

[HIGH COURT OF AUSTRALIA.]

KEPERT APPELLANT;
DEFENDANT,

AND

THE WEST AUSTRALIAN PEARLERS' }
ASSOCIATION (INCORPORATED) . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

*Association—Incorporation—Voluntary Association—Memorial of seal-holders—
Changes therein—Neglect to file fresh memorial—Levy upon members—Invalidity
—Memorial subsequently filed—Associations Incorporation Act 1895 (W.A.)
(59 Vict. No. 20), secs. 2, 3, 5, 6.*

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Knox C.J.,
Higgins,
Gavan Duffy,
Rich and
Starke JJ.

The *Associations Incorporation Act* 1895 (W.A.), by sec. 5 (1), provides that an association incorporated under the Act shall, as soon as conveniently may be after incorporation, file in the Supreme Court a memorial setting out (*inter alia*) the names, &c., of persons authorized to use the common seal of the corporation, and that upon every change in such names a fresh memorial to the like effect shall be filed in the Court. Sec. 5 (4) provides that upon “neglect to file such memorial as last aforesaid . . . the powers of the association shall be suspended during such period as the association shall so neglect as aforesaid.”

Held, that upon the failure of the association to file a memorial of the changes that had been made in the persons authorized to use the common seal of the corporation, the whole of the powers of the association, whether conferred by the Act or contained in the rules of the Association, are, by virtue of sec. 5 (4), suspended, and the suspension is not restricted to such powers as depend upon the Act for their authority.

In 1917 an association incorporated under the Act filed a memorial setting out the names, &c., of the persons entitled to use its common seal. No further memorial was filed till January 1925. In the meanwhile changes had been

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made in the personnel of the seal-holders. In 1924 the members of the association had passed a resolution authorizing a levy upon the members, of whom the appellant was one; and the appellant refused to pay.

Held, that the resolution authorizing the levy was invalid, and that the association was not entitled to recover the same either as a voluntary or as an incorporated association.

Decision of the Supreme Court of Western Australia (Full Court): *Keper* v. *West Australian Pearl*ers' Association, (1926) 28 W.A.L.R. 40, reversed.

APPEAL from the Supreme Court of Western Australia.

The West Australian Pearlers' Association (Incorporated) brought an action in the Local Court at Broome against Victor Ralph Kepert, in which the plaintiff claimed the sum of £70, being the first and second moieties of a levy alleged to be due to the plaintiff by the defendant as a member of the Association.

From the evidence it appeared as follows:—The plaintiff Association was incorporated in 1913 under the *Associations Incorporation Act* 1895 (W.A.). The original memorial setting out (*inter alia*) the names of persons authorized to use the common seal of the corporation was filed in 1917, as required by sec. 5 (1) of that Act; but, although frequent changes had occurred in the personnel of seal-holders, no fresh memorial setting out such changes, as required by that sub-section, was filed until 21st January 1925. On 3rd September 1924 it was resolved at a special meeting of the Association to inaugurate a scheme for the training of Chinese divers, and a levy was authorized of £20 for each trading vessel owned or worked by members of the Association, such levy to be called up in amounts of not more than £10 per vessel per annum. Kepert, who had become a member of the Association on 21st May 1921, refused to make the payments demanded of him in pursuance of the resolution. One of his defences to the action was that, as the Association had not complied with the requirement of sub-sec. 1 of sec. 5 that upon "every change of" the person or persons authorized to use the common seal of the corporation "a fresh memorial . . . shall be filed," sub-sec. 4 applied and the powers of the Association were suspended during the period of its neglect to comply with such requirement; and that, consequently, it had no power to pass the resolution above referred to, or to enforce it. The Magistrate who

heard the case on 28th May 1925 decided in favour of the plaintiff, and gave judgment for the amount claimed and costs. On appeal by the defendant to the Supreme Court of Western Australia, the Full Court upheld the Magistrate's decision : *Kepert v. West Australian Pearlers' Association* (1)

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From the decision of the Full Court the defendant now, by special leave, appealed to the High Court.

Other material facts sufficiently appear in the judgments hereunder.

*McDonald* (with him *Louch*), for the appellant. The liability of incorporated associations during suspension is, under the *Associations Incorporation Act* 1895, sec. 5 (4), unlimited. If an association fails to file a memorial of persons competent to use the corporation seal, its powers are suspended. Not only such powers as are conferred by the Act, but all the powers of the association, are suspended by the Act. The grant of a certificate of incorporation under the Act makes the association a new entity. The term "suspended" in sec. 5 (4) means "dormant" or "inert." Suspension does not make the corporation cease to exist. There is by implication an inherent power in the corporation always to comply with the terms of the Act. This is implied in the phrase "during such period as the association shall so neglect as aforesaid" (sec. 5 (4)). Though the powers of the association are suspended, the rights of other people are, by express exception, preserved (sec. 5 (4)). If the opinion of the Supreme Court was right, that only powers conferred by statute are suspended, the Association is in fact purporting to exercise here powers conferred by the statute. The common law entity of the Association is superseded by the statutory entity. A man can resign at any time from an association, and thereupon ceases to be a member without acceptance of his resignation (*Finch v. Oake* (2)). The subsequent filing of the memorial required by sec. 5 (1) does not validate the resolution of 3rd September 1924. Further, that resolution was *ultra vires* the Association. Special powers, however absolute, must be read within the special objects of

(1) (1926) 28 W.A.L.R. 40.  
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(2) (1896) 1 Ch. 409.  
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the association (see *Halsbury*, vol. VIII., p. 360; *Pickering v. Stephenson* (1); *Osborne v. Amalgamated Society of Railway Servants* (2)). The power to levy on members, if read literally, can be defeated by a *reductio ad absurdum*. The training of divers is not part of the "business of the Association" under the rules authorizing the raising of money. The nature of the transaction and its magnitude make the resolution *ultra vires* (*Brice on Ultra Vires* 3rd ed., Part III., ch. II., p. 123).

*Sir Walter James* K.C. (with him *Gordon James*), for the respondent. The resolution is not *ultra vires* the Association. *Keper* had full notice of the scheme and approved it. There is no limit to the powers of the Association so long as the matter is one affecting the pearling industry. There is an analogy between the resolution of the Association and a company enlarging its powers and objects (*In re Parent Tyre Co.* (3)). The Association is not a statutory body. It was in existence before incorporation. All that is suspended by sec. 5 (4) are those powers which the Act itself confers (*Halsbury*, vol. xv., p. 204, par. 445). On the lifting of the suspension the association can sue for what it could not sue while the suspension existed (*Palmer's Company Law*, 11th ed., p. 3). Under sec. 6 the association is incorporated before the person granting incorporation knows anything of the rules of the association, and without any exercise of control over future rules. The Act is for the incorporation of bodies, not for their regulation and control.

[*HIGGINS J.* referred to *In re Thomas*; *Ex parte Poppleton* (4).]

The "memorial last aforesaid" in sub-secs. 3 and 4 does not refer to what is literally the last-mentioned memorial, i.e., the fresh memorial, but to the original memorial required to be filed. Failure to file a memorial of changes in the personnel of seal-holders is not fatal (*Halsbury*, vol. iv., p. 418). Suspension only affects the incorporation. It leaves the association otherwise unaffected. After January 1925 the Association can sue to enforce rights acquired during suspension.

(1) (1872) L.R. 14 Eq. 322, at p. 340.  
 (2) (1909) 1 Ch. 163, at p. 191.

(3) (1923) 2 Ch. 222.  
 (4) (1884) 14 Q.B.D. 379.



*McDonald*, in reply. "Memorial last aforesaid" in sub-secs. 3 and 4 and "memorial" in sub-sec. 5 refer to the fresh memorial required to be filed.

*Cur. adv. vult.*

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The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND STARKE JJ. This is an appeal, by special leave, from the judgment of the Supreme Court of Western Australia dismissing an appeal from the judgment of the Local Court at Broome in favour of the respondent Association in respect of a levy alleged to be due by the appellant as a member of the Association.

The Attorney-General certified the Association as being one to which the facilities given by the Act ought to be extended, and it was incorporated on 14th May 1913 under the provisions of the *Associations Incorporation Act* 1895. No objection was taken before the Supreme Court or before this Court as to the propriety of this registration. A memorial of the persons entitled to use the common seal of the Association was filed on 14th May 1913 pursuant to sec. 5 of the Act. The rules of the Association were also duly filed. The objects of the Association are stated to be (1) "to provide the means of obtaining the united action of the pearlers on all matters affecting the industry, (a) to provide the means of giving effect to the united desires of the pearlers on all matters affecting the industry in so far as such desires are expressed in resolutions passed under the Rules of this Association and do not involve transactions securing pecuniary profit to the members" (rule 2). Rules 3 and 4 provide for membership, payment of entrance fees, annual subscriptions and annual levies. Rule 5 is as follows :—"Any additional funds required for carrying on the business of the Association shall be raised by resolution passed at a Special Meeting or, in urgent cases, by resolution passed without notice at a General Meeting, as provided by Rule No. 7, 'Resolutions.' Every member of the Association shall pay, as it becomes due, his proportion of the funds raised by resolution passed during his membership."



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The appellant became a member of the Association on 21st May 1921. On 3rd September 1924 a special meeting of members of the Association resolved to inaugurate a scheme for the training of Chinese divers, and authorized a levy of £20 for each licensed vessel owned or worked by members to be struck forthwith, such levy to be called up in amounts of not more than £10 per vessel per annum. This resolution was subsequently approved by a majority of members of the Association in accordance with rule 7 (b). The appellant objected to pay the levy, and an action, which resulted in the judgment already mentioned, was begun in the Local Court at Broome on 28th May 1925. On the hearing, it appeared that between the year 1917, the date of the filing of the memorial of persons entitled to use the common seal, and the year 1925 changes had occurred in the personnel of the seal-holders. No "fresh" memorial was filed until 21st January 1925. Since this date the Association has not taken any steps to adopt or confirm the resolution of 3rd September 1924 or to pass any resolutions to the same effect.

In these circumstances the question emerges whether the default in filing the memorial required by sec. 5 precluded the Association from passing the resolution already mentioned which gave rise to the action, the subject of this appeal.

Sec. 5 of the Act provides:—“(1) Every association shall, as soon as conveniently may be after such incorporation, file in the Supreme Court a memorial, in the form or to the effect set forth in Schedule ‘D’ to this Act, containing the name or names, together with the place or places of abode of the person or persons authorized to use the common seal of the corporation, with an impression of such seal, and verified by an affidavit of and countersigned by such person or persons, and upon every change of such person or persons a fresh memorial to the like effect shall be filed in the Court and verified. (2) All such persons, or such one or more of them as shall be fixed by the rules of the association, shall in all cases countersign any deed, instrument, or document to which the seal of the corporation shall be fixed. (3) At the time of filing the memorial last aforesaid a copy of the rules and regulations, or trust or settlement deed of the association, shall also be filed in the Supreme Court; and a like copy shall from time to time be filed in the said Court of all



additional rules, regulations and trusts, and of any alteration therein which may from time to time be made ; and all copies of such rules, regulations, and trusts and additions and alterations thereto or therein, shall, on the filing thereof, be verified by the affidavit of the person or persons authorized for the time being to use the common seal of the association. (4) In case any incorporated association shall neglect to file such memorial as last aforesaid, or such copy of the rules, regulations and trusts, or of the additions or alterations thereto or therein from time to time, then the powers of the association shall be suspended during such period as the association shall so neglect as aforesaid. Provided, nevertheless, that every such association shall be liable to be sued and proceeded against as a corporation ; and all dealings and transactions between the association and any person whomsoever shall be valid against the association and all persons claiming under such association, notwithstanding such suspension. (5) The production of the memorial or of the copy rules, regulations or trusts for the time being filed in the said Court under the provisions of this clause, or an office copy thereof, shall be conclusive evidence in any Court of law or equity, and in all proceedings and transactions whatsoever, that the person named in such memorial was at the time of his using the common seal of the corporation duly authorized so to do, and that the registered rules, regulations, and trusts are duly and legally made."

*Burnside J.*, who delivered the judgment of the Supreme Court, in construing this section, said :—" Anything that might lawfully be done by a voluntary association remains within the powers of the incorporated association. The power to make a levy is one that arises *dehors* its incorporation. It is not an act which is illegal in itself, but if it be sought to enforce in the corporate name the exercise of any such inherent power, then it is essential to show that the Act has been complied with. . . . In my opinion, therefore, the decision of the Magistrate may be supported on the grounds put forward by the learned counsel for the respondent, namely, that the powers of the Association which become suspended by reason of default under sub-sec. 4 of sec. 5 of the Act are those powers which depend upon the Act for their authority, and that the memorial required by sec. 5, having been filed prior to the

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commencement of the proceedings in the Court below, it became then competent to the Association to institute the proceedings and recover the amount of the levy in its corporate name."

We cannot agree with this opinion. Upon incorporation the voluntary association ceases to have any existence apart from the incorporated body. There are not two entities existing side by side—a voluntary association and an incorporated body; and the rules when filed become the rules of the incorporated association and subject to the Act regulate the internal economy of the incorporated association and have no separate operation for the management of a voluntary association. In our opinion the expression "the powers of the association" in sub-sec. 4 of sec. 5 denote all the powers of the incorporated association, whether conferred by the Act or contained in the filed rules. There is nothing in this section or in the Act to support the suggestion that though the powers conferred by the Act are suspended there exist what Sir *Walter James* called "certain common law powers" which the association is free to exercise but not to enforce until the Act is complied with and the default terminated. The suspension prescribed by the Act covers both the exercise and the enforcement of the association's powers. Suspension is a partial extinguishment (per *Tindal* L.C.J. in *Burton v. Barclay* (1)). The term has been defined as the act by which a party is deprived of the exercise of his right for a time (*Bouvier's Law Dictionary*, vol. II., p. 1088). According to Lord *Coke*, in *Co. Litt.* 313 (a), "Suspense . . . in legal understanding is taken when a seignory rent . . . &c. . . are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked." Lastly, it was suggested that the default giving rise to the suspension did not occur in not filing a "fresh memorial" but only in the event of neglect to file the original memorial referred to in sec. 5 (1). But it is clear that only one instrument is contemplated by the sub-section. The memorial to which the epithet "fresh" is prefixed is the same instrument as that mentioned in the sub-section without an epithet, namely, that in the form set forth in Sched. D to the Act. The words "such memorial as last aforesaid" in sec. 5 (4) refer to

(1) (1831) 9 L.J. C.P. 231, at p. 239.



this instrument as distinguished from the memorial B prescribed in H. C. OF A.  
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For these reasons we think that the appeal should be allowed.

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HIGGINS J. After a close examination of this remarkable Act, I am unable to accept the view taken by the learned Judges of the Full Court. I cannot find any justification for saying that the powers of the association which become suspended by default in filing a necessary memorial under sec. 5 (4) are limited to those powers "which depend upon the Act for their authority." The words used are "the powers of the association." Prima facie these are *all* the powers of the association; and (except as mentioned presently) there is no exception necessarily implied of any of the powers. The object of the provision was evidently to induce a prompt filing of the memorial on pain of having the association incapacitated from exercising its powers, its functions, "during such period as the association shall so neglect" to file. But these latter words necessarily imply that the association can file notwithstanding its neglect.

In my opinion, there is no valid foundation for the theory that after incorporation the association as unincorporated exists or can exercise any powers. By section after section it is made clear that the association when incorporated is the same association as existed before incorporation (secs. 3 (a), (c), 5, 6, 10, &c.). But it has acquired a new quality—a new head-dress as it were. The powers which the association had before incorporation remain to it after incorporation, but as the rights of persons outside the association may be affected, and especially as the members are freed from personal liability to creditors beyond the property of the association in their hands (sec. 8), the association is put under certain strict conditions of publicity. In this case, assuming that there was default in filing a necessary memorial, the power conferred on the association by rule 5 to raise additional funds for carrying on the business of the association cannot be exercised during the default. Since the default was remedied (21st January 1925), there has been no re-enactment or confirmation of the resolution to raise the additional funds.



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Holding this opinion, it is unnecessary for me to consider the point as to the power to raise the additional funds on the true construction of the rules themselves.

My chief difficulty has been as to a point not mentioned in the judgment, and, as I understand, not taken by counsel before the Full Supreme Court. Is default in filing a "fresh memorial" of the changes of the persons authorized to use the common seal such a default as suspends the powers of the association? Sec. 5 (4) provides: "In case any incorporated association shall neglect to file *such memorial as last aforesaid*, . . . then the powers of the association shall be suspended," &c. What does "*such memorial as last aforesaid*" refer to? Sec. 5 (3) uses nearly the same words: "At the time of filing the memorial *last aforesaid* a copy of the rules and regulations, on trust or settlement deed of the association, shall also be filed in the Supreme Court." Sec. 5 (1) provides that every association after incorporation is to file a memorial in the form of Schedule D, containing the names and abodes of the persons authorized to use the common seal, "and upon every change of such . . . persons a *fresh memorial* to the like effect shall be filed in the Court." Verbally, the memorial last aforesaid, therefore, is the "fresh memorial." But the provision in sec. 5 (3) for filing at the same time a copy of the rules and regulations or trust or settlement deed of the association would seem to refer to the form in Schedule D; it could hardly be meant that the rules and regulations or trust or settlement deed if unchanged were to be refiled on any and every change in the persons who may use the common seal. Yet the filing of any change in such persons seems to be a vital part of the scheme of the Act, which (sec. 11) makes service of any writ, &c., upon the persons who are authorized (according to the memorial) to use the common seal sufficient service on the association. The words "the memorial last aforesaid" (sub-sec. 3), "such memorial as last aforesaid" (sub-sec. 4), seem to be meant to distinguish the memorial in the form of Schedule D from the memorial *before* incorporation in the form of Schedule B showing the name of the institution, its object or purpose, where situated or established, the power of the trustees, in whom the management is vested, &c. There is no separate form prescribed for the "fresh memorial";



and, in my opinion, the "fresh memorial" is treated as taking the place of the memorial in Schedule D. Therefore I regard the words "such memorial as last aforesaid" in sub-sec. 4 as referring to the memorial prescribed by sec. 5 (1), both the original and as changed; the fresh memorial is included under the words "such memorial as last aforesaid"; and if there has been failure in filing it, there is a default which involves a suspension of the powers of the association; and the Full Supreme Court was right in its assumption that there was such a default.

In my opinion, and on these grounds, the action of the incorporated company for these additional funds fails; and the appeal should be allowed.

I should like it, however, to be clearly understood that all parties here assume that this Association is validly incorporated under this Act, on the certificate of the Attorney-General.

*Appeal allowed. Judgment of Magistrate at Broome and order of Supreme Court discharged and judgment entered for appellant. The respondent to pay the costs of the action and of the appeals to the Supreme Court and this Court.*

Solicitors for the appellant, *Robinson, Cox & Wheatley.*

Solicitor for the respondent, *H. D. Forbes.*

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