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is applicable to the present case, been altered by the provisions of Act No. 37 of 1912? The reasons for answering yea or nay to each of those questions have been fully stated in the judgments already delivered. I prefer the view expressed in the judgment of the Chief Justice to that adopted by my brother *Isaacs*. I am therefore of opinion that the first of these questions should be answered in the affirmative, and the second in the negative.

Questions answered accordingly.

Solicitors, for the appellants, *Hedderwick, Fookes & Alston.*

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

Aff *Miles v Sydney Meat-Preserving Company (Ltd)* (1913) 17 CLR 639

[HIGH COURT OF AUSTRALIA.]

MILES . . . . . APPELLANT;
PLAINTIFF,

AND

THE SYDNEY MEAT-PRESERVING COMPANY (LIMITED) AND OTHERS . } RESPONDENTS.
DEFENDANTS,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Nov.* 29; *Dec.* 2, 3, 19.

Company—Powers of majority—Ultra vires—Misuse of powers—Business carried on not with view to make profits for distribution—Rights of minority—Injunction—Sydney Meat-preserving Company (Limited) Incorporation Act 1871 (*N.S.W.*), *secs.* 1, 2, 12, 13.

Griffith C.J., Barton and Isaacs JJ.

A company, which had been established in Sydney under the rules, regulations and conditions of a deed of settlement, for the purpose of carrying on the business of meat preserving and disposing of and exporting the products, was in 1871 incorporated under a private Act of New South Wales for the purposes mentioned in the deed of settlement. The Act provided that the regulations might be altered, but not in opposition to the general scope or true intent and meaning of the deed of settlement, and that no dividends should be paid except out of profits. By the deed of settlement it was provided that the clear *bonâ fide* net profits arising from the operations of the company should be applied in payment to the shareholders of a dividend in proportion to the number of shares held by them, and that the directors should every half year determine upon such dividend or dividends or bonus out of such clear profits (if any) as they in their judgment, conformably to the provisions of the deed, should see fit; and that the directors might in their discretion out of the profits of each half year set apart and appropriate such sum as they might think advisable for increasing the works or plant or to a reserve fund, and that after such appropriation the balance (if any) should be available for payment of dividends. A majority of the shareholders were graziers. No dividends were ever paid by the company, but it was the settled policy of the company, which was approved by a majority of the shareholders and was publicly announced, to carry on their operations, not with a view to paying dividends to the members, but with a view to benefiting the pastoral industry generally, although such a policy involved the benefiting of such of the members as were interested in that industry, and the affairs of the company were conducted in accordance with that policy. In an action by a shareholder against the company and the directors,

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that the shareholder was not entitled to an injunction to restrain the company and the directors from carrying on the business of the company otherwise than with a view to earning profits for distribution among all the members.

Decision of the Supreme Court of New South Wales (*Simpson* C.J. in Eq.) affirmed, but his decision on demurrer: 12 S.R. (N.S.W.), 98, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by William John Miles against the Sydney Meat-preserving Company (Limited) and William Wright Richardson, Walter Russell Hall, John Bassett Christian and Lewis Porter Bain, the directors of that company; and the statement of claim was as follows:—

1. The plaintiff is the largest shareholder in the defendant company and he and the defendants other than the defendant company are the directors of the defendant company.

2. The defendant company was incorporated on the 17th day

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of June 1871 by the *Sydney Meat-preserving Company (Limited) Incorporation Act* 1871 for the purpose of carrying on business under the provisions of a certain deed of settlement dated the 10th day of June 1870.

3. By the said deed of settlement it was *inter alia* provided as follows :—

"5. The objects and business of the company shall be the preservation by such artificial means as the directors may adopt of meat, fish and vegetables; the conversion of animals fit for human food into marketable products; the preparation and preservation of the fat, skins, offal, bones, and other product of such animals, and the sale and exportation of such preserved meat, fish, vegetables and other products; the boiling down of such animals, and the conducting of all the operations aforesaid for or on behalf of other persons; and in connection with such operations, the buying and selling of live stock, the fattening of stock, the buying and selling of animal and vegetable food and products, and generally the conducting of all operations necessary or advisable in connection with the matters aforesaid. And it is declared that the directors may let the plant and implements of the company, or part thereof, to other persons for any of the purposes aforesaid.

"26. The clear *bonâ fide* net profits arising from the operations of the company shall be applied in payment to all the shareholders of the company of a dividend in proportion to the number of shares held by each shareholder.

"27. Previously to every general meeting during the continuance of the company, the Board of Directors shall, subject as herein mentioned, determine upon such dividend or dividends or bonus out of such clear profits (if any) as they in their judgment, conformably to the provisions herein contained, shall see fit, and at every such meeting shall propose such dividend or bonus so determined upon for the decision of such meeting.

"28. Within seven days after a dividend or bonus shall be

declared as aforesaid the Board of Directors shall give notice of the dividend or bonus, and when and where the same shall be payable, and shall, in conformity with such notice, pay to each shareholder on demand, to be made at any time within six years, but not afterwards, the amount of dividend or bonus on his shares, provided every call which may have been made on such shareholders shall have been paid, and such shareholder shall not be in any other manner indebted to the company, but in case any call shall be in arrear or such shareholder shall be in any manner indebted to the company, then such shareholder shall receive the balance of such dividend after deducting such call or other demand owing to the company, with interest thereon, or such dividend shall be applied in part payment of such call or other demand, and in no case shall interest be allowed on any unclaimed dividend or bonus."

The plaintiff craves leave to refer to the said Act and deed of settlement as if they were here set forth *in extenso*.

4. The defendant company has been carrying on business from the year 1871 up to the present time and has made considerable profits and a large reserve fund has been accumulated out of the said profits.

5. No dividend has ever been paid by the company since its formation.

6. The directors of the defendant company including the defendants other than the defendant company and the holders of the majority of shares in the defendant company have always refused and they still refuse to carry on the operations of the defendant company with a view to making a profit distributable among the shareholders of the company.

7. The affairs of the defendant company have been carried on and its property used by the directors and the majority of the shareholders solely with the object and result of maintaining the price of stock so as to benefit such of the shareholders of the defendant company as carry on the business of grazing and graziers and squatters who are not shareholders in the defendant company.

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7*a*. In order to achieve the foregoing result the said directors and the majority of shareholders have deliberately made it their invariable practice to pay excessive prices for the stock purchased by the defendant company or to buy numbers of stock in excess of the requirements of the company in order to enable the owners of such stock whether shareholders or not of the company to obtain, and they have thereby in fact obtained, higher prices for the same than they would otherwise have obtained and in consequence the plaintiff and such of the shareholders as are not owners of stock have been and are considerably prejudiced and injured.

8. The majority of the shareholders of the defendant company and all the directors of the defendant company other than the plaintiff are graziers or are otherwise interested in maintaining the price of stock and they are using their powers of voting in the company for the purpose of benefiting themselves in keeping up the price of stock to the injury of the plaintiff and other shareholders of the defendant company who are not interested in keeping up the price of stock and who are in a minority.

9. The plaintiff has endeavoured in meetings of the directors and at a general meeting of the shareholders of the company held on the 11th February 1910 to secure that the business of the company shall be carried on with a view to making a profit distributable among all the shareholders of the company, but the defendant directors and the majority of the shareholders refuse to carry on the business of the company except with a view to keeping up the price of stock in the interest of graziers in manner aforesaid.

10. In a circular issued to the shareholders of the defendant company by the defendant William Wright Richardson on behalf of himself and the other defendant directors they informed the shareholders that they were opposed to the plaintiff's proposal "to alter the policy of the company of not paying dividends which has been in existence for the past 31 years" and at the said meeting the majority of shareholders voted against the plaintiff's proposal on the ground put forward by speeches at the said meeting that the company should be carried on in the interest of squatters, and that it would be a pity from the squatters' point of view if that policy was changed.

11. The plaintiff says that the holders of the majority of shares of the company in so using their powers as a majority for the benefit of themselves at the expense of the plaintiff and other shareholders who are in a minority are committing a fraud upon the plaintiff and such minority of shareholders.

12. The plaintiff submits that the carrying on of the business of the said company for the purpose of keeping up the price of stock and not for the purpose of earning profits for division among the shareholders is *ultra vires* the defendant company.

13. The plaintiff fears that unless restrained by order of this honourable Court the defendant company and its directors other than the plaintiff will continue to carry on in the manner aforesaid and that his rights therein will continue to be greatly prejudiced by such carrying on.

The plaintiff therefore prays :—

1. That it may be declared that the defendant company and its directors are not entitled to carry on the business of the said company in the interest only of such of the members of the said company as are interested in keeping up the price of stock, or in the interests of squatters and graziers generally.

2. That the defendant company and its directors may be restrained from carrying on the business of the said company otherwise than with a view to earning profits for distribution among all the members of the company irrespective of whether they are graziers or squatters or not.

3. That the defendant directors may be ordered to pay the costs of this suit.

4. That the plaintiff may have such further or other relief as the nature of the case may require.

The defendants demurred *ore tenus* to the statement of claim, and *Simpson* C.J. in Equity disallowed the demurrer : *Miles* v. *Sydney Meat-preserving Co. Ltd.* (1). The hearing of the action then proceeded, and evidence was taken. At the close of the evidence *Simpson* C.J. in Equity dismissed the action with costs, holding on the evidence that the company were carrying on their business on commercial lines which were best calculated to ensure

(1) 12 S.R. (N.S.W.), 98.

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success, and so were within their deed of settlement and, therefore, that the Court could not interfere.

The plaintiff now appealed to the High Court from that decision. The material facts appear in the judgments hereunder.

Mitchell K.C., and *Clive Teece*, for the appellant. Upon the proper construction of the Act incorporating the company and of the deed of settlement, neither the directors nor the majority of the shareholders have power to carry on the business operations of the company otherwise than with a view to, and purpose of, making profits for distribution among the shareholders, although not necessarily for immediate distribution. The primary object of the company is to earn profits in order to pay dividends to the shareholders. Carrying on the business of meat preserving is the means by which that object is to be attained. The directors have declared that their practice and policy have been, and that their intention is, to carry on the business operations of the company, not as those of a dividend-paying company, but as an insurance company to protect the interests of graziers of stock when the market is glutted; and they have claimed, and still claim, the right to do so. The majority of the shareholders in general meeting have taken the same position. To carry on business operations on those lines would make the company one with a fundamentally different object from that which is prescribed expressly or by implication by the Act and the deed of settlement. Acts which would be lawful or within the powers of the directors and the company if done with the object of making profits for distribution among the shareholders, become unlawful or beyond the powers if done with the object of protecting the interests of graziers. The course pursued by the directors is either *ultra vires*, or it is a fraud on the minority whereby the minority are deprived of their rights: *Brice on Ultra Vires*, 3rd ed., pp. 44, 736, 737; *Fawcett* v. *Laurie* (1); *Shrewsbury and Birmingham Railway Co.* v. *North-Western Railway Co.* (2); *Davis* v. *Commercial Publishing Co. of Sydney Ltd.*

(1) 1 Dr. & Sm., 192.

(2) 6 H.L.C., 113, at p. 135.

(1); *Miners' Ditch Co.* v. *Zellerbach* (2); *Dominion Cotton Mills Co. Ltd.* v. *Amyot* (3); *Bloxam* v. *Metropolitan Railway Co.* (4).

[GRIFFITH C.J. referred to *Burland* v. *Earle* (5).

ISAACS J. referred to *British Equitable Assurance Co. Ltd.* v. *Baily* (6).]

The appellant is entitled to a declaration or an injunction to the effect that the directors of the company are not entitled to carry on the business of the company otherwise than with the view and purpose of earning profits for distribution among the shareholders: *Cohen* v. *Wilkinson* (7); *Elliot* v. *North Eastern Railway Co.* (8); *Kerr on Injunctions*, 4th ed., p. 571. The purpose with which the directors carry on the business of the company is a question of intention and not of motive: *Muntz* v. *Smail* (9); *Menier* v. *Hooper's Telegraph Works* (10).

[GRIFFITH C.J. referred to *Mayor &c. of Bradford* v. *Pickles* (11); *North-West Transportation Co. Ltd.* v. *Beatty* (12).]

The directors have not exercised their discretion in carrying profits to a reserve fund.

Knox K.C. (with him *Mann*), for the respondent directors. An act which does not amount to a legal injury cannot become actionable because it is done with an evil intent. The Court cannot compel the company to pay dividends even if they have the money. A shareholder can vote as he pleases and consult his own interest even to the extent of voting against what he knows to be the interest of the company: *Pender* v. *Lushington* (13). Consequently, the directors may enter into transactions on behalf of the company which are for their own benefit and opposed to the interests of the company, if they can get a majority of the members to support them, and they can use their own votes to get that majority. Another consequence is that no shareholder can complain that other shareholders are voting with the intention of benefiting themselves

(1) 1 S.R. (N.S.W.) (Eq.), 37.
(2) 99 Am. Dec., 300.
(3) (1912) A.C., 546.
(4) L.R. 3 Ch., 337.
(5) (1902) A.C., 83, at p. 95.
(6) (1906) A.C., 35, at p. 42.
(7) 12 Beav., 138; 1 Mac. & G., 481.
(8) 10 H.L.C., 333, at p. 358.
(9) 8 C.L.R., 262, at p. 273.
(10) L.R. 9 Ch., 350.
(11) (1895) A.C., 587.
(12) 12 App. Cas., 589.
(13) 6 Ch. D., 70.

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at the expense of the company, subject to the qualification only that no class of shareholders can appropriate for their own benefit to the exclusion of the other shareholders any specific asset of the company: *Menier* v. *Hooper's Telegraph Works* (1).

[ISAACS J. referred to *Griffith* v. *Paget* (2).]

Courts of law must deal with acts and not with intention or motive. No injunction has ever been granted to prevent an act being done with a certain intention. It is a misuse of language to say that under the Act and the deed of settlement the object of the company is to carry on business for the purpose of earning profits with which to pay dividends.

[ISAACS J. referred to *Allen* v. *Gold Reefs of West Africa Ltd.* (3).]

The object of the company is to preserve meat, and anything done which is incidental to the preservation of meat cannot be *ultra vires*. An injunction in the terms asked for would be a mere *brutum fulmen*. [He referred to *Burland* v. *Earle* (4); *Dominion Cotton Mills Co. Ltd.* v. *Amyot* (5); *In re Companies Acts*; *Ex parte Watson* (6).]

[ISAACS J. referred to *Ex parte Cowen*; *In re Cowen* (7).]

Whether the directors exercised their discretion or not in carrying profits to a reserve fund is unimportant, in view of the fact that the shareholders approved of what they did. It is not open to the appellant to say that the directors have not carried on business with a view to make profits, because profits have been made.

Maughan (*Shand* K.C. with him), for the respondent company. An action of this kind cannot be brought unless the acts complained of are of a fraudulent character or are *ultra vires*. In determining a question of *ultra vires*, concrete acts must be examined. Here the only concrete acts that can be challenged are the buying of stock. That is clearly within the objects of the company as defined by the charter of the company. The Court is not entitled to say that a company shall be carried on for the benefit of the shareholders: *Ving* v. *Robertson & Woodcock Ltd.* (8).

(1) L.R. 9 Ch., 350.
(2) 5 Ch. D., 894.
(3) (1900) 1 Ch., 656, at p. 671.
(4) (1902) A.C., 83.
(5) (1912) A.C., 546.
(6) 21 Q.B.D., 301.
(7) L.R. 2 Ch., 563.
(8) 56 Sol. J., 412.

Mitchell K.C., in reply.

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Cur. adv. vult.

December 19.

The following judgments were read :—

GRIFFITH C.J. The appellant's difficulty in this case has been to present his argument in a form which is at once intelligible, consistent with the facts, and not inconsistent with recognized principles of law.

The defendant company was incorporated in the year 1871 by a private Act, which, after reciting that the company had been lately established at Sydney under the rules, regulations and provisions of an indenture or deed of settlement dated 10th June 1870 for the purpose of carrying on the business of preparing and preserving meat and vegetables of every kind in the Australian Colonies and disposing of and exporting the products, with power to acquire suitable premises and machinery and to appoint necessary officers and workmen, and with a capital of £25,000 in 5,000 shares of £5 each, which might be increased by the issue of new shares, incorporated the persons who under the deed of settlement were the proprietors of the capital of the company by the name of the Sydney Meat-preserving Company (Limited). By sec. 2 the regulations of the company as contained in the deed of settlement might be altered, but not " in opposition to the general scope or true intent and meaning " of the deed of settlement or of the Act or any other statute law in force in New South Wales. No dividends were to be payable out of capital or otherwise than out of the net gains and profits of the business.

The deed of settlement provided that the clear *bonâ fide* net profits arising from the operations of the company should be applied in payment to the shareholders of a dividend in proportion to the number of shares held by them (cl. 26), and that the Board of Directors should every half-year " determine upon such dividend or dividends or bonus out of such clear profits (if any) as they in their judgment conformably to the provisions herein contained shall see fit," and should propose such dividend or bonus for the decision of a general meeting of shareholders (cl. 27). By cl. 45 the directors might in their discretion out of the profits of each half-year set apart

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and appropriate such sum as they might think advisable as a fund for increasing works and plant or in forming or adding to a reserve fund or a fund for equalization of future dividends, and that the balance after such appropriation (if any) should be available for the payment of dividends to shareholders.

The company began business in 1872, and has carried on operations ever since, but has never paid a dividend. At the hearing, Mr. Alban Gee, who had been manager of the company for 39 years, gave evidence, which was accepted by the learned Judge of first instance, of some facts which are notorious to all persons conversant with what may be called the fresh meat trade in Australia, and which I will briefly recapitulate.

The supply of stock for consumption varies very greatly according to the seasons. In some years, owing to deficiency of natural grass or water, the supply is limited, and prices are consequently high; in others there is a glut in the market, and the prices at which the overplus of stock can be sold are ruinously low. The business of meat-preserving is carried on almost wholly for export, the market being principally in Europe, where the meat meets with world-wide competition. It is, however, often necessary in the ordinary course of good management to make "forward" contracts, *i.e.*, contracts for future delivery. If purchases of live stock for slaughter are made when prices are high, it is not practicable to preserve the meat with any hope of disposing of it at a profit. In that case such a company has a choice of two courses, either to buy at current rates with the certainty of not being able to dispose of the product at a profit, or to discontinue operations until the market price falls. The latter course would involve closing the works for a longer or shorter time, and either dismissing the highly trained staff of specialists or retaining them in idleness at great cost to the company. On the other hand, when there is a glut in the market the company might, if it chose, purchase the residue of stock which is not wanted for immediate consumption as fresh meat at prices ruinous to the vendors, but possibly profitable to it. It is obvious that a business carried on under such conditions is of a precarious nature, and is not unlikely to result in the operations of the company coming to an abrupt end.

It is, however, an admitted fact that the existence and continuous operations of such a company are highly beneficial in the interest of growers of live stock, as tending to provide a safe and constant outlet for the surplus in times of glut. I need not pursue this point in further detail.

It appears that at a very early period in the history of the company, if not from its first inception, the majority, if not all, of the shareholders were growers of live stock. The first five half-years of the company's operations, 1873-1875, resulted in a loss of about £5,500. The next four half-years yielded a profit of about £7,500, which was followed in the next two half-years by a loss of £1,400 odd.

About this time the suggestion appears to have been made that all vendors of live stock in the Sydney live stock market should voluntarily contribute a sum of 10s. per cent. on the proceeds of their stock, to be paid to the defendant company and others carrying on similar business, on the understanding that the companies should not desist from buying stock when prices were too high to allow them to buy at a profit for meat-preserving, and should not take advantage of the necessities of owners in times of glut by paying a merely nominal price for stock when the unfortunate owner was bound by circumstances to sell at any price he could get rather than incur the ruinous expense of sending his stock back to the country by rail and road.

The suggestion was adopted, and has ever since been followed in practice, with the exception of a period of about three years, from June 1885 to June 1888, during which the defendant company incurred a loss of £24,500 on its operations.

In December 1888 these contributions were renewed, and have of late years been paid to the defendant company only. The net result of the operations from December 1888 to December 1909 was that during that period the company received in contributions from stock-owners sums amounting to £160,000, of which £92,000 was taken into profit and loss account. During the same period the sum of the losses exceeded the sum of the profits (including the £92,000) by £15,000. If the £92,000 had not been so taken into account, the losses would, of course, have exceeded the profits by £107,000.

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The residue of the £160,000 so received by the company was carried to a reserve fund, which was in credit on 31st December 1909 to the extent of £45,500. The total assets of the company at that date, as shown by its balance-sheet, were sufficient to repay the paid-up capital, then amounting to £20,000, and leave a surplus of nearly £60,000, which sum represents the net profit earned by the company from its inception, including the stock-owners' contributions, which amounted during the whole period to £183,000.

In the face of these facts Mr. Gee says that the company could not have carried on its operations as a meat-preserving company without the aid of the contributions, which, it may be assumed, would not have been given without such an understanding as already stated, nor if they were to have been applied in paying dividends to shareholders.

The plaintiff, however, who is a director and a holder of a substantial number of shares in the company, insists that the company ought to be carried on with the primary object of earning profits for division among the shareholders by way of dividend. At a general meeting of the company held on 11th February 1910, he formally proposed the following resolutions :—

"(*a*) That the primary object of this company as at present conducted is to benefit stock-owners whether shareholders in the company or not ;

"(*b*) That according to the constitution of the company the primary object should be to earn profits for division among the shareholders in dividends ;

"(*c*) That immediate steps be taken by the Board to give effect to the constitution in the respect mentioned in the preceding resolution."

The consideration of the resolutions was deferred to the next half-yearly meeting.

The plaintiff thereupon, on 6th April 1910, commenced this suit, in which he prays :—"(1) That it may be declared that the defendant company and its directors are not entitled to carry on the business of the said company in the interest only of such of the members of the said company as are interested in keeping up the price of stock, or in the interests of squatters and graziers generally.

(2) That the defendant company and its directors may be restrained from carrying on the business of the said company otherwise than with a view to earning profits for distribution among all the members of the company irrespective of whether they are graziers or squatters or not."

The appellant's counsel recognize that they must bring the case within the rules laid down in *Burland* v. *Earle* (1) and *Dominion Cotton Mills Co. Ltd.* v. *Amyot* (2). It is not disputed that the majority of the shareholders approve of the policy of the directors. It is therefore incumbent on the minority to show either that the action of the majority is *ultra vires*, or that the majority have abused their powers and are depriving the minority of their rights. Further, the action of the majority cannot be impugned merely because they have a personal interest in having the affairs of the company conducted in one way rather than in another, if both ways are *intra vires* of the company. Moreover, the Court has no jurisdiction to control the decision of a majority of the shareholders as to dividing or retaining profits. It is, of course, immaterial whether the minority is large or small. The appellant's complaint is that it is the settled policy of the company to carry on its operations, not with a view to paying dividends to the members, but with a view to benefiting the pastoral industry in general, and incidentally such of the members as are directly interested in that industry, and that the conduct of the affairs of the company is in accordance with that policy. This may be taken to be established. The appellant contends that such conduct is *ultra vires*. In support of this position he relies upon the case of *Cohen* v. *Wilkinson* (3). In that case a company had obtained Parliamentary authority for the construction of a line of railway from Epsom to Portsmouth. They afterwards abandoned that enterprise, but proposed to apply the subscribed capital to making a railway from Epsom to Leatherhead, a distance of about four miles. The Court granted an injunction to restrain the directors from applying the funds of the company in the construction of the new enterprise " or any otherwise than for the purpose and with the view of making and completing the . . . rail-

(1) (1902) A.C., 83. (2) (1912) A.C., 546.
(3) 12 Beav., 138 ; 1 Mac. & G., 481.

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way" as originally proposed. The ground of the decision was that the new enterprise proposed was substantially a different enterprise from the old one. The appellant seeks to base an argument upon the use of the words "for the purpose and with the view" in the injunction. In the circumstances of that case these words were used to express, and obviously expressed, the meaning of carrying out a substantial concrete object. In the present case the Court is asked to adopt the same words, but to use them in a quite different sense, as denoting a mental purpose or policy, as distinct from a concrete object. That case, therefore, has no bearing on the point.

The concrete acts of the company in this case consist in accepting the stock-owners' contributions, buying stock at such prices as the directors think just and fair, converting it into preserved meat, and selling the meat at the best price they can get. If the objection taken were to the directors' action in accepting the contributions, I could understand it, though I do not suggest that the objection would be valid. But the plaintiff refuses to take this objection. Again, he might object to the action of the directors in paying more than the absolute minimum price at which stock can be obtained in times of glut. But he expressly repudiates any such contention, which, indeed, in the face of the doctrines expressed in *Henderson* v. *Bank of Australasia* (1), he could not advance with any hope of success. His whole case is based upon the conduct of the directors in not trying to earn a profit for the purpose of immediate distribution. He contends that in the case of every company which is established for gain, in the sense that dividends may be declared out of profits, an implied contractual duty is imposed upon the directors of endeavouring to earn profits so as to be able to distribute them. If this is so, the duty must surely extend to making the largest possible profits, and to distributing the profits when earned. This last obligation is expressly negatived by *Burland* v. *Earle* (2). In my opinion, no such contractual duty is known to the law. In the case of a great many companies the practical question arises whether they shall be carried on for the purpose of earning immediate profits or with the motive of indirectly achieving some ulterior object which the members may consider beneficial. Take, for instance,

(1) 40 Ch. D., 170. (2) (1902) A.C., 83.

the case of a company formed to establish communication by water or land with a new suburb or newly settled locality. If the contention of the appellant is sound, the company would be bound to charge such tolls and dues as would produce the largest immediate profit, without regard to the encouragement of settlement in the new locality. Again, a trading company which thought fit to expend part of its income upon providing good and wholesome residences for its employés instead of distributing it in dividends could be enjoined from doing so. In my judgment, such matters are entirely matters of internal management with which the Court has no authority to interfere. It is now settled law that an act which is not a breach of a legal duty is not actionable merely because it is done with a bad motive : *Mayor &c. of Bradford* v. *Pickles* (1).

There are some cases in which the nature and quality of an act are regarded by the law as affected by the intention with which the act is done. The most familiar examples are afforded by the criminal law, in which " intention," in the sense of result sought to be obtained, is often an element of an offence. I do not know of any instance in the English or New South Wales criminal law in which motive, as distinguished from intention, is an element of an offence. In the branch of civil law also, the result sought to be obtained may sometimes affect the nature and quality of an act, as, for instance, in the case of fraudulent preference under the bankruptcy law, and, in a modified sense, in the case of what is called a fraud on a power, where an act which is within the letter of the power may be held invalid on the ground that it is not done in furtherance of the object for which the power was created, but in order to effect some other and improper object. The foundation of the objection in this case is the impropriety of the object, and the case is, in effect, regarded as a breach of trust.

These doctrines have no application to the regulation of the conduct of members of a joint stock company with regard to its internal management. The notion that they occupy a fiduciary relation to one another is negatived by the cases already cited. In my opinion, the nature and quality of the acts done by the

(1) (1895) A.C., 587.

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members, or by the directors with their approval, are not affected by the motives actuating the members or directors, and the Court can only take cognizance of the concrete and overt acts of the company. The policy of the company is a matter of motive as distinct from intention, and does not affect the nature and quality of the concrete acts. The injunction sought in this case is, in substance, a mandatory injunction to command the directors and the company to set their affections on other objects than those which have hitherto attracted them. Although such an injunction would be an entire novelty, I should not hesitate to grant it if it were consistent with any known principle of law. But, in my opinion, the law allows the members of a company to adopt what policy they please to guide them in carrying on its operations. If they think fit to carry them on with the collateral object of enabling another enterprise to be carried on with greater success than would otherwise be possible, I think that they are entitled to do so without any interference from the Court, provided that they do not expend the funds of the company upon any object not authorized by its constitution.

The law does not require the members of a company to divest themselves, in its management, of all altruistic motives, or to maintain the character of the company as a soulless and bowelless thing, or to exact the last farthing in its commercial dealings, or forbid them to carry on its operations in a way which they think conducive to the best interests of the community as a whole, or a substantial part of it, rather than in a way which they think detrimental to such interests, though more beneficial (in a pecuniary sense) to themselves. And if they desire to assist another enterprise, it is immaterial whether they are or are not personally interested in that enterprise.

If the appellant's contention is sound, he can in effect compel the defendant company to carry on its business in such a way as to incur ruinous loss and bring its operations to an end. If that is the only way in which it can lawfully carry on operations, so be it. But the appropriate remedy in that case is to present a petition to wind up the company on the ground that it is just and equitable

that it should be wound up. When such a petition is presented, it will be time enough to deal with it.

For these reasons I think that the appeal should be dismissed.

BARTON J. This appeal depends for its result upon the questions whether the conduct of the company and of its directors is beyond the powers granted to the company by the Act of incorporation and the deed of settlement, and whether the conduct of the majority of the shareholders, if within these powers, amounts to a fraud upon the rights of the minority.

In considering the first question one is struck by the peculiar fact that counsel for the plaintiff have not pointed out any specific act which they are entitled to impeach as *ultra vires*. The powers of the company have already been quoted. The company have for some forty years carried on the business of buyers of live stock in the market on a large and increasing scale. They have established and conducted extensive works in which they have preserved such parts of the slaughtered animals as have been saleable as meat, and have turned to account the other products ; and they have carried on the sale and exportation of the meat and other products. (Deed of settlement, cl. 5). Where the operations of the half-year have yielded a profit, the directors have exercised the discretion committed to them by carrying the profits to a reserve fund (see cl. 45) instead of proposing a dividend (clauses 26 and 27). The shareholders have had by cl. 75 " full power to regulate and control all the affairs, management, capital, profits, dividends, and concerns of the company," and they have throughout indorsed the action of the directors by adopting their reports and balance-sheets. The directors and the majority have exercised no power which has not been expressly conferred. While, however, that is conceded, it is contended that their offence is in the exercise of several powers together, in such a way that their combined effect is to take the operations of the company beyond its competency. Counsel put it thus: that by the proper construction of the Act and the deed neither the directors nor the majority of the shareholders have power to conduct the operations of the company otherwise than " for the purpose and with the view " of making profits for distribu-

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tion among the shareholders; that their admitted policy has been to carry on operations not for that purpose and with that view, but for the protection of the interests of graziers who sell stock in a glutted market; that to carry on operations on these lines is to make the concern a corporation with an object differing fundamentally from that either expressly or impliedly prescribed by the Act and deed of settlement; and would make acts which would be lawful as within the powers of the directors, if done with the object of making profits for the shareholders, unlawful or beyond their powers if done with the object of protecting the live stock market.

It is strenously urged that the incorporation Act and the deed impliedly require that the business shall be carried on "for the purpose and with the view" of making distributable profits and distributing them, and that the practice of the company is not imbued with that view and purpose. Distributable profits, if the subsidy is taken into account, have been made and are now a reserve fund, invested in the extension and improvement of plant and in the company's business generally. But it is, of course, meant that the making and distributing of as much profit as is reasonably possible is the *raison d'être* of the company.

Now, I am unable to extract any such implication from the Act and the deed. Clearly, it may be assumed that the object of a trading company whose business is manufacturing, buying and selling, is to make some profit. But the true, though not, perhaps, the ostensible complaint is that the making of the maximum of distributable profit is so insistent a duty that the company is not authorized to pay for surplus stock in times of glut a price not absolutely the lowest possible, because that course leads to a profit (if any) smaller than might otherwise be gained. It seems to me that the question thus raised is not one of power, but one of internal economy. It is impossible to say that the constitution of the company is broken when it does not pursue the policy or method, whichever it be, of cutting prices down to the lowest possible limit. (To avoid misunderstanding, I should say here that Mr. Gee, the only witness called on either side as to the company's operations at the sale yards, testifies that he, as manager and buyer for thirty-nine years, keeps in view the object of making a profit, and has

never intentionally paid an excessive price or bought in numbers beyond the company's capacity, though on one or two occasions —not more—in that long period he may have paid too much through inadvertence. It is certain, however, that on occasions the prices paid have helped to steady the market.)

But it is said that the case is different when the rates paid in a glutted market are regulated by the desire to keep up the price of stock and not merely to earn profits for division, and that action upon such a desire is *ultra vires* of the company. In the first place, Mr. Gee disclaims the notion that he buys without regard to the necessity of making profit, and I do not think that his evidence, he being in entire charge of the company's buying, is at all nullified by certain expressions in the company's reports and circulars. Next, the argument is based upon motive, as to which I shall have something to say presently.

It is difficult to separate the plaintiff's contentions as to the powers of the company from those in which he urges that a fraud has been committed upon the rights of the minority. It has all along seemed to me in this particular case that the two channels of argument run one into the other at almost every turn, and I cannot help thinking that it is upon the second branch, if upon anything, that the plaintiff must depend. It is to this branch that the " view and purpose " with which the operations of the company have been conducted is relevant, and I think his real grievance, though his counsel seemed scarcely to admit it to themselves, is that the shareholders are either graziers or interested in grazing, and that they have used and are using their voting powers for the purpose of benefiting themselves. It is in this way that the alleged keeping up of the price of stock is said to enrich the majority at the expense of the minority. I have already referred to some of the evidence which is relied on to establish this part of the case. But at this point it is convenient to say something about the subsidy which the company has been receiving from the stock salesmen. It is clear that this subsidy does help the company, especially in dry seasons, when the market is heavily overstocked, and when prices have become almost ruinously low, to step in and, by buying stock that have remained unsold at the end of the day, save the owner from having to send them back

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into the country, perhaps hundreds of miles. It is equally clear that the subsidy enables the company, when the market is "short" and prices are unusually high, to buy enough stock to keep the works going and to avoid breaking their time contracts, a result which would follow the shutting down of the works which might otherwise ensue. Such a shutting down would cause the company a dead loss of £600 a week in wages, or, as an alternative, the dismissal of a staff of specialists trained in the various branches of the business. It appears, therefore, that the payment of the subsidy has two principal effects. It benefits those who contribute it by preventing "slumps" in the market from becoming ruinous, and it benefits the company by ensuring the continuance of their business and the fulfilment of their contracts at all times. This subsidy, then, has really enabled the company to do the things of which the plaintiff complains, for without it they would no doubt have had, in self-preservation, to buy only at "bedrock" prices. (No doubt, too, they would have had stoppages when stock were dear.) Would then the shareholders, including the plaintiff, have been better off *as such* if the company had not accepted the subsidy, but, entering the market without it, had bought at cheapest, and taken the risk of stoppages in times of dearness? Or would the renunciation of the subsidy aid the profit-making purposes which the plaintiff seems to consider the only proper aim of the company? Mr. Gee, the only witness on the question, says that things would have been much worse. He says that the subsidy is much more profitable to the company than buying on commercial lines would be; and he instances the period from December 1885 to June 1888, when there was no subsidy, and his operations were conducted on commercial lines, independently of protecting the squatters in the time of "glut." He "tried to make the thing pay without the subsidy." The accounts in evidence show that the period to which Mr. Gee referred was really from June 1886 to June 1888, for during that time there was no subsidy. The loss during that period of two years was £18,200. In December 1885 the half-year's subsidy was only £93, and if that half-year be included, the loss was £24,000. Without the subsidy, so far as can be seen, there would be not only no profit, but very heavy loss; according to the

figures before us, and reckoning from the beginning of the company's operations, the loss would have been £116,000. The total subsidy paid has been £183,409. Of this, £115,409 has been carried to profit and loss account, and is gone. The remainder, £67,725, has been carried to reserve. But against this, charges for buildings, plant and tramway have been transferred, amounting to £10,000, and also losses in 1903, 1904, 1905 and 1908 (notwithstanding subsidy) amounting to £12,159. The result is that there is a balance of £45,565 at credit of reserve account, which has in effect been saved out of subsidy amounting to £183,409.

If, then, the policy advocated by the plaintiff had been adopted, the company would, so far as we can see, have collapsed in ruin many years ago. That is the extent to which the minority can say they have suffered through the action of the majority. If the policy were adopted now, ruin would soon follow. Can this be enforced ?

I proceed to consider the authorities applicable to the facts.

Were the defendants bound to declare dividends from time to time instead of carrying all the available surpluses to reserve account ?

In *Burland* v. *Earle* (1), the Judicial Committee, speaking by Lord *Davey*, say on this point :—" Their Lordships are not aware of any principle which compels a joint stock company while a going concern to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion should be divided and what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a ' fair ' or ' reasonable ' sum to retain undivided, or what reserve fund may be ' properly ' required. And it makes no difference whether the undivided balance is retained to the credit of profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company."

In the same case, Lord *Davey* said (2) :—" It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies

(1) (1902) A.C., 83, at p. 95. (2) (1902) A.C., 83, at p. 93.

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acting within their powers, and in fact has no jurisdiction to do so." Secondly, it was held that ordinarily the company must sue to redress a wrong done to it. This rule is subject to the exception that the complaining shareholders may sue in their own names where the persons against whom relief is sought themselves hold and control the majority of the shares and will not permit an action to be brought in the name of the company. But the complaining shareholders cannot succeed in such an action unless they show that the acts complained of are of a fraudulent character or beyond the powers of the company. "A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate" (1). Reference was made by his Lordship to the case of *Menier* v. *Hooper's Telegraph Works* (2), which I will cite presently. As a third principle, it was laid down that (3) "Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote. This is shown by the case before this Board of the *North-West Transportation Co. Ltd.* v. *Beatty* (4)." These principles are clearly applicable, in my opinion, to the present case.

Menier v. *Hooper's Telegraph Works* (2) was an instance in which the Court asserted its jurisdiction to interfere where the majority had fraudulently laid hands upon assets of the company to the exclusion of the complaining minority. The defendant company held the majority of the shares in the European and South American Telegraph Company, the shareholders in which were represented by the plaintiff. A suit by the European Company was pending "which might or might not turn out advantageous to that company." I quote from the judgment of *Mellish* L.J. (5):—"The plaintiff says that Hooper's Company, being the majority, have procured that suit to be settled upon terms favourable to them-

(1) (1902) A.C., 83, at p. 93.
(2) L.R. 9 Ch., 350.
(3) (1902) A.C., 83, at p. 94.
(4) 12 App. Cas., 589.
(5) L.R. 9 Ch., 350, at p. 354.

selves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them." A demurrer to the plaintiff's bill to assert that right was overruled by *James* and *Mellish* L.JJ. This was a clear case of a fraud upon the minority, for the reasons so tersely given. But an equally clear case to show that any shareholder, voting in what he considers his own interest, may vote in a manner injurious to the interests of the company, and that a course of action supported by such votes cannot successfully be challenged as a fraud upon the minority, being a lawful act whatever its motive, is *Pender* v. *Lushington* (1). There *Jessel* M.R., after citing the words of *Mellish* L.J. which I have just read, says (2) :—" In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest." This case is obviously applicable to the action of the majority in supporting the policy of the directors in the present case. The right to vote as a shareholder is a proprietary right, and, as the House of Lords decided in *Mayor &c. of Bradford* v. *Pickles* (3), " No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious" (Lord *Watson* (4)). In my view,

(1) 6 Ch. D., 70.
(2) 6 Ch. D., 70, at p. 75.
(3) (1895) A.C., 587.
(4) (1895) A.C., 587, at p. 598.

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the majority have taken the course of which the plaintiff complains, without transgressing any power of the company, and it is idle to question their motive, there being no jot of evidence of fraud.

So in *Dominion Cotton Mills Co. Ltd.* v. *Amyot* (1), decided in May last, Lord *Macnaghten*, speaking for the Judicial Committee, said :— " The principles applicable to cases where a dissentient minority of shareholders in a company seek redress against the action of the majority of their associates are well settled. . . . In order to succeed it is incumbent on the minority either to show that the action of the majority is *ultra vires* or to prove that the majority have abused their powers and are depriving the minority of their rights." His Lordship then quoted the judgment in *Burland* v. *Earle* (2), pointing out that it " has the high authority of Lord *Davey*." In this case the dissentient shareholders in the Dominion Cotton Mills Company sought to set aside a lease whereby the Cotton Company demised to its co-defendants the Dominion Textile Company for 21 years all the mills and properties of the Cotton Company ; and also a resolution passed by a majority of the shareholders of the Cotton Company approving that lease. The Textile Company itself controlled the majority of the shares in the Cotton Company. The grounds were : (1) that the lease was *ultra vires* of the Cotton Company, and (2) that the transaction was of a fraudulent character and amounted to a confiscation of the interest of the plaintiffs and other dissentient shareholders. Their Lordships held that as the Cotton Company had statutory authority to dispose of its mills, the lease, which was a disposition within the letter of the Statute, was not *ultra vires* ; and they found on the facts that the plaintiffs had not proved that there was any unfair dealing or that the lease was granted at an undervalue. In these circumstances it is clear that the only possible reason for complaint was that the transaction was carried through in the interest of the Textile Company by the votes controlled by that company, and that fact, having regard to the " third principle " laid down in *Burland* v. *Earle* (2), and the case of *North-West Transportation Co. Ltd.* v.

(1) (1912) A.C., 546, at p. 551. (2) (1902) A.C., 83.

Beatty (1), did not impair the validity of the resolution. In its essential freatures that case closely resembles the present one.

It is perhaps worth while to mention the case of *Ving* v. *Robertson & Woodcock Ltd.* (2). There an extraordinary general meeting of a company had resolved that " in consideration of services rendered " certain unissued shares should be allotted to three directors at par, the true value of the shares being much greater. The directors already held three-fifths of the shares between them, and the resolution was carried by their votes. The effect of the issue of the new shares was to diminish the value of the proportion of the assets attributable to the minority, and to increase the value of the proportion attributable to the majority by an amount greater than the sum paid by them to the company. *Warrington* J. held that the resolution was binding on the minority and could not be set aside.

The authorities, when applied to the present facts, are, in my view, strongly against the plaintiff's contentions. Indeed, they amply show that under similar circumstances such a course as has been taken by the defendants and the majority of the shareholders, would be held by the Courts which decided them to be well within the powers of the company, and in no sense fraudulent as to the rights of the minority. If that course is to be changed, it is for the shareholders to change it; and this they can do at any time they choose. There is no finality in the course complained of. It has endured purely at the will of the shareholders.

For these reasons I am of opinion that the appeal must be dismissed with costs.

ISAACS J. I regret to have arrived at a different conclusion.

The substance of the appellant's complaint is that the company is carrying on business " in opposition to the general scope and true intent and meaning of the deed of settlement and the Act of incorporation." The rival contentions involve a question of radical importance with respect to the conduct of trading corporations.

The appellant's case is that the " business " for the carrying on of which the company was incorporated by Parliament was a

(1) 12 App. Cas., 589. (2) 56 Sol. Jo., 412.

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business to be conducted, as commercial businesses ordinarily are, for the benefit of the shareholders, who invest their money and expect some return from it, and that upon the true construction of the Act and by-laws this condition is apparent and is fundamental. He says that the company is not really exercising its powers within the true intent and meaning of the social contract, because its avowed and dominant purpose is to use them, not for the benefit of shareholders generally, but for the benefit of graziers. As a large and controlling proportion of the shareholders are graziers, it is only the minority who are aggrieved, and they are helpless, unless the Court intervenes. The case is put on two legal grounds in the statement of claim: (1) a fraud on the minority (par. 11), and (2) *ultra vires* of the company (par. 12). The appellant claims a declaration in accordance with his contention, and an injunction restraining the company and its directors from carrying on the business otherwise than with a view to earn profits for distribution among the members generally. The respondents answer, in effect, is this—first, that the several concrete acts that have been done in carrying on the business, are authorized, because the buying and selling of stock are specifically mentioned in the by-laws, and that as these acts are within the literal terms of the documents constituting the company and defining its objects, they are *intra vires* irrespective of the mental purpose with which they are done; and, further, that as every shareholder can vote as he pleases and for any motive he pleases, the majority may, beyond any power of challenge, so direct the company's operations as to buy and sell with the avowed aim of benefiting the majority and other graziers, to the detriment of the shareholders as such, and incidentally may do so on such terms as will accomplish that aim; and if profits result, are entitled again and for the same reasons to disregard the claims of shareholders to dividends, and, relying on the literal words of articles 45 and 75, may cause the directors to appropriate all profits to reserve or extension of plant, without considering the claims of shareholders as such, and without considering any question of dividend, and as the corporation is perpetual, may do so for ever. The remedy they suggest is—that the minority should sell out.

In my opinion, the respondents' answer goes no deeper than the

bark, and would effect a radical change in the prevalent notions of a company's obligations to its shareholders.

But, first, the facts should be looked at in order to see how far the learned primary Judge was justified in basing his decision on the verbal testimony of Mr. Gee.

The learned primary Judge held that on the documents the appellant had made out his case. He says :—"In the absence of evidence to the contrary I think the Court would infer that the directors, with the support of a majority of shareholders, were carrying out the policy which they announced they were carrying out and intended to continue, and would interfere to prevent them converting a commercial company formed to make profits by the manufacture and sale of canned meats into an insurance company for the benefit of graziers."

I entirely agree with that, which is the main principle of the case ; and the exhibits referred to by the learned Judge, and which I need not repeat, sustain that conclusion.

But then he thought, that it being a question of fact, the *primâ facie* conclusion from the documents was displaced by Mr. Gee's evidence. With the greatest deference to that learned Judge, it was at this point he fell into error. That gentleman is the manager, and, of course, merely carries out the practical work of the company under the guidance and supervision of the directors. He does not, and could not, control the company's method of dealing with its capital, or profits, or dictate the ruling principles of its business conduct ; or act in conflict with the declared policy of the directors. Indeed, he admits that it was not even within his province to discuss it. Within the sphere of his duty, Mr. Gee doubtless does the best he can. It may well be that he buys to make some profit, and that he does make a profit having in view the subsidy. But that is little to the point. His admissions are, as it seems to me, a complete confirmation of the main facts relied on by the appellant. Gee admits :—(1) That the company during its whole existence—about 40 years—has never paid a dividend ; (2) that it is true it has been looked upon more as an insurance company to protect graziers' stock when the market was glutted—a mode of expression which in the most practical way indicates the real career which

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the majority have pursued and desire to pursue; (3) that that was that principle which guided him in buying and managing in time of glut; and (4) that the majority of shareholders are persons having grazing interests.

So that, reading these admissions, together with his evidence as to the prices he gave, and his own personal object in bidding, it is clear that he did the best for the company consistently with and subject to the distinct line of action marked out by the directors, and by which his actual transactions were limited, coloured, and affected. No one can tell what the actual transactions of the company or what the profits would have been, had the ordinary course of commercial business been followed. And no one can tell what would in that case have been the method of dealing with the profits—whether they would have been distributed, or have been retained to still further assist the pastoralists. That is all independent of Mr. Gee. None of the directors gave evidence to explain their circulars and advertisements, or their perpetual withholding of dividends; and, whatever Gee has said regarding his personal object within the sphere of his duty and responsibility, that is as to details, there is nothing said by the directors, or on their behalf, to withdraw or weaken their unmistakable general attitude, as reiterated in writing, supported by their mode of dealing with such profits as were in fact made. On the contrary, the company in its defence (pars. 13, 14) does not deny the plaintiff's assertions, either as to the past or the future; while the directors in their separate defence (par. 8) content themselves with a negative pregnant, and in pars 14 and some following paragraphs maintain their right on behalf of the company to pursue the course. This is a claim to do what is objected to: See *Attorney-General for Queensland* v. *Brisbane City Council* (1). Therefore, the case does not depend, even for its facts, that is, for its central and dominant facts, upon Mr. Gee's credibility or upon the force of the testimony he gives, but upon the acts and declarations of the company through its directors. And I may say that even learned counsel for the respondents practically rested their case upon that, rather than upon any contradiction by Gee of the directors' own statements.

(1) (1909) A.C., 582, at p. 596.

I decline to stamp those repeated statements of the directors coming down to 1909 as fraudulent, and intended to mislead graziers, including the majority of their own shareholders. As samples, take the exhibits in which they announced in 1905 and 1907 that "The company's buyer is always present at the Homebush sales, competing for all grades of stock in the interests of owners." In one of those exhibits, the last four words are italicized. Without dissecting the results of separate years or even sets of years, it appears that over 37 years, from 1873 to 1909, the profits (irrespective of reserve) are £91,233 0s. 2d. and the losses £91,554 13s. 11d., a balance on the side of loss of only £321 13s. 9d. notwithstanding the policy of generosity to graziers rather than of justice to shareholders. Had the latter principle guided the company, the balance, even apart from reserve, might have been substantial. The amount of net profits carried to reserve however, amounts to £67,725 2s. 11d., consisting of accumulations from June 1893 to June 1902, and still existing. Since that date, the reserve has remained stationary, while subsidy carried to profit—really used to enable the company to carry out its scheme of assisting the graziers—has been treated simply as "profit" to counteract losses incurred in working out the scheme. So that there is, as matters stand, a net profit of £67,725 2s. 11d., and still the majority say there never shall be dividends. And the question arises: Why? The early period of loss was while the company was struggling to gain a footing, and the second period of want of subsidy—1885 to 1888—was only three years, and, as stated in the exhibit dated 11th July 1888, the prices of tinned meats and tallow in England were "exceptionally low." Besides, the company was carrying out its policy of looking after the grazing interest first. Obviously, if actual results could have any legal bearing on the question we have to decide, the periods of so-called "loss" pointed to cannot form any conclusive or even satisfactory basis on which to settle the whole future policy of the company. It is said that the reserve used in the business makes the value of the business so much the greater. True; but for whom? Not for the shareholders if the declared policy is carried out, but for the graziers. A member of the grazier majority or another grazier might be

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willing to give more for a share, but an ordinary shareholder is not to be forced to sell. See *Lindley on Companies*, 6th ed., p. 440, and *Natusch* v. *Irving* (1), applied to joint stock companies in *Simpson* v. *Westminster Palace Hotel Co.* (2). Nor can the desire to assist the grazing industry by keeping up the price of meat in New South Wales afford any justification. A scheme by which the majority secure to themselves as well as others in a like case, higher prices, is not altogether altruistic, and it needs a fuller acquaintance with surrounding circumstances before one can pronounce the increase of the price of meat to the local consumer by forced competition to be an unmixed public blessing.

Special assistance deliberately given to the grazing industry by this company could only, as I understand the law, be justified on one supposition.

If, in the interests of the company itself, for the better prosecution of its own legitimate business, and as a recognized method of prosecuting that business, or, as Lord *Robertson* expresses it in *British Equitable Assurance Co. Ltd.* v. *Baily* (3), "in the interests of the company as an institution," the directors—or the majority of the company—*bonâ fide* thought some assistance necessary, so as to preserve a required source of supply, there would be no legal objection: *Henderson* v. *Bank of Australasia* (4). So long as a company is acting on right lines there is nothing in the law which requires it to be grasping or greedy in its transactions with others. A fair price means a price fair to both sides, having regard to all the circumstances, which include the prospects of future years. But while a company is not required to wring profits out of the distresses of others, neither are the majority of the company who control it to sacrifice the property or rights of the minority associated with them in the joint enterprise. Lord *Macnaghten*, in *Welton* v. *Saffery* (5), made some observations which ought not to be lost sight of. He said:—"Shareholders in these companies require protection just as much as creditors—perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners;

(1) Gow on *Partnership*, 3rd ed., App., 398.
(2) 8 H.L.C., 712, at p. 717.
(3) (1906) A.C., 35, at p. 39.
(4) 40 Ch. D., 170, at p. 180.
(5) (1897) A.C., 299, at p. 325.

they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act." When the deed of settlement was executed, it was agreed (article 7) to apply for an Act of incorporation, but if the Act had not been obtained, it was contemplated that the company as an association would go on, and in partnership (article 80). Had that been so, it would have been difficult for the majority to suggest any justification for their present action. But it is said, because the directors did succeed in getting an Act of incorporation which (sec. 2) most carefully guarded against any infringement of the true intent and meaning of the deed of settlement, all that is changed, and the majority may make what use they like of the company's funds provided they go through the form of transactions of buying and selling, and boiling and canning, and putting away profit reserves. It need scarcely be said that a company might be formed for the declared purpose of carrying on such a business in order to aid graziers regardless of the pecuniary welfare of the members. But, unless something is said to have that unnatural effect, it will not be implied. It was once said by *James* L.J., in *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (1), that " the clearer a thing is, the more difficult it is to find any express authority or any *dictum* exactly to the point." And though learned counsel for the appellant insisted, and, with deference, I think correctly insisted, that the terms of the Act and deed of settlement entitled every shareholder to have the business conducted with a view to the shareholders' benefit, whatever discretion existed as to policy or individual transactions within the proper ambit, no authority was cited. The principle is so fundamental that, as far as I know, no necessity has heretofore arisen for its direct affirmation as part of any curial order of a Court. Still its assumption is the necessary groundwork of several decisions which I have examined since the argument. And I may point to three or four, together with some actual observations of great authority.

In *Bligh* v. *Brent* (2), *Alderson* B. in delivering the judgment of the Court, in speaking of the capital subscribed to the Chelsea Waterworks Company incorporated by Act of Parliament, said :—" The

(1) L.R. 10 Ch., 515, at p. 526.

(2) 2 Y. & C., 268, at p. 295.

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property is money—the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation who have an unlimited power of converting part of it into land, part into goods; and of changing and disposing of each from time to time; and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors."

In the leading case of *In re Suburban Hotel Co.* (1), Lord *Cairns* L.J. delivered a judgment in which the late *Turner* L.J. had expressed his concurrence both in conclusions and reasons. The learned Lord Justice said :—" Now, it is important to bear in mind what is the character of the contract into which, in a case of this kind, the shareholders enter. I apprehend that the contract is of this nature: a certain number of persons are willing to undertake to supply a limited amount of capital upon the terms of the business of the company being confined to certain specified objects, and upon the terms of the affairs of the company being managed by persons who shall be elected in a particular manner. Provided this end be attained, the persons who subscribe are willing to undertake to supply capital up to a certain point, and to try whether, with that capital so subscribed, the business cannot be managed in a way that will be profitable for every person. . . . But, subject to the wishes of the majority, and subject to the occurrence of any of those tests which are mentioned in the Act, I apprehend that the contract means that the shareholders will supply the specified amount of capital for the purpose of carrying on the business as long as it can be carried on." So that Lord *Cairns* was clearly of opinion that every subscriber undertook to try to manage the business in a way that will be profitable for every person.

That is at the root of the matter. Now, the learned Lord Justice referred to several partnership cases, including *Jennings* v. *Baddeley* (2), a decision of Lord *Hatherley* when Vice-Chancellor, where this is said (3) :—" The doctrine of this Court has always been, that expectation of profit is implied in every partnership; that every partnership is entered into by the partners with the view of deriving

(1) L.R. 2 Ch., 737, at pp. 742, 743. (2) 3 Kay & J., 78.
(3) 3 Kay & J., 78, at p. 83.

profit from the concern. No one can suppose that persons, who have agreed to carry on a business for a certain term, will continue to carry it on during as many years as the term may have to run, when it is clear that, during the residue of the term, they must be working at a certain loss." The learned Vice-Chancellor further says (1):—"It would almost seem that nothing more than common-sense is required to lead to the conclusion, that, in a common case of partnership, formed, as all partnerships must be, for the purpose of an effectual working at a profit, you cannot force the partners to continue the co-partnership, when it is clearly made out that the business is no longer capable of being carried on at a profit. The question, whether or not the concern is embarrassed, cannot make any difference. That may depend on whether one of the partners is rich, as is the case here. The real question is whether, in a fair mode of proceeding, each partner contributing his usual share to the capital of the concern, the matter can be worked so as to enable the concern to go on with the object which both parties have in view."

Later on (2), the learned Vice-Chancellor asks himself whether the business could be carried on "so as to answer the purpose for which all partnerships are entered into, viz. the realization of profit." He found, as he said, that the whole "purpose" of the partnership had failed, and dissolved it.

That was in 1856, and there can be little doubt that when in relation to limited companies, learned Judges speak of the "purposes" of these statutory partnerships, then, although in many respects rights and obligations are necessarily altered, yet the word "purpose" or "purposes" undergoes no radical alteration of meaning; nor is the underlying implication of expectation of profit obliterated. Neither in a partnership nor a trading corporation, is division of profits essential to the concept, but the making of profits by the enterprise is, and unless division is negatived, it is expected.

Lord *Cairns* evidently had Lord *Hatherley's* words in his mind in making the observations I have quoted, and was apparently disposed, if necessary, to apply to a company, under the "just and equitable" clause, the same considerations as had been applied to an ordinary partnership.

(1) 3 Kay & J., 78, at p. 88. (2) 3 Kay & J., 78, at p. 90.

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It has been said here, that this is an attempt to wind up the company. The distinction is clear, and shown by the two cases referred to. So long as what *Wood* V.C. calls "a fair mode of proceeding" in conducting the company is preserved, nothing is done contrary to the agreement, and therefore nothing but a dissolution in winding up would apply. But unless it is shown that loss is inevitable, supposing that fair mode of proceeding be adopted, winding up is, so far as that ground is concerned, inapplicable, and nothing remains but such a proceeding as the present: See *In re Crown Bank* (1).

But, say the respondents, if it be assumed that the acquisition of profit is essential to the conception, it involves the acquisition of as much profit as may by pressure or artifice be squeezed out of the opposite party, and, as that is impossible, the idea of trying to make any profit is no part of the bargain. The premises are fallacious. A solicitor is bound to do all he can to win his client's cause—yet he is not bound to resort to unfair means, or sharp practice, or to snap a judgment, or to do more than an honourable fair-minded man would think right; but he must not sacrifice any substantial advantage which the law gives his client. A trustee is certainly bound to work with a single eye to the benefit of his *cestui que trust*, still no one ever accused a trustee of wrong, because he treated an opponent justly. But the point is again covered by high *dictum*. In *Smith* v. *Anderson* (2), *Cotton* L.J., with reference to the conditions which would bring associations under the *Companies Act*, said :—"Most persons when they invest their money do it for the purpose of profit, that is to say, they expect to get a profit in the shape of dividends, and probably also expect that the investment will go up and will produce them a profit when hereafter they may wish to realize." Again in *Imperial Mercantile Credit Association* v. *Chapman* (3), *Malins* V.C. said he must suppose the shareholders took shares in the company to make a profit. This view is strengthened by the judgments in *Pooley* v. *Driver* (4) and *Mollwo, March, & Co.* v. *Court of Wards* (5).

(1) 44 Ch. D., 634, at pp. 646, 647.
(2) 15 Ch. D., 247, at p. 283.
(3) 19 W.R., 379, at p. 380.
(4) 5 Ch. D., 458, at p. 472.
(5) L.R. 4 P.C., 419, at p. 436.

It was urged that the decision on this point would have an important bearing on ordinary trading corporations under the Companies Acts. To this I assent, but I think it would be regarded as a new idea if shareholders were told that companies formed to carry on business operations, were never bound to try and make a profit, in other words, that such a company is not intended to make its trading operations a commercial success. If the respondents are right, a bank would be justified in devoting its capital to bolstering up the outside business concerns of such of its shareholders as could control the management, and, as fast as profits came in, appropriate them to extending its facilities for further assistance to those enterprises, telling the rest of the shareholders that although dividends were expressly provided for in the articles yet that paying dividends was no part of its scheme, and would never be countenanced.

So much would, in my opinion, follow as a necessary implication if there were no affirmative provisions. And these general considerations are necessary because of the respondents' argument as to the proper attitude towards the express stipulations of the deed of settlement. There are provisions which the respondents contend amount merely to internal management, but which I read as an inalterable part of the scheme agreed to and sanctioned by Parliament, and, at all events, if not inalterable, are binding so long as unaltered.

The preamble recites (1) the purpose of carrying on the business "as in the said deed of settlement," to which we must therefore turn for information as to its scope; (2) the agreement as to capital; (3) the provision made for payment of dividends, and the disposal and application of the profits, referring to articles 26, 27, 45 and 75; and (4) the desire of the company to be incorporated.

Sec. 1 incorporates the company "for the purposes aforesaid but subject nevertheless to the conditions restrictions regulations and provisions hereinafter contained."

Sec. 2 declares the articles in deed of settlement binding unless altered or unless inconsistent with the Act. It also declares that "no rule or by-law shall on any account or pretence whatsoever be made by the said corporation either under or by virtue of the said indenture or deed of settlement or by this Act in opposition to the

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general scope or true intent and meaning of the said indenture or deed of settlement or of this Act or " &c. Dividends are referred to in subsequent sections (12 and 13).

The negative provisions referred to prohibit, *ex necessitate*, any act which might be authorized by a forbidden by-law. Lord *Cairns* L.C., in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), said such a negative clause includes " the engagement that no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association . . . that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

Turning then to the deed of settlement, article 4 is a mutual promise to observe and keep all the covenants articles and provisions " according to the true intent and meaning " of the same.

Article 5 declares the " objects and business " of the company to be the preservation of meat fish and vegetables, the preparation of animal products and the sale and exportation of these productions; the boiling down of animals and conducting the operations for or on behalf of other persons, this last being an agency power. That includes all the objects and business. But then the article goes on with incidental or minor or working powers. It says :—" And *in connection with such operations*, the buying and selling of live stock," &c. The buying and selling powers are by the respondents, however, erected into a separate and independent power, and the main or governing purposes previously mentioned are treated as subordinate to the buying and selling. This is simply reversing the parliamentary and contractual agreement, but is necessary to the respondents' position. Applying the language of Lord *Cairns* in the *Ashbury Case* (2), it is " reversing entirely the whole hypothesis of the memorandum of association."

Article 26 says :—" The clear *bonâ fide* net profits arising from the operations of the company shall be applied in payment to all the shareholders of the company of a dividend in proportion to the number of shares held by each shareholder."

It will be observed that this article is not a power given to directors

(1) L.R. 7 H.L., 653, at p. 670. (2) L.R. 7 H.L., 663, at p. 667.

to declare a dividend. Directors have no power to finally make any dividend of profits. They may provisionally determine upon them under the next rule, but it is only a general meeting that can decide the matter. Article 26 is a clear agreement *inter socios* that dividends shall be payable, subject, of course, to article 45.

Article 27 received no attention during the argument, but it appears to me to have considerable importance. It is in these terms :—" Previously to every general meeting during the continuance of the company, the Board of Directors shall, subject as herein mentioned, determine upon such dividend or dividends or bonus out of such clear profits (if any) as they in their judgment conformably to the provisions herein contained shall see fit ; and at every such meeting shall propose such dividend or bonus so determined upon for the decision of such meeting."

This is the first step towards fixing the amount of dividend, and it is a binding agreement between each and every shareholder that the directors are to exercise their discretion, at the times and in the manner stated in the article. It seems to me any such pre-determined line of conduct as the company has taken, and now insists on, is an abrogation of the agreements in articles 26 and 27.

Article 45 says that out of the net profits of each half-year the directors may in their discretion before declaring any dividend—which I take to mean the provisional determination in article 27—set apart and appropriate a sum for increasing works and plant and reserve fund, a fund for equalizing future dividends and the *balance* " shall be available for the payment of dividends among the shareholders."

It is true article 75 gives to a general or special meeting full power to regulate and control all the affairs, management, capital, profits, and dividends and concerns of the company—but I apprehend, that if the directors have left a " balance " within the meaning of article 45, the majority have no power to break a substantive term of their standing agreement and by-laws, and say that balance shall not be distributed. That would be a confiscation. In *Burland* v. *Earle* (1), Lord *Davey* for the Privy Council said, there is no principle which compels a joint stock company while a going concern to divide

(1) (1902) A.C., 83, at p. 95.

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the whole of its profits among its shareholders. To what corporate use profits should be applied, said the learned Lord, is a matter of internal management and for the shareholders to decide, but these words are added :—" Subject to any restrictions or directions contained in the articles of association or by-laws of the company."

Here we have the directions expressly stated.

I am unable to entertain any doubt, therefore, that the true intent and meaning of the social compact was to conduct the business for the benefit of the shareholders and with a view to profit, and, when made, net profits were to be divided among shareholders proportionately to share interests, except so far as the directors, exercising, in the circumstances *then* appearing, their fiduciary discretion for the benefit of the shareholders, thought fit to appropriate those profits for the stated purposes.

Indeed, article 87 makes provision for dissolution in case of certain losses.

In view of the respondents' contentions it is necessary to state that the appellant does not claim, and is not, in my opinion, entitled to claim, that dividends must be paid at all hazards or immediately, nor that it is a breach of agreement or an *ultra vires* act to conduct the business if in fact a profit is not made, or to give liberal terms to graziers, or to do so on terms of receiving a subsidy. The point is that the corporation powers of buying and selling &c. are given to implement the governing purpose of the association, namely the carrying on of the business for the common benefit of those who subscribe their capital, and no one else: See *per Blackburn* J. in *Taylor* v. *Chichester and Midhurst Railway Co.* (1), in the passage quoted in *Brice on Ultra Vires*, 3rd ed., p. 45; and that, without either harshness, meanness, or sacrifice; that in so doing others may be helped so far as it is *bonâ fide*, and in order to advance by business methods the welfare of the corporation itself: See *Colman* v. *Eastern Counties Railway Co.* (2); *Tomkinson* v. *South-Eastern Railway Co.* (3); *Simpson* v. *Westminster Palace Hotel Co.* (4). But the benefit to others is not the primary or governing purpose, or, *per se*, any purpose of the company, and as such is beyond its powers:

(1) L.R. 2 Ex., 356, at p. 378.
(2) 10 Beav., 1.
(3) 35 Ch. D., 675, at p. 678.
(4) 8 H.L.C., 712, at p. 718.

Simpson v. *Westminster Palace Hotel Co.* (1); *Amalgamated Society of Railway Servants* v. *Osborne* (2). *Cohen* v. *Wilkinson* (3) was cited for the appellant to show that acts literally within the terms of authorization may be outside the power if done for a foreign purpose. Lord *Cottenham* L.C., who decided it, explained its principle in a later case, *Bagshaw* v. *Eastern Union Railway Co.* (4), in these terms :—" Although it was part of the work, yet not being part of the work for the purpose of effecting the whole, the company ought not to be permitted to go on with it." The learned Lord Chancellor, manifestly, did not think the work itself was the purpose, and his observation is strictly applicable to this case.

The word "purpose" means, as in the other cases cited, the purpose which they had in view in doing the specific act. See, in illustration of this, the observations of *Romer* L.J. in *Attorney-General* v. *Pontypridd Urban District Council* (5), where he says:—" Really a destructor such as this is was not wanted for the purpose of the supply of electricity at all. It was wanted for the purpose of disposal of the refuse, and was wanted by the defendants for that purpose in order to enable them to comply with the duties imposed upon them under the *Public Health Act.* The only connection between the erection and use of the destructor for the purposes of the destruction of refuse and the supply of electricity is this: that, seeing the use of the destructor of necessity gives rise to certain heat, use is made of that heat, which is one of the many results necessarily flowing from the use of the destructor, for the purpose so far of helping the generation of electricity. But as a matter of substance the destructor was not erected for the purpose of obtaining that heat; it was erected, as I have said, to comply with the obligations of the *Public Health Act*, and the heat was merely one of the necessary outcomes of that compliance with the Act. This is also shown by the very magnitude of the building proposed to be erected, and by the proceedings taken by the defendants for the purpose of borrowing money to defray the expense of it. They sought, and as I say, having regard to its nature and purpose, properly sought, to defray the expense of it as a separate work erected

(1) 8 H.L.C., 712.
(2) (1910) A.C., 87, at p. 94.
(3) 1 Mac. & G., 481.
(4) 2 Mac. & G., 389, at p. 393.
(5) (1906) 2 Ch., 257, at pp. 268, 269.

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to comply with the provisions of the *Public Health Act*, and not as a work done for the purpose of the supply of electricity. They purported to defray the expense by borrowing money for it, as I have pointed out, as a purpose distinct from the purpose of the supply of electricity."

Similarly, in *R.* v. *Eastern Counties Railway Co.* (1), Lord *Denman* C.J. says :—" It is not a complaint by the majority of the proprietors against the governing body, but by a minority against the conduct of the company itself, which they charge substantially with a breach of faith towards them by stopping short of a *bonâ fide* execution of that purpose which induced them to become subscribers." The specific or concrete acts done in the course of carrying on the business are not the purpose ; the " purpose " is the *bonâ fide* carrying on of the business. The respondents contended that *bona fides* has no place in this connection, and that the Court would not and could not inquire into it. In my opinion it has a very important place, and the Court insists on it, as the cases show. I have already made one or two citations which involve the position. I will mention others, including two of the highest authority which I shall refer to first. In *Burland* v. *Earle* (2), Lord *Davey* says that different considerations would arise if it appeared the directors were abusing the powers vested in them for the management of the company's business, and adds that the transaction impeached did not appear to their Lordships to be otherwise than " a *bonâ fide* exercise of the powers of the company and the directors."

Then in *British Equitable Assurance Co. Ltd.* v. *Baily* (3), Lord *Lindley* says :—" Of course, the powers of altering by-laws, like other powers, must be exercised *bonâ fide*, and having regard to the purposes for which they are created, and to the rights of persons affected by them. A by-law to the effect that no creditor or policyholder should be paid what was due to him would, in my opinion, be clearly void as an illegal excess of power."

Surely then, if a by-law that no shareholder should in future receive any dividend would be invalid, such a determination of the company without a by-law is not a *bonâ fide* exercise of dis-

(1) 10 A. & E., 531, at p. 549. (2) (1902) A.C., 83, at p. 97.
(3) (1906) A.C., 35, at p. 42.

cretionary power, and can, on the authority of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), stand in no better position. Trustees, even when invested with uncontrolled authority, can be checked if acting *malâ fide* : *Gisborne* v. *Gisborne* (2). And when a shareholder places himself in the hands of others in such a compact, I should think the very first principle is that there must be good faith in exercising the powers given.

Other instances are :—*Pugh* v. *Golden Valley Railway Co.* (3) ; *Attorney-General* v. *Corporation of Cardiff* (4) ; *Foster* v. *New Trinidad Lake Asphalt Co. Ltd.* (5) ; *Da Prato* v. *Provost &c. of Partick* (6).

This principle is not inconsistent with the right of every shareholder to exercise his vote for his own reasons and his own advantage as settled in *North-West Transportation Co. Ltd.* v. *Beatty* (7) ; *Burland* v. *Earle* (8), and *Dominion Cotton Mills Co.* v. *Amyot* (9), because his right to vote as he pleases is absolute, provided it refers only to the agreed powers of the corporation and within their ambit. But the present question is entirely different ; it concerns the limits and extent of those powers ; no decision has ever been given that shareholders can for their own reasons knowingly authorize the exercise of what I may call the working incidents of a corporation's objects given for one purpose, to carry out a purpose *alio intuitu*.

It was suggested that no order could be effectual. I see no more difficulty in deciding as to whether a company is *bonâ fide* pursuing the true purpose of its corporate life than in determining the *bona fides* of a trustee's act. The fact has, for instance, to be determined in this case. It is a question of fact and a declaration and injunction on the lines that the company is bound to carry on its business in its own interests and for the benefit of its shareholders generally, and with a view of making profits, and with a further view of dividing those profits when made, subject only to the expressed discretionary appropriations, and that the directors and shareholders in general meeting are bound to give effect to the pro-

(1) L.R. 7 H.L., 653.
(2) 2 App. Cas., 300, at p. 305.
(3) 12 Ch. D., 274, at p. 281 ; 15 Ch. D., 330, at p. 338.
(4) (1894) 2 Ch., 337, at p. 342.
(5) (1901) 1 Ch., 208, at p. 213.
(6) (1907) A.C., 153, at p. 155.
(7) 12 App. Cas., 589.
(8) (1902) A.C., 83.
(9) (1912) A.C., 546.

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visions of the deed of settlement relating to the appropriation of net profits. To do otherwise comes within either or both of the conditions mentioned in *Burland* v. *Earle* (1), namely "of a fraudulent character or beyond the powers of the company."

In these circumstances I have been led to a view different from that formed by my learned brothers, and in my opinion this appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors, for the appellant, *Leibius & Black.*

Solicitors, for the respondents, *Holdsworth & Son.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CASEY . . . . . APPELLANT;
PETITIONER,

AND

HIS MAJESTY THE KING . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 26, 27.

Griffith C.J., Barton and Isaacs JJ.

Public Service of Victoria—Pension or superannuation allowance, Right to—Date of appointment—Pensions Abolition Act 1881 (*Vict.*) (*No.* 710), *secs.* 1, 2—*Public Service Act* 1883 (*Vict.*) (*No.* 773), *sec.* 99—*Public Service Act* 1890 (*Vict.*) (*No.* 1133), *sec.* 107—*Public Service Act* 1893 (*Vict.*) (*No.* 1324), *sec.* 22.

Sec. 99 of the *Public Service Act* 1883 (Vict.) (sec. 107 of the *Public Service Act* 1890 (Vict.)), provides that: "All persons classified or unclassified holding offices in any department of the public service at the time of the passing of this Act except persons appointed since the passing of" the Act No. 710 "shall be

(1) (1902) A.C., 83, at p. 93.