principle upon which the House of Lords proceeded in *Bargate* v. *Shortridge* (1) is in my judgment conclusive that this 7th plea is a good defence to this action either as an equitable or a legal plea. Such principle may be thus expressed : if an act required to be done is within the power of directors of a company to do, or to permit to be done, and if it be their duty to do it, or to permit it to be done, and they neglect to do it, or refuse to permit it to be done, and by such neglect or refusal damage is done to a third person, neither a court of law or equity will allow the company to take advantage of such neglect or refusal of the directors, and if the directors neglect a form or obligation which they ought to perform, the company cannot insist upon the non-compliance with such form or the non-fulfilment of such obligation as against the person entitled to have had the form complied with and the obligation fulfilled, and in such case no question arises whether a creditor of the company could or could not take advantage of such non-performance in support of any legal demand the creditor might have against such party as a shareholder in the company.

I have gone thus at length into this point because it was entertained in the court below, and has been made a ground in the respondents' factum in support of the judgment of the court below and was relied upon in the argument before us; but in truth the appeal case laid before us shews that neither the sufficiency nor materiality of the seventh plea, but its truth only, has been put in issue upon the record.

Now, the charter which affects the rights of shareholders in this banking company is the Dominion statute 34 *Vict.*, ch. 5, the 19th sec. of which enacts that:

(1) 5 H. L. C. 297.

The shares and capital stock of the bank shall be held and adjudged to be personal estate, and shall be assignable and transferable at the chief place of business of the bank, or at any of its branches which the directors shall appoint for that purpose, and according to such form as the directors shall prescribe; but no assignment or transfer shall be valid, unless it be made and registered and accepted by the party to whom the transfer is made, in a book or books to be kept by the directors for that purpose, nor until the person or persons making the same shall, if required by the bank, previously discharge all debts or liabilities due by him, her, or them to the bank, which may exceed in amount the remaining stock, if any, belonging to such person or persons, and no fractional part or parts of a share or less than a whole share shall be assignable or transferable.

This is the only clause in the charter qualifying the rights of a shareholder in the plaintiff's company to dispose of his shares. In *Chouteau Spring Co.* v. *Harris* (1), the Supreme Court of *Missouri* in 1855 held that:

Stock in incorporated joint stock companies is always treated as property without any declaration in the charter to that effect, and when such a provision is inserted, it is considered as merely cumulative, except so far as it designates the peculiar character of the property, whether real or personal. One of the incidents of property is its transferability, and, of course, the power of disposing of this stock like the power of disposition of any other property is incident of common right to the ownership of it.

Then, citing *Sargent et al.* v. *Franklin Ins. Co.* (2), and *Bates* v. *New York Ins. Co.* (3), the court says:

The doctrine laid down in these cases is, that although the company have the power of regulating the transfer of stock, by prescribing the mode in which it shall be made, the transfer is valid as against the company, if they have notice of it and refuse to allow it the necessary formalities.

In *Isham* v. *Buckingham* (4), decided by the Court of Appeals of the State of *New York* in 1872, the provision of the charter of the company referred to in that case was similar to the clause above extracted from the act relating to banks, namely:

(1) 20 Missouri 383.
(2) 8 Pick. 90.
(3) 3 Johns. Cases 238.
(4) 49 N. Y. 216.

1883

SMITH v. BANK OF NOVA SCOTIA.

Gwynne, J.

The stock of every such corporation shall be deemed personal property and be transferred only on the books of such corporation in such form as the directors shall prescribe, and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation.

The court then says:

In this State it is well settled that the delivery of the certificate with a power of attorney to transfer passes the entire title, legal and equitable, as between the parties (the vendor and purchaser), and that the provisions referred to (as to mode and form of transfer in the company's books) are for the security of the corporation in securing its interests in its relations and dealings with stockholders, and that if a company did not provide a transfer book, or did not transfer the stock when required so to do according to the prescribed forms, the fault was its own, of which it could not take advantage.

And in *Angel and Ames*, on Corporations (1), several cases are referred to in support of this doctrine, that as between vendor and purchaser the delivery of the stock certificate, together with a power of attorney to transfer it in the books of the company, is a completed transaction which the vendor cannot after call in question. In *Weston's* case (2), the Lord Justices in appeal held, that shares in joint stock companies are transferable by virtue of the statute, and that the province of the articles of association is to point out the mode in which they shall be transferred, and the limitations, if any, to which a shareholder shall be subjected before he can transfer; and that neither the shareholders at large nor the directors can prevent a particular shareholder from transferring his shares unless by the force and effect of some clause in the articles of association authorizing them to do so. Sir *W. P. Wood*, L. J., says:

It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles of association.

(1) Sec. 564. (2) L. R. 4 Chy. App. 20.

1883

SMITH v. BANK OF NOVA SCOTIA.

Gwynne, J.

And Sir *C. J. Selwyn*, L. J., says:

We have the general Act of Parliament which constitutes these companies, one important effect of which is, that the shares which in an ordinary partnership would not be transferable are made transferable, and the 22nd section, which has been relied on in argument, merely refers the company to their own articles for determining the manner in which that transfer shall be effected, but leaves the general right to transfer to stand upon the provisions of the Act. Then when we look at the articles of association in the present case and find that the 14th clause imposes a particular limit upon the authority of the directors, and mentions two cases only in which they may refuse to register a transfer, I think that the rule of *expressio unius exclusio alterius* applies most strongly to this case. No doubt if the directors had reason to believe that the transaction was fraudulent or fictitious, they might refuse to be partakers in any such fraudulent or fictitious transaction, but in the absence of that—unless they could bring the case within the provisions of the 14th clause—in my opinion they would be bound to register.

So (to apply the decision in that case to the case before us) unless the directors of the plaintiffs' bank could bring their objection to permitting the transfer to be entered in due form in their books within the provisions of the 19th sec. of the Act relating to banks and banking, they were bound to permit the transfer to be entered in the transfer book of the company.

In *re National and Provincial Marine Insurance Co.* ex parte *Parker* (1), Lord Justice *Rolt* was of opinion that a transfer of shares made expressly to escape liability did not necessarily vitiate the transfer, but no question of that kind arises here, for there is no doubt that the sale by the defendant to *Almon* and *Mackintosh* was a *bonâ fide* sale made for value and to persons who were perfectly solvent and responsible. In *re Scranton Iron and Steel Co.* (2), V. C. Sir *James Bacon*, in 1873, speaks of the right to transfer shares in a joint stock company, as an incident to the ownership of the shares; and he says that it is the duty of directors of the com-

(1) L. R. 2 Ch. App. 690. (2) L. R. 16 Eq. 562.

1883

SMITH v. BANK OF NOVA SCOTIA.

Gwynne, J.

pany to receive and register, or to furnish some reason for refusing to do so; and *Weston's* case shews that it must be a valid and sufficient reason; and *Lowe's* case (1) is to the like effect. It appears that the general practice of the bank in perfecting the entry of transfers, when the the parties did not attend in person to sign the form of transfer approved by the directors in a transfer book kept for the purpose, and the acceptance of such transfer by the purchaser, was for the vendor and vendee respectively to give a power of attorney to an officer of the bank authorizing such officer to sign the transfer and perfect the same in the bank book kept for that purpose. Such officer, upon receiving such powers of attorney and the stock certificate held by the vendor, laid the matter before the board, who, unless there was sufficient reason for withholding their assent to the transfer, authorized it to be made, and the necessary entries for that purpose were accordingly made in the bank book by the officer having the powers of attorney, and a new stock certificate was issued in favor of the purchaser. Now, when the defendant sold his shares to *Almon & Mackintosh* and received from them the consideration money therefor, and delivered to them his stock certificate, and placed in their hands a power of attorney duly executed, constituting and appointing *John A. Leslie*, manager of the bank, to be his attorney for him, and in his name to transfer the shares, the sale and transfer of the shares, as between the defendant and *Almon & Mackintosh*, was complete, and the defendant never could have revoked that power of attorney to the prejudice of *Almon & Mackintosh*, neither could they repudiate the sale; but the defendant could compel them to have themselves entered in the books of the bank as holders of the shares, and to indemnify the defendant against all calls made

(2) L. R. 9 Eq. 593.

subsequent to the sale; and when *Almon & Mackintosh* wrote to *Leslie*, as manager of the bank, as they did, enclosing to him the defendant's stock certificate and the power of attorney executed by him in favor of *Leslie*, together with the power of attorney from themselves to *Leslie* authorizing him as their attorney to accept the transfer, and to do all lawful and necessary acts to complete the same, and directed the bank to consider them as the holders of the stock formerly owned by the defendant, *Almon & Mackintosh* could not afterwards be permitted to repudiate their liability to the bank upon the shares. Now, what appears to have been done by *Leslie*, upon receipt of the above documents, was to communicate them at a board meeting to the directors, who, although the bank had no demand whatever against the defendant, and although the credit and responsibility of *Almon & Mackintosh*, if that had been material, was never questioned, and if it had been, was above suspicion and good beyond controversy, refused to permit the transfer to be entered in the bank book without assigning any reason for such refusal.

In this action they have attempted to justify their refusal upon the allegation that upon the 26th June, A.D., 1873, at a special general meeting of the shareholders of the bank at which, as appears by the evidence, the defendant was not present, it was resolved as follows:

> That in the opinion of this meeting the bank of *Liverpool* should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect.

Such a resolution, if binding upon the shareholders and directors, might have the effect of prejudicing the

1883

SMITH v. BANK OF NOVA SCOTIA.

Gwynne, J.

bank, if, for example, more solvent and wealthy persons than the then holders of stock should be willing to take the place of these holders by purchase of their stock, but whether such a resolution could have the effect of subjecting a non-assenting shareholder to the burthen of a condition restricting the rights acquired by him under the authority and sanction of an Act of Parliament, upon the faith of which he became a shareholder, and which the Act did not subject him to, it is not necessary now to enquire, because it is clear from the evidence that in truth the resolution was never acted upon, and the bank cannot now rely upon it as affecting the defendant's right of transfer in October, 1877. So far from its having been acted upon, it appears that twenty shares were transferred in the bank books two days after the passing of the resolution, and that between that day and the refusal to enter the transfer of the defendants stock in the bank books one thousand eight hundred and thirty-three shares were in like manner transferred, and that prior to the month of February, 1874, the bank effected a loan of $80,000 upon the security of a Mr. *Black*, who, to secure himself, took bonds to lesser amounts from other shareholders, and among those, from the defendant, which bond Mr. *Black* released upon the occasion of the sale by the defendant of his stock to *Almon & Mackintosh*. It appears therefore that the resolution relied upon, of the date of 26th June, 1873, was not a valid reason for the directors refusal to allow the transfer to be perfected in their books from the defendant to *Almon & Mackintosh*, and if such had been given at the time as the reason for such refusal it would not have afforded to the bank any justification, and they could have been compelled by bill in equity to permit the transfer to be entered; and as no other reason is suggested and the only justification for refusal mentioned in the Act of Parliament affecting the case,

is proved not to have had any existence, I am of opinion that it was the duty of the directors to have permitted, and therefore they ought to have permitted, the transfer to have been entered in their books in October, 1877, and that having refused to do so without any good, valid and sufficient reason justifying such refusal they cannot now be permitted to avail themselves of their own wrong to the prejudice of the defendant.

The appeal must therefore be allowed with costs, and the rule for a new trial in the court below must be discharged with costs, and judgment be entered for the defendant upon the verdict rendered in his favor.

*Appeal allowed with costs.*

Solicitors for appellant: *Thompson, Graham & Tupper.*

Solicitors for respondents: *J. N. & T. Ritchie.*