REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1925-1926.

[HIGH COURT OF AUSTRALIA.]

DAVISON . . . . . APPELLANT;

AND

VICKERY'S MOTORS LIMITED (IN LIQUIDATION) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 9, 12.

SYDNEY, *Nov.* 27.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Practice—High Court—Appeal from Supreme Court of State—Ground of appeal—Point taken for first time in High Court—Conduct of cause at trial.

Company—Shareholder—Agreement to take shares—Authority of director to sell shares—Ratification—Application for shares—Withdrawal of offer—Directors—Meeting of directors—Proxy for director—Validity of acts done.

On a summons in the Supreme Court of Victoria by the appellant for rectification of the register of the respondent company by expunging his name on the ground that no agreement to take shares was ever concluded between him and the company, the trial Judge found that the appellant and a director of the company had concluded an arrangement by which it was agreed that the company should buy from the appellant a motor-car for a certain sum to be paid, and that the appellant should buy from the company a certain number of contributing shares in the company for which he should then pay to the company the sum which he had received for the motor-car.

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He also stated that the arrangement had by both parties been treated throughout as made between the appellant and the company. This decision was, on appeal, affirmed by the Full Court. On appeal to the High Court the notice of appeal stated as one of the grounds "that on the evidence the learned Judge was wrong in holding that there was a contract concluded between the appellant and the respondent whereby the appellant agreed to take" the shares in question. On the hearing of the appeal the contention was for the first time set up that the director was not in fact authorized by the company to enter into the agreement and that in view of the articles of association the directors could not authorize one of them to make such an agreement or ratify it when made.

Held, by *Knox* C.J., *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the appellant should not be permitted to rely on the contention.

Per Isaacs J.:—(1) *Bolton Partners* v. *Lambert*, (1889) 41 Ch. D. 295, is not good law. (2) Until the company itself validly ratified the authority given by the board of directors, the appellant could retract from the *de facto* agreement.

Per Higgins J.: The absence of power on the part of the director to allot shares was fatal to the contention of the company that an agreement was made by the appellant with the director; and, as the defect could not be cured by any evidence, it was available, as a matter of law, on appeal to establish that no agreement was concluded with the director, even if the defect was not pointed out at the trial by the appellant's counsel.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

By a summons taken out by Thomas Davison he applied for an order that the register of shareholders of Vickery's Motors Ltd. (In Liquidation) should be rectified by expunging therefrom the name of the applicant as the owner of 1,000 ordinary shares, on the ground that no agreement to take the said shares was ever concluded by the applicant with the Company. The summons was heard by *Weigall* A.J., who dismissed it. In delivering his judgment he found as facts that on the night of 12th January 1924, at Wagga, Davison interviewed John Henry Vickery, the managing director of the Company, and Charles D. Johnson, who was employed by the Company to sell its shares; that Davison's purpose was to induce the Company to buy from him a motor-car; that as a result of discussion it was at that interview agreed that the Company would buy from Davison the motor-car for £250 then to be paid and that Davison should take 1,000 £1 shares in the Company paid up to 5s.

for which he should at the same time pay 5s. per share, that is, £250; that in pursuance of that agreement Vickery on that night gave the Company's cheque for £250 to Davison, who then endorsed it and handed it back to Vickery together with a printed form of application for 1,000 shares signed by Davison. The learned Judge held that, as Davison had agreed with the Company to take the shares and as his name was in pursuance of the agreement entered on the register of shareholders, Davison was not entitled to have his name removed from the register. On appeal by Davison the Full Court, by a majority (*Cussen* and *Mann* JJ., *Irvine* C.J. dissenting), affirmed the decision of *Weigall* A.J.

From that decision Davison now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Gregory, for the appellant. There was never anything more than an offer by the appellant to take shares in the Company, and it was a condition of the offer that the Company should buy the motor-car for £250 and apply that sum in payment of the shares. The offer was validly withdrawn before an acceptance by the Company was communicated to the appellant. Vickery had no authority from the Company to enter into a binding contract with the appellant to take shares in the Company. Even if there was an irrevocable offer to take the shares, that offer was never validly accepted by the Company. The meeting of directors at which the application for shares was accepted was not properly constituted. No notice of the meeting was sent to Hall. (See *Halifax Sugar Refining Co.* v. *Francklyn* (1); *In re Homer District Consolidated Gold Mines* (2); *In re Portuguese Consolidated Copper Mines* (3).)

[RICH J. referred to *Young* v. *Ladies' Imperial Club* (4).]

Morey had no authority to act at that meeting as a director. There is no authority under the articles of the Company to appoint a proxy to act at a meeting of directors. The only power in the articles is to appoint a substitute director (art. 82), and a person so appointed has, while he occupies the position, all the powers and duties of a director. A proxy is merely an agent who is to act as he

(1) (1890) 59 L.J. Ch. 591.
(2) (1888) 39 Ch. D. 546.
(3) (1889) 42 Ch. D. 160.
(4) (1920) 2 K.B. 523, at p. 528.

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is directed by the person who appoints him (*In re English, Scottish and Australian Chartered Bank* (1)).

Owen Dixon K.C. (with him *J. H. Moore*), for the respondent. There was, as has been found, an agreement by the appellant with the Company to take the shares, and his name is on the register. That being so, he is a member of the Company (sec. 31 (2) of the *Companies Act* 1915 (Vict.)), and it is immaterial how his name got on the register. Vickery had authority to sell shares on behalf of the Company, and, if he had not, there was ratification by the Company of Vickery's act. The application for the shares by the appellant was not necessary to constitute the appellant's agreement to take the shares, but was merely a formal means of carrying that agreement into effect (*In re Valparaiso Waterworks Co.—Davies' Case* (2)).

[RICH J. referred to *In re United Ports and General Insurance Co.—Brown's Case* (3).]

The agreement of the Company to allot the shares is not necessary to constitute an agreement by the appellant to take the shares (*In re Olympic Fire and General Reinsurance Co.* (4). It has been found that there was ratification of Vickery's act, and there is ample evidence to support the finding. It was not competent for the appellant to withdraw from his agreement (*In re Portuguese Consolidated Copper Mines*; *Ex parte Badman* (5)). A ratification is effective even after the agreement has been repudiated (*Bolton Partners* v. *Lambert* (6) ; *In re Tiedemann and Ledermann Frères* (7)). The validity of the meeting of directors at which the shares were allotted to the appellant cannot be challenged in view of the provision in art. 80 that all acts done by a meeting of directors are to be valid notwithstanding that it be afterwards discovered that there has been some defect in the appointment of some of the directors (*Channel Collieries Trust Ltd.* v. *Dover, St. Margaret's and Martin Mill Light Railway Co.* (8)).

(1) (1893) 3 Ch. 385, at pp. 417-418.
(2) (1872) 41 L.J. Ch. 659.
(3) (1871) 41 L.J. Ch. 157.
(4) (1920) 2 Ch. 341.
(5) (1890) 45 Ch. D. 16.
(6) (1889) 41 Ch. D. 295.
(7) (1899) 2 Q.B. 66.
(8) (1914) 2 Ch. 506, at p. 511.

Gregory, in reply. Art. 80 is limited to meetings of persons who purport to be directors. Here Morey only purported to be a proxy of a director. *Bolton Partners* v. *Lambert* (1) is not good law. It was doubted by the Privy Council in *Fleming* v. *Bank of New Zealand* (2). (See *Fry on Specific Performance*, 6th ed., App. A.)

Cur. adv. vult.

Nov. 27.

The following written judgments were delivered :—

KNOX C.J. The appellant applied to the Supreme Court for rectification of the register of the respondent by expunging his name as the holder of 1,000 shares. The application was dismissed by *Weigall* A.J., and on appeal the Full Court of the Supreme Court, by majority (*Cussen* and *Mann* JJ., *Irvine* C.J. dissenting), upheld the decision of the primary Judge. The facts of the case are fully stated in the reasons of *Weigall* A.J., and need not be repeated.

Notwithstanding the elaborate argument presented by Mr. *Gregory* for the appellant, I find myself in complete agreement with the reasons given by *Cussen* J. for the conclusion at which he arrived, and no useful purpose would be served by an attempt on my part to express those reasons in other words.

In my opinion the appeal should be dismissed.

ISAACS J. In my opinion, the appeal should be allowed so far as it relates to expunging the appellant's name from the register as the owner of 1,000 shares. There never was any contract between the appellant and the Company to take the shares. I accept all the findings of fact by the learned primary Judge, *Weigall* A.J., and I agree with *Cussen* and *Mann* JJ. that the conclusions he arrived at with respect to the actual agreement on 12th January 1924 are correct.

1. *Vickery's Agreement.*—What were the terms of the actual agreement, as distinguished from a contract creating a legal obligation, that Davison made with Vickery on that day ? That depends upon the resultant effect on the mind of the tribunal that heard it of the oral evidence which with the written testimony and exhibits constituted the evidentiary material. That is what is called " a

(1) (1889) 41 Ch. D. 295. (2) (1900) A.C. 577, at p. 587.

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jury question" (*Moore* v. *Garwood* (1)). There is nothing here to enable us to disturb the finding. The basic finding of *Weigall* A.J. is thus stated:—"The arrangement arrived at on the Saturday night has by both parties been throughout treated as made between Davison and the Company. In substance it was that the Company should buy from Davison the car for £250 then to be paid and that Davison should buy from the Company 1,000 shares paid up to 5s. a share, for which he would then pay the £250 to be received by him for the car. These payments were then actually made. The Company on that night gave to Davison as vendor of the car its cheque for £250, and Davison thereafter endorsed this cheque and gave it to the Company as vendor of the shares. Davison would not have bought the shares if the Company had not bought at the same price what he offered to the Company as his car, and conversely the Company would not have bought the car for £250 if Davison had not bought at the same price the shares offered by the Company." That is to say, the whole transaction was entire and interdependent. *Cussen* J. says:—"I understand the learned Judge to conclude, and I should myself conclude, that there was a completed oral agreement that the Company should buy the car with a certain registered number and pay £250 for it, and that the appellant should buy the shares and hand back the £250 as a present payment in respect of them. In this view the signing of the application is merely an act done in performance of the agreement already complete." *Mann* J. concurs.

I assume, therefore, that the agreement was as definite as stated; and that the application was not in itself intended to be a revocable offer, but, apart from one consideration which is vital, stood substantially in the position of an offer which could not be withdrawn (see per Lord *Herschell* in *Helby* v. *Matthews* (2), and *In re Olympic Fire and General Reinsurance Co.* (3)). If the Company had been a private individual, or if its articles had been so framed as to enable Vickery by office regulation or some process of management to dispose absolutely of shares, the position would have been simple and Davison must, in my opinion, have failed.

(1) (1849) 4 Ex. 681, at p. 690. (2) (1895) A.C. 471, at p. 477.
(3) (1920) 3 Ch. 341.

It was urged for the respondent on this appeal that at the original hearing the authority of Vickery to make the contract on behalf of the Company was not disputed and therefore should now be assumed. For the appellant that was contested, it being maintained that all that was conceded at the hearing was that Vickery agreed as representing the Company, and not that he had authority to do so. I, however, consider the point is immaterial. If Vickery's authority depended on some resolution or other act of the board of directors or on any circumstances within the scope of the articles of association, I might have hesitated, in view of the observations of *Weigall* A.J., to act on the absence of evidence of actual authorization. But that is not the case. The articles are in evidence, and were put in evidence by the Company. It is a question of law (see *Smith* v. *Hull Glass Co.* (1) and *Totterdell* v. *Fareham Blue Brick and Tile Co.* (2)) whether the agreement made by Vickery professing to act for the Company was when made a contract between the Company and Davison and binding them both. Reference to the articles will show that that is not legally possible. Not even a majority resolution of shareholders in general meeting would have given Vickery such authority (*Grant* v. *United Kingdom Switchback Railways Co.* (3)). "The Court is bound to give judgment according to law," said *Jessel* M.R. in *Chilton* v. *Corporation of London* (4). Neither pleadings nor admissions can alter the law. Lord *Loreburn* L.C., in *Gramophone Co.* v. *Magazine Holder Co.* (5), said: "A Court of justice can never be bound to accept as true any fact, *merely* because it is admitted between the parties." The whole House refused to act on an admission. In the case at bar the supposed admission—even assuming it was made—is contrary to law, having regard to the *Companies Act* 1915 and the articles made under it. What in view of that situation is the duty of this Court now that the point has been pressed at the bar? We are, I apprehend, bound, if by nothing else, at least by the express direction of the Privy Council. That we have in two cases, the latter adopting and reaffirming the former. In *Yorkshire Insurance Co.* v. *Craine* (6)

(1) (1849) 8 C.B. 668; (after new trial) (1852) 11 C.B. 897.
(2) (1866) L.R. 1 C.P. 674, at p. 678.
(3) (1888) 40 Ch. D. 135.
(4) (1878) 7 Ch. D. 735, at 740.
(5) (1911) 28 R.P.C. 221, at p. 225.
(6) (1922) 2 A.C. 541, at p. 554; 31 C.L.R. 27, at p. 39.

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Lord *Atkinson*, quoting Lord *Watson's* words, said: "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea." "This," adds Lord *Atkinson*, "is rested upon the general principle upon which a tribunal of last resort exercises in the public interest the jurisdiction conferred upon it." The creation and issue of shares in limited companies is in these days a matter very closely and very extensively affecting the public interest. I do not see how we can escape the duty to consider and give effect to the law as it arises on the point referred to. There are other cases bearing in the same direction, but, if *Craine's Case* (1) is not sufficient as an authority, others would naturally be useless. It may, however, not be out of place, since the facts of this case must make it a precedent on this point, to advert to the principle on which the general rule of binding a party on appeal by his conduct of the case may be supposed to rest. There are only two possible alternatives: either it is to avoid a greater injustice than conceding his rights as they appear on the facts elicited, or it is by way of penalty for not sooner perceiving his rights as they undoubtedly exist. In my opinion the former is the true basis. In *Sydney Harbour Trust Commissioners* v. *Wailes* (2) *O'Connor* J. said:—"The question always is whether, if the point had been taken at the trial, the defect could have been remedied. This point, if well founded, must have been fatal." That is exactly the position here. If therefore the appellant be held bound, as is suggested, it must be on the ground that the true principle underlying the relevant cases is that of penalty for not perceiving earlier an argument in law.

Vickery styles himself "managing director." The articles do not provide for a managing director (*Boschoek Pty. Co.* v. *Fuke* (3)). I will assume that he had authority to buy the motor-car. I will assume—though apparently this does violence to art. 74 (i)—that he had power to draw the cheque to pay for the car. But, even so, I can find no warrant for assuming his authority to bind the Company

(1) (1922) 2 A.C. 541; 31 C.L.R. 27. (2) (1908) 5 C.L.R. 879, at p. 881.
(3) (1906) 1 Ch. 148, at p. 159.

to part with shares, which means introducing new partners into the business. That power is confided to the directors as a body, and the discretion of the board or a quorum of the directors cannot be delegated to one director in the absence of a provision in the articles permitting that to be done. There is no such provision. *In re Leeds Banking Co.—Howard's Case* (1) and *In re County Palatine Loan and Discount Co.—Cartmell's Case* (2) are among the relevant authorities. The result of that is that there was no contract with the Company on Saturday, 12th January 1924, notwithstanding the distinct and absolute terms of the agreement itself and notwithstanding Vickery purported to act for the Company. If the Company had chosen to disregard the transaction, there never would have arisen any obligation of Davison to the Company or of the Company to Davison. The car would have remained the property of Davison, assuming it had been his own and the money of the Company had not in fact passed to him by the symbolical payment. Everyone remained unaltered in actual position. But if the Company, *rebus sic stantibus*, chose to adopt the transaction by its agents duly authorized *in that behalf* and to notify Davison of its adoption, then, on the principle of ratification, there would have arisen a contractual obligation between them. Although arising for the first time upon ratification, it would have related back to the first moment the agreement existed.

2. *Adoption by Company.*—On Monday morning, 14th January, a meeting of directors is said to have taken place and the transaction to have been adopted by the directors duly exercising their authority. Exception is taken to that meeting on two grounds. First, it is said that Morey, the secretary, was not properly appointed. The defect alleged is that he was appointed proxy instead of substitute. There is a possible difference between a proxy and a substitute in such a case. It is not necessary to determine this point, but it may be useful to say that some assistance in comparing a proxy with a substitute may be had by considering the two positions as they arose in the old Ecclesiastical Court. The antiquity of the distinction between the two positions as well as its nature is seen by reference to *Consett's Spiritual Practice*, at pp. 29-31,

(1) (1866) L.R. 1 Ch. 561. (2) (1874) L.R. 9 Ch. 691.

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a work published in 1708. *Rogers, Ecclesiastical Law* (1849). pp. 768 and 771, repeats this. Forms are given in the *Clerk's Instructor* (1740), see particularly the form of substitution at p. 102. But conceding, though certainly without deciding, that there was a substantial defect, there can be no doubt that it was not considered a defect when the meeting dealt with the business on the 14th. Vickery and Morey honestly thought that all was done that was necessary to enable Morey to act in place of Peacock. The case is therefore met by art. 80. The other reason for challenging the allotment on the 14th is that a third director, Hall, had not had notice of the meeting. The evidence impeaching the adoption on account of Hall is not so satisfactory to me that I would disturb the allotment if that were the only point in contest.

In those circumstances what was done at the meeting must, I think, be accepted in this case as so far validly done. All that was then needed, as matters stood, to create the *obligatio* between Davison and the Company (assuming the Company had in law ratified the transaction) was notice to him that the Company had adopted the agreement that Vickery had purported to make on its behalf (see by analogy *Re Saloon Steam Packet Co.*; *Ex parte Fletcher* (1); *In re National Savings Bank Association—Hebb's Case* (2); *In re Richmond Hill Hotel Co.—Pellatt's Case* (3)).

This is a convenient point at which to say a word as to the register. From the loose leaf exhibit of the register the date 14th January 1925 is entered as the date when Davison became a member in respect of 1,000 shares. But as to the date when the entry was actually made, it does not appear, and the entry is admittedly faulty inasmuch as the £250 is entered under the call account. No evidence was given as to when the entry was made. The minutes of the meeting of 14th January show that the meeting rose after transacting business that did not include any direction to enter Davison's name on the register. Morey's proxy was limited to that meeting. Consequently the Company did not even purport on that day to authorize the entry on the register. Even if it had been physically possible to enter the name on 14th January, it would

(1) (1867) 37 L.J. Ch. 49, at p. 50. (2) (1867) L.R. 4 Eq. 9.
(3) (1867) L.R. 2 Ch. 527.

have been unauthorized by the Company. But it was physically impossible to make the entry on that day if the requirements of the statute were obeyed, and this we should presume. Sec. 37 of the *Companies Act* 1915 directs that the register of members "shall be kept at the registered office of the company," and there generally open to inspection. The registered office is, and it was on 14th January 1925, in Melbourne. Besides, even the minute-book was apparently not in Wagga. The minutes of 14th January are typed on different paper afterwards inserted in the minute-book and paged 28a. The entry in the register was obviously made on some later date; and we may therefore for present purposes confine our attention to the effect of the adoption of the agreement by allotment in the director's bedroom.

3. *Retractation.*—Between the adoption in Vickery's bedroom by him and Morey—a tacit adoption so far as Davison was concerned—and its notification to him on behalf of the Company, a very important event took place which, in my opinion, entirely changed the situation. It appears that the car really belonged to Davison's mother and, though he believed he was able to sell it, she refused to sanction or carry out the sale. This took away the known basis of the transaction, and accordingly Davison hastened early on the morning of the 14th to inform Vickery, as representing the Company, of the difficulty. The directors' meeting, however, had already been held with a most commendable business promptitude as early as 9.15 a.m. On seeing Vickery, Davison purported in fact and very definitely to retract, and to retire from the Saturday night agreement *in toto*.

Retractation in fact was not controverted before us. The majority in the Full Court did not deal with retractation on the 14th as their Honors held there was a concluded contract on the 12th. *Irvine* C.J. thought there was an effective withdrawal on the 14th. *Weigall* A.J. considered the attempted withdrawal ineffective for reasons he gives. But the learned primary Judge, in very carefully stating the facts as he found them on the evidence, makes it too plain for discussion that there was in fact a retractation *in toto*. What Davison did and said in this regard is thus stated by *Weigall* A.J.: "As early as possible therefore on Monday morning he went to

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Vickery and explained his position, and intimated that he could not go on with the transaction of Saturday night, and asked that the whole transaction should be cancelled." Davison in his affidavit says he told Vickery "that as my mother would not go on I was not in a financial position to do so and that the whole matter should be dropped." In his oral evidence in cross-examination he said:—"I told Vickery I could not go on and that it would have to be cancelled. I said the whole matter would have to be dropped." Morey admits in par. 7 of his affidavit that to him Davison said "the contract would have to be annulled." Vickery in his cross-examination says: "We would not have bought the car if he would not have bought the shares, and conversely he would not have bought the shares if we would not have bought the car." *Weigall* A.J. in his judgment says: "I have accepted as honest the evidence by or for Davison, but as already indicated some of the opposing evidence I entirely distrust." Having regard to the finding of the learned primary Judge, to his appreciation of the witnesses, and to the evidence itself in relation to the circumstances, it is plain why no contest was raised before us as to the fact of retractation. Vickery knew that the basis of the bargain, as he states it, had disappeared—that Davison, as *Mellish* L.J. in *Dickinson* v. *Dodds* (1) phrased it, had "not remained in the same mind" to contract. If any vagueness be found in Davison's intimation —and I do not find it vague—it was entirely owing to Vickery leading Davison to think that he (Vickery) had been already authorized on Saturday to conclude a bargain between Davison and the Company. Vickery, however, as representing the Company on Monday—for if he represented the Company to notify the allotment he represented it also to receive the withdrawal—knew perfectly well from what Davison said that he insisted so far as he could on cancellation. After that any step by the Company to notify adoption of Vickery's agreement was useless unless the case is to be governed by the case of *Bolton Partners* v. *Lambert* (2). It can only be so governed if the *Company* validly ratified Vickery's act in making the agreement on its behalf. Mr. *Dixon*, to establish this, relied not merely on the events of the 14th but

(1) (1876) 2 Ch. D. 463, at p. 474. (2) (1889) 41 Ch. D. 295.

also on subsequent acts on behalf of the Company, such as the entry on the register, the returns to the Registrar-General and the correspondence. I do not think the matters subsequent to 14th January carry the matter any further, because they are not any exercise of discretion or more than consequential on the allotment.

I shall in the first place assume that the allotment on 14th January was also in law an attempt by the Company itself to ratify the Vickery agreement as well as an allotment of shares. Subsequently I shall state my views on the basis that the articles are inconsistent with the assumption I now deal with.

4. *Bolton Partners v. Lambert* (1).—Mr. *Dixon* naturally relied on the decision in that case. In the circumstances I have first to consider how far I am bound to yield an unquestioning acceptance to that decision. The reasons suggested for that course are (1) the observations of the Privy Council in *Trimble* v. *Hill* (2) and (2) the time the decision has stood in England unreversed. I am unable to see in either reason anything to weaken my ordinary constitutional duty to declare the law as I believe it to be, subject, of course, to the contrary opinion of this Court and then the Privy Council, and also, I will add, for reasons I have stated in *Webb* v. *Federal Commissioner of Taxation* (3), the House of Lords.

In some cases the suggestion in *Trimble* v. *Hill* (2) must naturally have great weight; but this is not one of them. Having regard to the status of this Court and its functions in relation to the Australian Courts referred to in the suggestion in *Trimble* v. *Hill*, as well as the features of the particular question now involved, I have no hesitation in believing it to be my judicial duty to form and declare my own opinion on the point. Moreover, in passing, I would add that, while fully conscious, as already stated in *Webb's Case* (4), of the importance of securing uniformity of interpretation in the Empire, that purpose must not be pressed too far. Forty-five years have passed since *Trimble* v. *Hill*, and the relative status of the highest Dominion Courts as well as of the Dominions themselves

(1) (1889) 41 Ch. D. 295.
(2) (1879) 5 App. Cas. 342, at p. 344.
(3) (1922) 30 C.L.R. 450, at pp. 469, 470.
(4) (1922) 30 C.L.R., at pp. 469, 470.

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is not the same. Inter-Imperial trade and general communications have become more complex. Logically, on the ground of uniformity, there is as much reason for following a decision of the Supreme Court of Canada or of New Zealand, of the Irish Free State or in some cases of South Africa—all of which like our own are under the corrective power of the Privy Council, as for singling out the one Appellate Court of England subject to appeal to the House of Lords. Each case must, in my opinion, be dealt with on its own merits, and in that process every decision of an English Court, original or appellate, is sure to receive our traditional and unfeigned respect. But, short of emanation from a supreme source, every potion should at least be tasted and appraised before being swallowed.

It is proper and, in view of the opinions expressed during the argument, only decorous on my part to state in the first instance what I regard as the features of the particular question. It is patently true that *Bolton Partners* v. *Lambert* (1) was in 1889 determined by three most distinguished lawyers, *Cotton* L.J., *Lindley* L.J. and *Lopes* L.J. It was treated as a case of first impression, though the *Mayor of Kidderminster* v. *Hardwick* (2) had already decided the point the other way. It decided that, where an agreement was made between A of the one part and B, assuming without authority to act for C, of the other part, there was in law a *contract* between A and C subject only to recognition by C of B's unauthorized agency, and therefore an intermediate withdrawal by A was ineffectual. In February 1890, in *Managers of Metropolitan Asylums Board* v. *Kingham* (3), *Fry* L.J., sitting as a primary Judge, said: "I am bound by that decision." The learned Lord Justice would have felt constrained to follow it if the facts were appropriate, notwithstanding his own personal opinion to the contrary already expressed in the 3rd edition of his work on *Specific Performance* at pp. 711-713. But he did not act upon it, finding *means to distinguish it.* In May 1890 the Court of Appeal (*Cotton* L.J., *Lindley* L.J. and *Bowen* L.J.) dealt with the case of *In re Portuguese Consolidated Copper Mines Ltd* (4). But *Cotton* L.J. thought there never was any withdrawal until after competent ratification, and

(1) (1889) 41 Ch. D. 295.
(2) (1873) L.R. 9 Ex. 13.
(3) (1890) 6 T.L.R. 217, at p. 218.
(4) (1890) 45 Ch. D. 16.

referred to *Bolton Partners* v. *Lambert* (1) only to show the relation back of the ratification. *Lindley* L.J. certainly says the case is governed by *Bolton Partners* v. *Lambert*, but, as he also thought there was no repudiation, he evidently applied that case to another point. *Bowen* L.J. also said there was no repudiation. But it is most important to observe that *Bowen* L.J., though he does not mention *Bolton Partners* v. *Lambert*, says something directly opposed to it in this respect. He says (2): "*Original contract, from my point of view, there was none, they not having been authorized agents to make it.*" I therefore do not regard the *Portuguese Mines Case* (3) as a reaffirmation of the relevant point in *Bolton Partners* v. *Lambert*. In 1896, in *Dibbins* v. *Dibbins* (4), *Bolton's Case* was cited and distinguished, the present point not arising. In 1899, in *In re Tiedemann and Ledermann Frères* (5), the point did arise, and the Divisional Court (*Darling* and *Channell* JJ.), bound of course by the Court of Appeal, followed *Bolton's Case*. In 1895 it was adversely criticized by *Chatterton* V.C. in *Athy Guardians* v. *Murphy* (6). In 1898 there had arisen the case of *Fleming* v. *Bank of New Zealand* (7). It is sufficient to say that *Bolton's Case* was relied on. *Pennefather* J., as primary Judge, distinguished it on the facts, but said that if it were exactly in point he would hold himself bound by it in spite of the hostile criticism in *Fry on Specific Performance*. In the Court of Appeal before three Judges, one of the learned Judges, *Denniston* J., in a dissenting judgment, doubted whether *Bolton's Case* could be distinguished, and said he should hesitate very much to disregard the decision in that case. The other Judges did not mention it. The matter went to the Privy Council (8). *Bolton Partners* v. *Lambert* and subsequent references were discussed. The question was therefore directly brought under the notice of the Board. Lord *Lindley*, one of the Court that decided *Bolton's Case* twelve years before, after stating the reasons for allowing the appeal, said (9):—"The above view of the case renders it unnecessary to consider any question of ratification, or to dwell on the

(1) (1889) 41 Ch. D. 295.
(2) (1890) 45 Ch. D., at p. 34.
(3) (1890) 45 Ch. D. 16.
(4) (1896) 2 Ch. 348.
(5) (1899) 2 Q.B. 66.
(6) (1896) 1 I.R. 65, at p. 74.
(7) (1898) 18 N.Z.L.R. 1.
(8) (1900) A.C. 577.
(9) (1900) A.C., at p. 587.

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decision of *Bolton Partners* v. *Lambert* (1), and its application to the facts of this case. The decision referred to presents difficulties; and their Lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so." In my opinion, those observations, especially from one of the authors of the decision, shake it severely, and leave the case entirely open for any superior Court of the Empire, subject to the revision of the Privy Council, to consider the matter for itself. I cannot think it is required of this Court at all events that it should blindly follow any decision of an English Court of Appeal that it believes to be wrong, and more particularly a decision that the Privy Council itself has seriously doubted. This Court has heretofore not adopted that course. In *Brown* v. *Holloway* (2) it did not hesitate to express an opinion contrary to repeated decisions of the English Court of Appeal on the subject of a husband's liability for a wife's torts. That independent opinion of this Court was not considered unimportant by the House of Lords in *Edwards* v. *Porter* (3), even although the majority of the House differed from it. In *Brown* v. *Holloway* the Court made the position very plain. *Griffith* C.J. said (4):—"This Court is not formally bound by the decision of the Court of Appeal in *Earle* v. *Kingscote* (5), although the learned Chief Justice was no doubt right in following it. And although it is, I think, expedient that the High Court should follow decisions of the Court of Appeal under ordinary circumstances, I do not think that it ought to do so when the decision in question has been doubted and regarded as open to question by the Court itself, and when it is founded on reasoning which does not commend itself to us. If, therefore, it were necessary to rely on this point I should be prepared to decline to follow the cases of *Seroka* v. *Kattenburg* (6) and *Earle* v. *Kingscote*." *O'Connor* J. said (7):—"There are therefore now standing two decisions of the English Court of Appeal against the view of the statute which Mr. *Graham* has put forward, a view which after full consideration of the matter I believe to be right. The question then arises to what extent, if at all, is this Court obliged under these circumstances

(1) (1889) 41 Ch. D. 295.
(2) (1909) 10 C.L.R. 89.
(3) (1925) A.C. 1.
(4) (1909) 10 C.L.R., at p. 98.
(5) (1900) 2 Ch. 585.
(6) (1886) 17 Q.B.D. 177.
(7) (1909) 10 C.L.R., at p. 102.

to follow the decisions of the English Court of Appeal? In matters not relating to the Constitution this Court is, no doubt, bound in judicial courtesy by the decisions of the House of Lords, the tribunal of the highest authority in the British Empire. The Judicial Committee of the Privy Council is by Imperial statute placed, as to matters within its jurisdiction, in effect at the head of the judicial system of every British possession outside the United Kingdom, and as to all matters within its jurisdiction we are bound by its decisions. Apart from those tribunals there is no Court in the Empire whose decisions we are on any ground obliged to follow. The English Court of Appeal stands to this Court in much the same position as any other tribunal where British law is administered by Judges of high attainments, great learning and wide experience. The judgment of such a tribunal when it expresses the considered opinion of its members must always carry very great weight in the estimation of this as of every other Court in the Empire." For myself I was content with what had been said, and acted upon it. I entirely agree with the observations of *Griffith* C.J. and *O'Connor* J.

Since 1900 the instability of this doctrine of *Bolton Partners* v. *Lambert* (1) has been recognized, as by *Channell* J. in *In re Gloucester Municipal Election Petition—Ford* v. *Newth* (2), and by Lord *Blanesburgh* (then *Younger* L.J.) in *Reynolds* v. *Atherton* (3). As to the accuracy of the decision itself, the force it receives from the individual eminence of the members of the Court is seriously off-set by the hesitation shown in later references to accept it. I may give instances which are in addition to those already mentioned, which include the powerful monograph of *Fry* L.J. in his work on *Specific Performance*. They are: *Lindley on Companies* (1902), 6th ed., at p. 238; *Pollock on Contracts* (1921), 9th ed., at p. 104; *Palmer's Company Precedents* (1922), vol. I., at p. 716 (where it is said of the decision on this point, "This is a startling doctrine"); *Gore-Browne's Handbook on Companies* (1922), 35th ed., at p. 176, and *Bowstead on Agency*, 7th ed., at p. 56. The most important reference, however, is found in the transcribed notes of the argument before the

(1) (1889) 41 Ch. D. 295. (2) (1901) 1 K.B. 683, at pp. 692, 693.
(3) (1921) 125 L.T. 690, at p. 698.

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Judicial Committee in what is known as the *Skin Wool Case* (1). At p. 38 of the notes of the last day's proceedings (7th February 1924) is reported the argument of learned counsel as to when the Commonwealth Government did adopt the decision of the Central Wool Committee. Then this passage appears: "Viscount *Cave*:—'In *Bolton Partners* v. *Lambert* (2) they could adopt it almost at any time. It is a startling decision but that is the decision you cited.' Mr. *Geoffrey Laurence*:—'That is so. That would only apply of course to a case where the agent had purported to act on behalf of the principal.' Viscount *Cave*: 'Yes.'"

Clearly the matter may without temerity be examined on principle. Before doing so, I may quote a few words of an American Judge, *Cardozo* J., speaking for the Court of Appeals of the State of New York. In *Catholic Society* v. *Oussani* (3), in speaking of ratification after withdrawal, he says: "The case of *Bolton Partners* v. *Lambert* (2), which holds that ratification in such cases is possible, is inconsistent with many cases in our own country." The basic assumption on which the novel and special doctrine of *Bolton Partners* v. *Lambert* rests is that a person may by the act of another become party to a bilateral contract without his authority or knowledge and possibly contrary to his express direction. The assumption connotes that there is no instant binding effect on the supposed principal and yet that the other party is instantly bound. This is an instance where *apices juris* may be said to be *jura*. "It is an excellent definition of a contract," said Lord *Kinnear* in *Jackson* v. *Broatch* (4), "that it is an agreement which produces an obligation." You cannot have a contract which at the same time is no contract. What was the "obligation" as between Lambert and the Bolton company at the moment when Scratchley accepted the offer? It is hard to examine the position from any legal standpoint without repeating the criticisms of Sir *Edward Fry* in his Additional Note A. At the moment of Scratchley's acceptance—seeing that his act was unauthorized—the company was an utter stranger to the transaction (see per *Rolfe* B. in *Bird* v. *Brown* (5)). It had received no offer, it had given no reply, it

(1) (1924) 34 C.L.R. 269.
(2) (1889) 41 Ch. D. 295.
(3) (1915) 215 N.Y. 1, at p. 6.
(4) (1900) 37 S.L.R. 707, at p 714.
(5) (1850) 4 Ex. 786, at p. 800.

neither gave nor received consideration, it had not established any nexus with Lambert. Where was the bilateral contract? Even in the case of a direct communication between A and B, an arrangement however specific between them personally which merely leaves one of them open to buy or sell does not constitute a contract. Only when the election is made and the gap closed can there be said to be a contract. And then, only if thereby the conjoint wills concur. Lord *Herschell* L.C., in *Helby* v. *Matthews* (1), said: "If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it."

The basic assumption of the case cannot, therefore, in my opinion, be supported. But once the act of the professing agent is adopted, the effect of adopting it is expressed in the maxim *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. On the assumption that the Company has itself purported to ratify, the following propositions are all that are necessary in this case:—(1) The general rule is that no person can become a party to a bilateral contract unless he enters into it personally or by an authorized agent. (2) An exception is recognized where a person ratifies an agreement made by another as for him but without his antecedent authority. (3) On ratification, and not before, the agreement is as a general rule deemed by a fiction to have been made by his antecedent authority to the person actually making it. (4) Fictions, however, are not arbitrary. They are not allowed to work an injury; their operation is to prevent a mischief or to remedy an inconvenience that might result from the general rule of law. (5) Where, therefore, an injury would be caused by the operation of the fiction, it cannot be invoked to alter the general course of the law. (6) An injury would be caused in this case certainly by the known basis of the agreement having disappeared followed by the withdrawal of Davison from the agreement.

For propositions 1, 2 and 3, we need go no further than to refer to *Keighley Maxsted & Co.* v. *Durant* (2) and particularly the judgment of Lord *Macnaghten*, and also to quote from *Irvine* v. *Union Bank of Australia* (3) the words "a ratification is in law treated as equivalent to a previous authority." For proposition 4,

(1) (1895) A.C., at p. 476. (2) (1901) A.C. 240.
(3) (1877) 2 App. Cas. 366, at p. 374.

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see *Blackstone's Commentaries*, vol. III., p. 43. For propositions 5 and 6 there are numerous cases, such as *Donelly* v. *Popham* (1), *Bird* v. *Brown* (2) (injury to third persons), *Walter* v. *James* (3) (injury to the other party who had by agreement with the professing agent cancelled the agreement and restored the previous position), *Phosphate of Lime Co.* v. *Green* (4) (injury to ratifier himself), and most notably *Mayor of Kidderminster* v. *Hardwick* (5) (injury to the other party who had done before ratification substantially what Davison did in this case). In *Hardwick's Case* the defendant, as appears by p. 16 of the report, wrote to the town clerk saying he was unable to perform the contract, and withdrawing from it and asking for a return of the money already paid. That is what *Kelly* C.B. (6) terms "the breach," and after that, says the learned Chief Baron, the assumed ratification came too late. To deny the right of withdrawal from a non-obligatory situation would, according to that decision, have been an injury preventing the application of the fiction. This is in direct conflict with *Bolton Partners* v. *Lambert* (7), though, as *Chatterton* V.C. observes in *Athy Guardians* v. *Murphy* (8), it was not cited. Accepting, then, for the moment the assumption stated, the ratification was futile. But the assumption itself is, in my opinion, erroneous for a reason already made apparent. That is, the fiction is not that the principal personally made the original agreement, but that the person actually making it was himself duly authorized.

The difficulty in this class of cases is, I venture to think, caused by a mistaken use of terms. It is very commonly said that ratification consists in the adoption of a contract or a tort, and that such adoption is equivalent to a prior authority or command to make the contract or commit the act which is, but for the adoption, a tort. No doubt, in a number, perhaps the majority, of cases that process of reasoning leads to the correct conclusion. But as the legal test it is erroneous, and in many instances, of which this is one and *Bolton Partners* v. *Lambert* (7) is another, it leads to a wrong result. It leads to a wrong result because it treats the principal

(1) (1807) 1 Taunt. 1.
(2) (1850) 4 Ex. 786.
(3) (1871) L.R. 6 Ex. 124.
(4) (1871) L.R. 7 C.P. 43, at pp. 56, 57.
(5) (1873) L.R. 9 Ex. 13.
(6) (1873) L.R. 9 Ex., at p. 22.
(7) (1889) 41 Ch. D. 295.
(8) (1896) 1 I.R. 65.

(as I shall call him) as having in law personally made the bargain or committed the otherwise tortious act. Three examples will illustrate the error. First, suppose A (principal) purchases B's horse for £10, delivery and payment in a week. Next day B sells to C. C gets no title. Next, suppose X authorized by A makes the same bargain for A with B, and B similarly sells to C. C again gets no title. Thirdly, suppose X, unauthorized by A, makes the same bargain for A with B, and B, before ratification by A, sells to C. C gets and retains title, even though A subsequently ratifies. That demonstrates that A's ratification is not regarded precisely as if A had personally made the bargain. It is, of course, trite law that ratification by a principal constitutes the person who professed to be his agent to be *pro hac vice* actually in law his agent and retrospectively invests him with authority *ab ante* to act for the ratifying principal. See per Lord *Sumner* in *Union Bank of Australia Ltd.* v. *McClintock* (1). *Parke* B., in *Buron* v. *Denman* (2), said: "If an act be done by a person as agent, it is in general immaterial whether the authority be given prior or subsequent to the act." Why, then, the distinction in the instances supposed? It is especially necessary to answer this question, having regard to the multifarious parts played by incorporated companies in our daily life. The root of the matter is that, whether it be in contract or in tort, *ratification means not the adoption of the transaction itself but merely the adoption of the relationship of agency assumed by the professing agent in the transaction.* That adoption is taken as a fact actual or imputed. The result of it, however, when once established is a matter of law and varies according to the circumstances, including those existing at the time the fact occurs. If the principal himself is said to effect the adoption, two questions must always be answered before it can be said that the ratification is effectual, namely, (1) Has he in fact adopted the relationship of agency as assumed by his professing agent? and (2) In the circumstances will the law regard that adoption as relating back to the origination of the transaction? If the ratification is said to be effected, not by the principal personally, but by some agent of his, three questions must be answered, namely:—(1) Was the alleged ratifying agent authorized

(1) (1922) 1 A.C. 240, at p. 248. (2) (1848) 2 Ex. 167, at p. 188.

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to adopt on behalf of the principal the relationship of agency as assumed in the original transaction ? (2) Has the alleged ratifying agent adopted that relationship ? (3) In the circumstances will the law regard that adoption as relating back to the origination of the transaction ? These questions crystallize the governing principles upon which the cases of authority on this special branch of the law have been decided. It is easy to deviate into terminology that may mislead. For instance, when it is said that a principal ratifies when he adopts the act of his professing agent, it is necessary to define the word "act." Frequently it is taken that it means the entire transaction conducted by the professing agent. That is erroneous. If, however, it is limited to the act of assumption of agency and not extended to what is done as in pursuance of that assumed authority, leaving that to be determined on settled legal principles, it is right enough.

I apply those considerations to the facts of this case. The question, then, is: Could the directors—themselves agents merely—adopt as for the Company and as a fact, the relationship of agency as between Vickery and the Company which he had assumed, and thereby as a legal consequence fictionally clothe Vickery in the circumstances with authority *ab initio* to bind the Company ? For valid ratification of an unauthorized act must be an adoption by the principal, that is, either personally or by an agent or agents duly authorized *for that purpose*. The *Portuguese Mines Case* (1) is valuable for this. *Bowen* L.J. (2) puts the matter most clearly. As to ratification by an agent, "you must look to see whether the agent is clothed with authority to do *the act he is doing*, not whether he would have been clothed with authority to do *some other act*; and, the only act which we are driven to consider in the last instance being an act of ratification, the question we have to ask ourselves is whether the person who purported to ratify on behalf of the company had really *authority to ratify*." As the principal here is an incorporated company it must be a question of the authority of the two directors, Vickery and Morey, at Wagga on 14th January 1925 to ratify the assumption of authority by Vickery on the 12th, supposing always that the initial question "Did they ratify that act ?" is answered

(1) (1890) 45 Ch. D. 16.

(2) (1890) 45 Ch. D., at p. 37.

in the affirmative. If they did not ratify Vickery's assumption of authority to make the agreement of the 12th and then simply act on it as being *bound* to allot the shares in accordance with the agreement, it is clear Davison's withdrawal was a fatal interposition between the application and the allotment. The case of the Company, however, must rest on the finding that Vickery purported to bind, if he did not actually bind, the Company to allot the shares. Dealing with the matter on that footing, ratification necessarily means the adoption in the way indicated of *his bargain*, not the making of a new one (*Hunter* v. *Parker* (1)). It means the abandonment of the directors' duty of discretion to allot shares on the mere footing of an application which would enable them to decline altogether or to accede in part. It is the act of Vickery which, if validly ratified, would become the Company's act *ab initio* (*Seignior and Wolmer's Case* (2)), and would be treated as the Company's contract at the time Vickery agreed. That point it is desirable to make utterly clear and emphatic. *Bolton Partners* v. *Lambert* (3) assumes, and so far rightly assumes, that it is the act of the professing agent which, assuming subsequent ratification, binds the principal; not that upon ratification the act of the professing agent disappears, and the law assumes that the principal himself personally made the contract. If the latter were the legal outcome, the maxim quoted would be entirely beside the question. But the whole matter is part of the law of agency, and authority at the time of the contract must appear either actually or fictionally. The fiction invests the professing agent with the necessary authority, and the principal who ratifies may ratify either with full knowledge of all the circumstances or with the intention to ratify without inquiry into the circumstances but to rest content with the discretion and judgment of the person assuming to act for him. In either event the principal is bound by his now duly authorized agent. But where was the authority of the two directors at Wagga on 14th January to stand in the place of the Company for the purpose of thus constituting Vickery the Company's agent as on the 12th to sell the shares as on that date ? That is to say, what article enabled the two directors

(1) (1840) 7 M. & W. 322.
(2) (1624) God. 360.
(3) (1889) 41 Ch. D. 295.

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to depart from their trustee obligation of exercising their own discretion unfettered on 14th January as to the shares and to *authorize Vickery* by subsequent approval to pledge the Company by the bargain he had agreed to to issue 1,000 shares neither more nor less ? Applying the test of *Bowen* L.J., here the answer must, in my opinion, be adverse to the validity of the ratification. I am aware there are to be found expressions that, divorced from their surroundings, appear to give wider power to directors and to enable them, merely because they themselves have power to sell, to ratify the unauthorized sale by a stranger. All such expressions—and they are very few—are, I believe, used with reference to directors who were directly empowered by statute or articles either to do generally whatever the Company could do, or to give in advance to the person professing to act for the Company the authority to do what he in fact did without such authorization. Here, if we regard merely the general character of the directors, we know it was representative and fiduciary, and the creation and issue of shares and the consequent introduction of new partners and proprietors is far beyond ordinary routine and management, and not the subject of delegation.

If, again, we have regard to the actual authority the Company marked out and granted to the directors, we find neither explicitly not implicitly any power to take up and ratify such an act by others. The directors could not give Vickery indirectly the authority they were unable to confer directly. It might have been a totally different matter if the directors, instead of blindly accepting the Vickery agreement as a *fait accompli*, which is the main contention of the Company, had treated the matter as entirely open and had considered it for themselves. But then the door would be left open for retractation, which would be equally fatal to the Company's case. The respondent's main position is the true one in fact, as I conceive, but it needs for validity the directors' power to *ratify Vickery's assumption of authority.*

We have the ruling of the Privy Council in *Irvine* v. *Union Bank of Australia* (1) that "As a general rule a person, or body of persons, not competent to authorize an act, cannot give it validity by ratifying it." In the *Portuguese Mines Case* (2), as appears by the report of

(1) (1877) 2 App. Cas., at p. 374.

(2) (1890) 45 Ch. D. 16.

the earlier case (1), there was an article 101 giving power to the directors to delegate any of their powers to two directors "as they may think fit." What they had power to do in advance, they might, as was held, ratify. There is no such power here. The register should, therefore, in my opinion, be rectified. As, however, no money ever really passed, the cheque merely playing the part of the Wall in "Midsummer Night's Dream," the claim for refund cannot be sustained.

HIGGINS J. I am of opinion that the conclusion of the learned Chief Justice of Victoria was right, and that this appeal should be allowed.

The applicant seeks to have the register of shareholders rectified by expunging his name as the holder of 1,000 shares, "on the ground that no agreement to take the said shares was ever concluded by him with the Company." If there was no such agreement *with the Company*, the order must be made; for, although the name of the applicant is entered on the register of members, the other condition of membership is lacking, if he never agreed to become a member (Victorian *Companies Act*, sec. 31 (2)).

There is no doubt that on Saturday, 12th January 1924, Vickery, one of the directors, suggested to Davison, who had come to sell a motor-car, that he (Davison) should take 1,000 shares in the Company, and that Davison was willing, and signed the form of application for shares which Vickery handed him; but Vickery had no power under the Company's articles to bind the Company to issue the shares to Davison. The binding of the Company to issue shares was left, as it had to be left, to a meeting of directors; and, assuming that a meeting of directors on Monday, 14th January, resolved to allot the shares in pursuance of the application, Davison, before he received notice of any allotment, withdrew his offer.

The judgment of the learned primary Judge is so lucid (except in one respect) that I find no difficulty in putting finger on the point where I must differ from him. The judgment says that "as a result of the discussion, it was, *at this interview*" (12th January), "*agreed* that the Company would buy from Davison the motor-car for £250

(1) (1889) 42 Ch. D., at p. 162.

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then to be paid, and that Davison should take 1,000 £1 shares in the Company, paid up to 5s., for which he should at the same time pay 5s. per share, i.e. £250." It appears to me that there was no such agreement at that interview *made by the Company*, as Vickery had no power to make such an agreement. This is my conclusion as a matter of law based on the articles of the Company. These are in evidence. On the question of fact—did Vickery purport to agree for the Company ?—it may not be necessary for me to express an opinion. But I feel constrained to say that to find as a fact that Vickery did purport to agree for the Company would be in direct conflict with the only document that issued from the interview, the application for shares which Vickery got Davison to sign for 1,000 shares or any less number that the Company might allot. The written document is surely the best evidence ; and even if we were at liberty to balance against it the verbal evidence of the interview, it is surprising to find how slender is the evidence that Vickery purported to conclude a contract for the Company to issue 1,000 shares to Davison. Taking the statement of Vickery as to the interview, he merely describes Davison's attempt to sell a second-hand motor-car, and adds :—" We suggested to Davison that he should take 1,000 ordinary shares in the said Company and told him that the Company would buy the car for £250. Davison agreed to this, and seemed pleased with the arrangements, and a cheque was then drawn by me on behalf of the Company for £250 and paid to Davison. Subsequently Davison endorsed this cheque in favour of the Company in consideration of the application and allotment moneys payable." It is obvious that if the Company refused to allot 1,000 shares there would have to be a readjustment as to the cheque.

But, subject to this comment as to the facts of the interview, I propose to accept the material facts, so far as disputed, as found by *Weigall* A.J., who saw the witnesses (he accepted as honest the evidence given by or for Davison, but " entirely distrusted " some of the Company's evidence) :—(1) On 12th January Davison, at Wagga, asked Vickery, a director of the Company, to buy a motor-car. Vickery consented, at the price of £250 (there is nothing to show even that the Company had given him the power to make this purchase).

At Vickery's suggestion, Davison signed an application for 1,000 shares (or any less number that the Company might allot), and handed to Vickery a cheque for £250, which Vickery (as on behalf of the Company) gave for the car, as in payment of 5s. per share for 1,000 shares. (2) On Monday, 14th January, at about 9.15 a.m., in Vickery's bedroom in a hotel, Vickery and one Morey, secretary of the Company, held what they call a directors' meeting, and they resolved (*inter alia*) that the application for shares be approved, and the 1,000 shares allotted. [I propose to deal afterwards with Morey's position as proxy for another director, one Peacock.] (3) Just after the meeting Davison called on Vickery, told him that his (Davison's) mother was interested in the car, that he could not get her to concur in the sale or help him to carry out the transaction of Saturday, that he was not able to carry it out without her aid, and that therefore the whole transaction would have to be "cancelled." Vickery said that the shares had been allotted, and that he had no power to "cancel" on behalf of the Company, but that he would do what he could for Davison in Melbourne (where the head office is). (4) No intimation of allotment was made by Vickery until Davison had expressed his desire to cancel. (5) No notice of allotment was sent to Davison at any time. (6) Davison at once called on Cunningham, his solicitor, who asked Vickery that the whole matter should be dropped; and on 18th January the solicitor wrote to the Company a letter, recounting the facts, and saying "We have therefore to inform you on behalf of Mr. Davison that he hereby *withdraws his application* for shares in your Company." I need not set out the subsequent correspondence.

It is certain, I think, that Davison did not grasp the real legal position, and that he used the word "cancel" as to the transaction, instead of "withdraw the offer." Legally, at any time before the allotment was communicated to Davison, he could withdraw his offer (*Pellatt's Case* (1); *In re Imperial Land Co. of Marseilles—Harris's Case* (2); *Brogden* v. *Metropolitan Railway Co.* (3)). In my opinion, what Davison told Vickery on the morning of the 14th was a sufficient withdrawal, and in good time. For, before the

(1) (1867) L.R. 2 Ch., at p. 535. (2) (1872) L.R. 7 Ch. 587.
(3) (1877) 2 App. Cas. 692.

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acceptance by the directors had been communicated to Davison, Davison showed clearly that his will to take the shares did not continue. To constitute a contract, there must be an offer continuing up to the time of the acceptance—that is to say, of the allotment communicated; and, as the learned Judge says, if there was a withdrawal, Davison's right "could not be defeated by a reply informing him for the first time of the fact of allotment." In the important case of *Dickinson* v. *Dodds* (1) before the Court of Appeal, it was even held that a sale to a third party which came to the knowledge of the other party was an effectual withdrawal. As *James* L.J. said (2):—"It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. . . . In this case . . . the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer.'" (And see *Cartwright* v. *Hoogstoel* (3); *Henthorn* v. *Fraser* (4).)

If this view is correct, that there was on 14th January a withdrawal of his offer by Davison before communication to him of the Company's acceptance, there is no need to consider the validity of the resolution to allot on that date. But if there was not a withdrawal on the 14th, there was a clear withdrawal on the 18th by the solicitor's letter—if it was not too late; and it was too late if there was a valid acceptance of the application and a valid allotment communicated to Davison on the 14th.

Before considering the effect of the solicitor's letter of the 18th, I desire to deal with one passage in the judgment of *Weigall* A.J.—a passage on which *Cussen* J. relies on the appeal: "The arrangement arrived at on the Saturday night has *by both parties been throughout treated* as made between Davison and the Company." If this

(1) (1876) 2 Ch. D. 463.
(2) (1876) 2 Ch. D., at p. 472.
(3) (1911) 105 L.T. 628.
(4) (1892) 2 Ch. 27.

passage means merely that Davison treated the "arrangement" as having been made with the Company, and tried to "cancel" it instead of withdrawing an offer, it would have little importance. If the passage means that counsel for Davison failed to use the argument that, whatever Vickery did on 12th January, Vickery had no authority to conclude an agreement to sell the 1,000 shares on behalf of the Company, the failure does not estop Davison from using the argument on this appeal. As Lord *Watson* said in *Connecticut Fire Insurance Co.* v. *Kavanagh* (1), "when a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea" (and see *The Tasmania* (2); *Yorkshire Insurance Co.* v. *Craine* (3)). Such must be the position—the Court has to decide what is the law applicable to the materials before it, whether counsel has put before it the appropriate view or not. This point of law is well within the ambit of the application (quoted above), and well within the ambit of the notice of appeal to this Court. For, in addition to the general grounds stated for appeal, this specific ground is stated—"4. That on the evidence"—the articles were in evidence—"the learned Judge was *wrong in holding that there was a contract concluded* between the appellant and the respondent whereby the appellant agreed to take 1,000 ordinary shares in the respondent Company."

But if the passage means that, in the conduct of the case by counsel at the trial, counsel for Davison admitted that an agreement was concluded on the Saturday night between the Company and Davison, the passage would have a more serious aspect. Mr. *Gregory* stoutly denies that he made any such admission; but we are bound to accept the statement of the Judge, if it is clear that the passage means that such an admission was made, expressly or by implication. If the Company was misled by such an admission into calling no evidence of authority given by the Company to Vickery to make the alleged contract on the Saturday, the admission might be fatal to Davison. For my part, I do not think that the

(1) (1892) A.C. 473, at p. 480. (2) (1890) 15 App. Cas. 223.
(3) (1922) 2 A.C. 541; 31 C.L.R. 27.

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passage has clearly that meaning; but, assuming that such a meaning is clear, it is not pretended that the Company could call any other evidence of authority given by the Company to Vickery to conclude the alleged contract; and no admission by counsel can justify us in treating what is bad law as good or in treating the articles as giving the authority when they do not give the authority. In my opinion, to say that there was a completed oral agreement (between the Company and Davison) as to the shares, and that the signing of the application was merely done in performance of the agreement already complete, is contrary to the law under the articles, as well as is wholly inconsistent with the only document resulting from the Saturday discussion—an application for 1,000 shares which the Company was free to accept or to reject, or to accept for some less number of shares. Nor can the entry which appears on the register of a contract as concluded on 14th January be consistent with an alleged contract of 12th January, or with a ratification thereof.

It is evident, from the turn that this case has taken, that it is necessary to concentrate attention on 12th January, and on Vickery's position on that date. Assuming the board of directors to have, on that date, power, under article 73, to sell shares, Vickery had not that power. As there was no power in the articles to delegate their powers (art. 1 excludes Table A with clause 91), the board of directors could not delegate to Vickery or to Johnston, the canvasser, their discretion as to admitting persons as shareholders (*In re Leeds Banking Co.—Howard's Case* (1); *Harris's Case* (2); *In re R. N. Cunningham & Co.—Simpson's Claim* (3); *In re Taurine Co.* (4); distinguish *Dey* v. *Pullinger Engineering Co.* (5)). Indeed, to do them justice, the board did not affect to delegate that power. Far too much has been made of the statement in par. 2 of Davison's affidavit that Vickery and Johnston were in the town of Wagga "representing the Company." A boundary rider may represent his company in Wagga, in one sense; but it does not follow that he can sign a cheque on its behalf. The point is that on the Saturday the Company did not agree to sell the shares, as there was no one competent to agree at the interview. Probably, after the Saturday

(1) (1866) L.R. 1 Ch. 561.
(2) (1872) L.R. 7 Ch. 587.
(3) (1887) 58 L.T. 16.
(4) (1883) 25 Ch. D. 118, at pp. 141-142.
(5) (1921) 1 K.B. 77.

interview, both Davison and Vickery felt no doubt that, on Vickery's recommendation, the Company would grant to Davison the full 1,000 shares; but that is not enough. The application to the Company for 1,000 shares, "or any less number that may be allotted to me," was the final outcome of the interview. The very words of the application are inconsistent with a concluded contract on the part of the Company to give 1,000 shares; and the very register of the shares is inconsistent with it—for the date of the allotment of the shares, and the date of Davison's becoming a member, appear on the register as the 14th January, not the 12th. Even if Vickery purported to contract for the Company on the 12th to give the shares, the board of directors did not even purport to ratify it at the meeting of the 14th; the board (assuming it to be a valid board) merely resolved that "the *applications* be approved" (this application among several) "and that shares be allotted in accordance with the applications received." That is all. There was no ratification of the alleged contract of the 12th; according to Vickery, when Davison expressed his wish to "cancel," Vickery merely said that the shares "had been allotted"—not that an agreement was made on the 12th; and, of course, there could be no ratification of a contract of the 12th by a resolution to accept Davison's application on the 14th. Any ratification must relate back to the date of the unauthorized contract (cf. *Keighley Maxted & Co.* v. *Durant* (1)). I desire to reserve my opinion on the question whether Vickery's action could be ratified at all by another agent—the board of directors—under these articles. It is also unnecessary, in this case, for me to decide whether the case of *Bolton Partners* v. *Lambert* (2) is good law or not; for in that case the would-be agent *did* clearly purport to act for the company in accepting the offer, and the ratification did relate back to the date of the unauthorized contract.

Now, at the alleged meeting of directors on the 14th the only persons present were Vickery, a director, and Morey, the secretary; but Morey held the following "proxy" dated 11th January from Peacock, another director: "I hereby appoint Mr. Burnard Wesley Morey to act as my proxy at a meeting of directors of Vickery Motors Limited to be held in Wagga on the 14th day of January

(1) (1901) A.C. 240, *passim*. (2) (1889) 41 Ch. D. 295.

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1924. (Signed) H. G. Peacock, director of Vickery's Motors Ltd." But under the articles there is no power to appoint a proxy for a meeting. There is this power to appoint a " substitute " : " 82. Any director may appoint a person (whether a member of the company or not) to act as his substitute during any temporary absence illness or incapacity not exceeding twelve months at any one time and such substitute shall be entitled to act as a director in his place as fully and effectually as he himself could do provided that any person so appointed may be debarred from acting by a majority of the remainder of the directors." In my opinion, a proxy to act at a single meeting of directors is not the same thing as a substitute to act during any temporary absence, illness or incapacity not exceeding twelve months. Whoever is appointed as a substitute must be in a position to act at any moment, at any place, during a defined period ; for instance, he may be required to join in signing a cheque (art. 75 (1)), or to sign a resolution in writing instead of attending a meeting (art. 81) ; or to make a quorum for a directors' meeting on any day during a defined period. " Proxy " is not a technical word ; but the appropriate meaning seems to be that suggested in the *Oxford Dictionary*, (2b) " a writing authorizing a person *to vote* instead of another, at an election, a meeting of shareholders, &c., or as formerly in the House of Lords." (See also the provisions for " proxy " for shareholders, in these articles.) It is enough to say that here there is nothing to show any intention to allow Morey to use his own discretion, free from instructions ; and I think Morey was not validly appointed to act as a director under art. 82. Nor does art. 80, in my opinion, affect the position, making as it does, all acts done by any meeting of the directors or by any person acting as chairman or as a director valid, " notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director *or person acting as aforesaid.*" This articles does not apply so as to validate acts done by a person acting as a *proxy* for a director, although it may apply to a defect in the appointment of a person who acts as if he were a director in his own right.

As for the argument of the applicant that Hall was also a director on 14th January, and that no notice of the meeting was given to

him, I think the learned Judge was right in rejecting the contention, and for the reasons which he stated.

RICH J. I do not propose to travel outside the facts found by *Weigall* A.J. and adopted by the majority of the Full Court as the basis of their judgment. Until the matter was argued before us it had not been suggested that the negotiations in question were not being conducted on behalf of the Company. On the contrary, in his affidavit the appellant states that he "met Mr. J. H. Vickery and a Mr. Johnson who were in the town representing the Company . . . they said their Company would buy the car for £250. They also told me they were selling shares in Vickery's Motors Ltd. which were a very good investment, and asked me to take up shares in the Company."

In his judgment *Weigall* A.J. describes Vickery and Johnson as being "employed by the Company to sell its shares," and on the facts states that "the arrangement arrived at on the Saturday night has by both parties been throughout treated as made between Davison and the Company." On appeal *Cussen* J. adopted this conclusion as correct, and held that "the case having been conducted on this basis . . . we need not now consider whether there was subsequent ratification by the Company and . . . we should not now be affected by suggestions which might be made as to the absence of proof of authority from the Company to the persons purporting to act on its behalf or making the arrangement." The course taken by the applicant at the hearing obviated the necessity of proving authority or ratification. This is not the class of case where a question of law is allowed to be raised for the first time in a Court of last resort (*Martin* v. *Hogan* (1); *Yorkshire Insurance Co.* v. *Craine* (2); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (3)).

The only material question, then, is whether it can be predicated of Davison that he was a person who had agreed to become a member of the Company and whose name was entered on its register of members (sec. 31 (2) of the *Companies Act* 1915). I conclude, as I understand *Weigall* A.J. did, that there was a valid binding agreement

(1) (1917) 24 C.L.R. 234, at pp. 256, 257.
(2) (1922) 2 A.C., at p. 553; 31 C.L.R., at p. 38.
(3) (1923) 32 C.L.R. 413, at p. 426.

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to accept the shares in question. In a case such as this of acceptance of a prior offer of shares by a company, allotment is not necessary to complete the agreement (*In re Valparaiso Water Works Co.—Davies' Case* (1)). And, the appellant's name having been entered on the register—that being a mere matter of form, a mere ministerial act (*In re Florence Land and Public Works Co.—Nicol's Case* (2); *In re N.S.W. Refrigerating and Meat Export Co.—Head's Case* (3))—the complete status of membership had been acquired by him. The prima facie evidence of the register (sec. 40 of the *Companies Act* 1915) on proof of agreement becomes conclusive, the party named in the register having failed to show that his name had been entered there without his consent (cf. *Portal* v. *Emmens* (4); *Buckley on Companies*, 10th ed., p. 51).

In view of the opinion I have expressed, I need not now consider the effect of Davison's delay, with knowledge that his name was on the register of members, in neglecting to take steps to rectify the register until liquidation proceedings had supervened.

In my opinion the judgment under appeal should be affirmed and the appeal dismissed.

STARKE J. The majority of the learned Judges in the Supreme Court (*Weigall* A.J., who tried the case, and *Cussen* and *Mann* JJ. on appeal) held that Davison, the appellant, and Vickery, a director of the respondent Company, concluded an arrangement on 12th January 1924, whereby it " was agreed that the Company should buy from Davison " a " motor-car for £250 then to be paid and that Davison should take 1,000 £1 shares in the Company paid up to 5s., for which he should at the same time pay 5s. per share, i.e., £250." Now, that is a conclusion of fact based upon the effect of the oral and written evidence in the case, and one in my opinion which ought not to be disturbed.

Vickery's authority to make this arrangement on behalf of the Company is now for the first time disputed. The controversy in the Supreme Court was as to the nature of the arrangement—whether it was " a completed transaction, or a mere negotiation dependent for any legal effect upon a proper allotment of shares "

(1) (1872) 41 L.J. Ch. 659.
(2) (1885) 29 Ch. D. 421, at p. 426.
(3) (1894) 15 N.S.W.L.R. (Eq.) 121, at p. 126.
(4) (1875-76) 1 C.P.D. 201, 664.

and withdrawn before any such allotment was made or communicated to Davison. The grounds of appeal, both to the Supreme Court and to this Court, again raise this controversy, but want of authority on the part of Vickery to make the agreement on behalf of the Company is not explicitly taken, though it may perhaps be covered by the general objection that the judgment is bad in law. No one, I suppose, disputes the authority of an appellate Court to consider questions raised, for the first time, before it, but such questions "ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them" (*Owners of Ship Tasmania* v. *Smith—The Tasmania* (1)). It is less difficult to induce a Court of Appeal to consider a question of law raised for the first time upon the construction of a document or upon undisputed facts, than a new question of fact. But a party cannot be allowed to take his chance of a finding in his favour upon the fact of an agreement, and then, on appeal, for the first time dispute the authority of the person who negotiated that agreement. Such a party is and ought to be bound by the course of the trial (*Wilson* v. *United Counties Bank Ltd.* (2)). In the present case, the articles of association were not put in evidence for the purpose of proving or disproving Vickery's authority, and no care whatever was exercised in elucidating his authority: it was accepted by all parties, or at all events not disputed. Again, it is quite clear that Davison contested the fact of any agreement with him, and took the chance of a favourable finding on that issue. And finally, in his notice of appeal, Davison has not explicitly raised the question of Vickery's authority (see *Wilson* v. *United Counties Bank Ltd.* (3)). Under circumstances such as these, Davison ought not, in my opinion, to be allowed to raise that question in this Court.

The appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Eggleston & Eggleston.*

Solicitors for the respondent, *McCay & Thwaites.*

B.L.

(1) (1890) 15 App. Cas. 223, at p. 225.
(2) (1920) A.C. 102, at p. 123.
(3) (1920) A.C., at p. 106.