[HIGH COURT OF AUSTRALIA.]

BENNETT AND OTHERS . . . . APPELLANTS;
DEFENDANTS,

AND

MURRAY AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 19-21; *Nov.* 25.

Rich A.C.J., Starke and Dixon JJ.

Company — Directors — Retirement — Articles of association — Test of seniority — Method of determining who should retire—Lot—Estoppel.

Article 38 of the articles of association of a company provided: "At each annual meeting the two directors who have been longest in office shall retire, but shall be eligible for re-election. If more than two directors have been in office an equal length of time, the two to retire shall be decided by lot." Of the three senior directors in office at the time of the annual meeting of the company, one had been longer in office than the other two, who had held office for an equal length of time.

Held that the object of article 38 was to secure the retirement of two directors annually, to use seniority as the ground of settling the order of retirement, and when seniority failed to do it by lot. Although the literal words of the article did not cover the precise case which had occurred, there was a plain implication that as between the two directors who had been in office an equal length of time only one should retire and the choice of that one should be by lot.

The two directors who had been in office an equal length of time, on being informed that their seats would become vacant, offered themselves by circular and otherwise as candidates for re-election, but before the poll, though after the ballot-papers had been printed and posted, they disputed the view that they both retired and drew lots between themselves. The plaintiff was one of the two, and the drawing was in his favour. A poll for the election of three directors was held, and upon the counting of the votes thereat the plaintiff was not amongst the three candidates who secured the greatest number of votes. The returning officer reported the number of votes cast but did not

proceed to declare any candidates elected, and no resolution was submitted or passed on his report, but the three candidates who secured the greatest number of votes proceeded to act as directors, and the plaintiff was excluded from so acting. There were irregularities in the conduct of the poll other than in respect of the number of directors to be elected.

Held that the plaintiff's conduct did not amount to a resignation and that he was not estopped from impugning the validity of the election.

Decision of the Supreme Court of New South Wales (*Nicholas* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Thomas George Murray, Patrick Moore MacMahon, Michael Stanislaus Veech, James Charles Hughes, Ormond Joseph McDermott, Matthew John O'Neill, Hercules Christian McIntyre and Walter Patrick McGrath, against William Bennett, Cyril Basil Kearney, Robert J. Taylor, Frank Edgar Wall, George Edward Bryant and the City Mutual Life Assurance Society Ltd. for declarations: (*a*) that the plaintiff McDermott was a director of the society; (*b*) that the ballot conducted prior to the annual meeting of the society on 10th April 1940 was abortive and void and that there was no valid election of directors in pursuance thereof; and (*c*) that the defendants Bennett, Kearney and Taylor were not directors of the society.

The court was asked to restrain (i) the defendants Bennett, Kearney and Taylor from acting in the affairs and business of the society as directors, and (ii) the defendants Bryant, Wall, Bennett, Kearney and Taylor from preventing the plaintiff McDermott from acting as a director of the society and from having access to the books of the society access to which a director is by law entitled to have, and from going into and using the directors' room at the head office of the society.

The court was asked to direct that the defendants Bryant and Wall join with the plaintiff McDermott in calling a meeting of members of the society for the purpose of choosing two further directors of the society, or, alternatively, the court itself call a meeting of the members for that purpose.

The plaintiffs sued on behalf of themselves and all other members of the society who did not vote at the ballot mentioned above in favour of the defendants Bennett, Kearney and Taylor.

The principal point at issue involved the proper construction of article 38 of the society's articles of association. Article 38 provided, so far as material, as follows:—"At each annual meeting the two

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directors who have been longest in office shall retire, but shall be eligible for re-election. If more than two directors have been in office an equal length of time, the two to retire shall be decided by lot."

The directors in office at the close of the year 1939 were the defendants Bryant, Wall and Bennett and the plaintiffs O'Neill and McDermott. Bryant was the chairman, and Bennett was the managing director of the society. Bennett had been longest in office. O'Neill and McDermott had been in office an equal length of time and, with the exception of Bennett, had been in office longer than any other director. At a meeting of the board of directors held on 7th February 1940, O'Neill said that Bennett and either McDermott or he, O'Neill, would retire in accordance with the provisions of article 38. McDermott and O'Neill drew lots for the purpose of determining which of them should retire at the annual meeting. The result of the draw was that O'Neill should retire with Bennett. Bennett, however, said that he had counsel's opinion, which he produced, that, in the circumstances, all three should retire, whereupon the board resolved that the annual meeting be held on 10th April 1940, to receive the annual report and balance-sheet and to elect three directors in the place of Bennett, McDermott and O'Neill, who would retire but were eligible for re-election. The notice convening the annual meeting contained these notifications. It was also notified that nominations for the positions had also been received from Kearney and Taylor. The annual report also set forth that Bennett, McDermott and O'Neill "retired in accordance with the articles of association . . . all of whom are eligible for re-election, and offer themselves accordingly." All the candidates for the office of director had given due notice of their candidature. As soon as the board received the nominations of Kearney and Taylor, Bryant was appointed presiding officer to conduct the ballot. A form of ballot-paper was approved by the board and ballot-papers were forwarded, about 18th March 1940, to policy holders of the society.

There was not any book or books kept by the society which was or purported to be a register of members; what were kept were policy register cards or books. According to the general accountant it was "almost impossible," with this system, "within the time available, to investigate and ensure that the rightful owner of each policy was posted a ballot-paper." The procedure adopted in connection with the ballot was as follows:—In New South Wales, envelopes were prepared from the card index, by means of an addressograph machine. On these envelopes were placed particulars as to the name and address

of each policy holder and the sum assured. The number of votes to which each policy holder was entitled was calculated and marked in pencil on the ballot-paper. As to other States, the branches there also prepared envelopes showing thereon particulars of the names and addresses of policy holders, and the sum assured, which was "marked in pencil inconspicuously, generally on the lower left-hand corner." Officers at the head office thus calculated the number of votes each policy holder would be entitled to according to the articles of association and marked it in pencil on the ballot-paper. Instead of sending their ballot-papers to the head office very great numbers of members sent them to branch offices. There, apparently, they were opened and sent in bundles to the head office. Not a few ballot-papers showed alterations or defacement of the figures in the corner indicating the number of votes. In sending out the envelopes many mistakes were made as to the person entitled to vote, particularly in the case of assignees whose assignments were not absolute. It was, however, denied that the errors were sufficient in number to affect the result of the poll.

On 10th April 1940 the board met before the time appointed for the annual meeting and Bryant submitted to it a report to the effect that the form of the ballot-papers did not give effect to the articles and that he was satisfied that what was done did not afford sufficient safeguards to take a ballot; that, having conferred with counsel, he held the view that only two directors should retire, and accordingly that the poll was on the wrong basis and informal, abortive and void, and that, therefore, he had refrained from examining the ballot-papers but had preserved them intact and carefully sealed up the boxes containing the ballot-papers so as to have them safely and securely under control. The board, by a majority, adopted the report and declared the ballot abortive. At the annual general meeting, which was held immediately afterwards, a resolution was carried that the meeting be adjourned to 15th April and that the presiding officer, Bryant, be requested to count the ballot-papers in his custody and to report the result of such ballot to the adjourned meeting. Bryant presented a report to the directors which was read at the adjourned meeting. It was expressed thus: "I have to report that following upon the resolution passed at the annual meeting . . . but without departing from the view as to the ballot being abortive already expressed by me, I have examined the ballot-papers, and these papers, omitting the informal ones, show that votes were recorded as mentioned in the schedule hereunder." The schedule showed that, of the five candidates, the number of votes credited to each of the other three was considerably greater

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than either those credited to O'Neill or those to McDermott. No resolution was submitted or passed upon this report. Thereafter Bennett, Kearney and Taylor, together with Bryant and Wall, acted as directors of the society and McDermott was excluded from meetings of the directors.

Nicholas C.J. in Eq. overruled a demurrer made on behalf of the defendants Bennett, Kearney, Taylor and the society as to the right of members of the society to sue although the society was not a plaintiff, and held that upon a practical interpretation of article 38 the number of directors to retire in each year was two and that when two were of equal seniority the one to retire should be decided by lot. His Honour made a decree declaring McDermott to be a director of the society; that the ballot was abortive and void; and that the defendants Bennett, Kearney and Taylor were not directors of the society, and he granted the appropriate consequential relief by way of injunction.

From that decision Bennett, Kearney and Taylor appealed to the High Court, the respondents to the appeal being all the other parties to the suit.

Other relevant articles of association and material facts are set forth in the judgments hereunder.

Maughan K.C. (with him *Harper*), for the appellants. The provision in article 38 for determining by lot who of the directors shall retire applies only when two directors of "more than two directors who have been in office an equal length of time" are to retire. That provision does not apply to the facts of this case. The articles, which must be regarded as a contract, do not provide for the position which has arisen. There is not any right at common law to decide anything by lot, either common-law rights, statutory rights, or contractual rights. In the circumstances each of the two directors who have been in office an equal length of time should retire because it cannot be predicated of either of them that he has been "longest in office." The article does not limit the number of retiring directors to two. Where, as here, parties have entered into a contract providing for a particular event the court is not at liberty to insert in the contract a provision providing for a somewhat similar event which had not been provided for by the parties. The court will refuse to provide a *casus omissus* (*In re David Moseley & Sons Ltd.* (1)). The respondent McDermott correctly retired as a matter of law according to the provisions of the articles. Even if as a matter of construction he was not obliged to retire, he did retire and thereby resigned and

(1) (1939) Ch. 719.

submitted himself to election. He is bound by his actions and having so committed himself was unable later to deny that he had retired. The ballot was properly held. The articles do not require that successful candidates shall be declared elected. The presiding officer's report complied with the requirements of article 24. The opinion expressed by him as to the ballot being abortive did not prevent the report being a report of the result of the poll. He was not empowered to express an opinion upon the matter: his powers are limited to deciding the formality or informality of individual ballot-papers. It was beyond his jurisdiction to refuse to count the votes or to express an opinion that the ballot was abortive. The powers of a chairman or presiding officer in respect of an election are discussed in *Palmer's Company Precedents*, 15th ed. (1938), Part 1. pp. 651, 652. An implied provision should not be read into the articles (*In re Nott and Cardiff Corporation* (1)).

Mason K.C. (with him *C. M. Collins*), for the plaintiff respondents. The ballot-papers were issued without the authority of the board of directors or of the presiding officer. The many irregularities, particularly in the matter of indicating the number of votes available to the voter, justified the decision of the presiding officer that the proper steps had not been taken to give effect to article 27 and that therefore the election was abortive. It was within his jurisdiction so to decide. His decision was based on the informality or otherwise of the ballot-papers. How candidates for election are to be elected can be determined only at the annual meeting. The ballot-papers were issued long before the annual meeting although it was only at such meeting that the question of how candidates were to be elected could be determined. The ballot should not have been closed before the annual meeting. In the circumstances, the respondent McDermott did not resign his office. He is not estopped by his actions, because all interested persons were cognisant of them and the reasons therefor. The ballot was abortive on several grounds. The word "two" in article 38 means "two": it does not mean "more than two," nor does it mean "less than two." The dominant feature in the article is that it is obligatory and compulsory that two directors should retire at the annual meeting. The intention is that those two shall be the longest in office and that in order to reduce the number of retiring directors to two lots should be drawn. On its proper construction article 38 does not present any ambiguity, but, if it does, the ambiguity should be resolved by applying the reasoning of *Simonds* J. in *In re David Moseley & Sons Ltd.* (2), with the result that the provision for a decision by lot being inapplicable

(1) (1918) 2 K.B. 146, at p. 168. (2) (1939) Ch. 719.

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there should only be a ballot in respect of one vacancy. The company in general meeting has no power to fill the vacancies; therefore the decision in *Foss* v. *Harbottle* (1) does not apply: the only way in which these vacancies can be filled is by a ballot of members.

Teece K.C. (with him *Walsh*), for the respondent Bryant. The rule is that the court will not interfere if the matters complained of are such as can be corrected by the company as matters of "internal management": in all other cases the court will interfere (*Bagshaw* v. *Eastern Union Railway Co.* (2); *Baillie* v. *Oriental Telephone and Electric Co. Ltd.* (3); *Burland* v. *Earle* (4); *Mozley* v. *Alston* (5)). The correct definition of internal management is stated in *Gore-Browne's Handbook on Joint Stock Companies*, 39th ed. (1936), p. 381. Provisions in articles of association as to the election, retirement and removal of directors are matters of contract, so that if they are not followed any shareholder has the right to apply to the court to vindicate his contractual right (*Australian Coal and Shale Employees' Federation* v. *Smith* (6); *Imperial Hydropathic Hotel Co. Blackpool* v. *Hampson* (7))—See also *Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (8). If it cannot be predicated of two directors that they are the two directors "longest in office", then neither of them should retire (*In re David Moseley & Sons Ltd.* (9)). As the conditions which must exist in order to compel the retirement of the directors have not occurred none of the directors was compelled to retire at the annual meeting. The rule as to whether irregularities which occur in an election are such as to make void the election is stated in *Woodward* v. *Sarsons* (10) and was applied in *In re Barnes Corporation*; *Ex parte Hutter* (11). The irregularities disclosed in this case bring the matter within the fourth proposition stated by *Isaacs* J. in *Bridge* v. *Bowen* (12): See also *Liston* v. *Davies* (13). A member of a company incorporated under the *Companies Act* means a person entered on the register of members (*Pender* v. *Lushington* (14)). The definition of a register and the provision as to what it should contain appear in secs. 78, 79 and 86 of the *Companies Act* 1936 (N.S.W.). The provisions of that Act apply to this company.

(1) (1843) 2 Ha. 461 [67 E.R. 189].
(2) (1849) 7 Ha. 114 [68 E.R. 46].
(3) (1915) 1 Ch. 503, at p. 518.
(4) (1902) A.C. 83.
(5) (1847) 1 Ph. 790 [41 E.R. 833].
(6) (1937) 38 S.R. (N.S.W.) 48; 55 W.N. (N.S.W.) 19.
(7) (1882) 23 Ch. D. 1.
(8) (1901) 1 S.R. (N.S.W.) (Eq.) 37; 18 W.N. (N.S.W.) 104.
(9) (1939) Ch. 719.
(10) (1875) L.R. 10 C.P. 733, at p. 743.
(11) (1933) 1 K.B. 668, at pp. 680, 683.
(12) (1916) 21 C.L.R. 582, at pp. 623, 624.
(13) (1937) 57 C.L.R. 424, at pp. 445, 446.
(14) (1877) 6 Ch. D. 70, at pp. 76-78

The decision of the presiding officer on the matter of irregularities is final and should be regarded as concluding the matter.

Knight, for the respondents Wall and the City Mutual Life Assurance Society Ltd., submitted to any order the court deemed fit to make.

Maughan K.C., in reply. The correct procedure in the order of events relating to the election was adopted. The fact that votes for the filling of vacancies on the board of directors must be taken at the annual meeting shows conclusively that the necessary preliminary matters, e.g., preparation of the ballot-paper, must be attended to prior to the annual meeting. Even if the election were void a shareholder would not have the right to the assistance of the court unless the matter had first been reviewed by the company as a forum. The rules of the court preclude an individual shareholder from complaining of any of the things which are of the character mentioned in the statement of claim and proved or partially proved. The only cases in which an individual shareholder has been entitled to bring a suit is where there has been a wrong done to him personally; typical of such cases are *Australian Coal and Shale Employees' Federation* v. *Smith* (1), *Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (2), and *Pender* v. *Lushington* (3). Except where a wrong has been done to himself a shareholder cannot institute proceedings in respect of a matter done in the management of a company unless the matter complained of is either *ultra vires* of the company or fraudulent (*MacDougall* v. *Gardiner* (4); *Cotter* v. *National Union of Seamen* (5)). *Burland* v. *Earle* (6), *Baillie* v. *Oriental Telephone and Electric Co. Ltd.* (7), *Kaye* v. *Croydon Tramways Co.* (8) and *Bulfin* v. *Bebarfalds Ltd.* (9) are cases of fraud. In *Cousins* v. *International Brick Co. Ltd.* (10), *Coulson* v. *Austin Motor Co. Ltd.* (11) and *Henderson* v. *Bank of Australasia* (12) the shareholder's personal rights were involved. The question of jurisdiction was not raised in *Munster* v. *Cammell Co.* (13), *Young* v. *South African and Australian Exploration and Development Syndicate* (14) or *Neuschild* v. *British Equitorial Oil Co. Ltd.* (15). The two cases last mentioned are obviously cases brought in a friendly way to have a particular matter

(1) (1937) 38 S.R. (N.S.W.) 48; 55 W.N. (N.S.W.) 19.
(2) (1901) 1 S.R. (N.S.W.) (Eq.) 37; 18 W.N. (N.S.W.) 104.
(3) (1877) 6 Ch. D. 70.
(4) (1875) 1 Ch. D. 13.
(5) (1929) 2 Ch. 58.
(6) (1902) A.C. 83.
(7) (1915) 1 Ch. 503.
(8) (1898) 1 Ch. 358.
(9) (1937) 38 S.R. (N.S.W.) 423; 55 W.N. (N.S.W.) 136.
(10) (1931) 2 Ch. 90.
(11) (1927) 43 T.L.R. 493.
(12) (1890) 45 Ch. D. 330.
(13) (1882) 21 Ch. D. 183.
(14) (1896) 2 Ch. 268.
(15) (1925) Ch. 346.

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decided. Statements which appear in *Australian Coal and Shale Employees' Federation* v. *Smith* (1) are *obiter dicta* and are contrary to the decision in *MacDougall* v. *Gardiner* (2). Other statements made in that case (3) also are *obiter dicta* and cannot be reconciled with *Cotter* v. *National Union of Seamen* (4). The question whether there is a register within the meaning of the *Companies Act* is not the test here. All the matters complained of in respect of the election are matters of internal management which have been or are capable of being dealt with by the company, and, therefore, do not come within the jurisdiction of this court (*Bowen* v. *Hinchcliffe* (5)). Even assuming that the matters complained of were irregularities, the election was not deprived of its character of a real election, nor would the ultimate result be affected.

Cur. adv. vult.

NOV. 25.

The following written judgments were delivered :—

RICH A.C.J. The judgment of *Nicholas* C.J. in Eq. from which this appeal comes to us was in the first instance given on a demurrer *ore tenus* to the jurisdiction of the court to entertain the suit. The demurrer was founded on the " cardinal principles laid down in the well-known cases of *Foss* v. *Harbottle* (6) and *Mozley* v. *Alston* (7) and in numerous later cases which it is unnecessary to cite " (*Dominion Cotton Mills Co. Ltd.* v. *Amyot* (8)). One of the plaintiffs, however, McDermott, bases his interest in the relief claimed not on the fact that he is a member in the company simply but on the claim that he lawfully holds the office of a director and that from the exercise of that office he has been excluded. If this claim is well founded the demurrer cannot be sustained. I shall go at once to the question whether McDermott is a director. That question necessarily involves a determination of the question who constitutes the present board and the question whether a poll taken for the purposes of a meeting of the company held on 10th April 1940 resulted in the valid election of the three defendants appellants. The question in the first instance depends on what number of directors were required by the articles of association to retire as on that occasion. The poll was conducted on the footing that three vacancies on the board had occurred. *Nicholas* C.J. in Eq. has decided that

(1) (1937) 38 S.R. (N.S.W.), at p. 56 ; 55 W.N. (N.S.W.), at p. 22.
(2) (1875) 1 Ch. D. 13.
(3) (1937) 38 S.R. (N.S.W.), at pp. 57, 58 ; 55 W.N. (N.S.W.), at pp. 22, 23.
(4) (1929) 2 Ch. 58.
(5) (1924) 24 S.R. (N.S.W.) 262 ; 41 W.N. (N.S.W.) 32.
(6) (1843) 2 Ha. 461 [67 E.R. 189].
(7) (1847) 1 Ph. 790 [41 E.R. 833].
(8) (1912) A.C. 546, at p. 552.

upon the true construction of the articles two directors only retired and as there were only two vacancies to be filled the poll was abortive. There are other reasons advanced for saying that the election of directors miscarried, but these only arise if the first objection fails.

In my opinion the decision of the learned judge was right. It rests on the interpretation which he placed on article 38. That article is as follows:—"At each annual meeting the two directors who have been longest in office shall retire, but shall be eligible for re-election. If more than two directors have been in office an equal length of time, the two to retire shall be decided by lot. Candidates for the position of director must give not less than thirty-five days' notice in writing of candidature to be lodged at the head office." Article 39 provides that: "In the event of there being more candidates than the number of vacancies to be filled a ballot of members shall be taken in manner hereinbefore provided."

The three senior directors at the time of the meeting were Bennett, McDermott and O'Neill. Of these Bennett had been longer in office than the other two. But they had held office for an equal length of time. Thus there were not two persons who could be described as "the two directors who have been longest in office." Nor was it possible to say with literal correctness that "more than two directors had been in office an equal length of time." As the exact words of article 38 were not precisely satisfied, a question was raised at the board how many and which directors ought to retire. A similar situation had occurred once before, and then counsel's opinion had been taken and acted upon. The opinion was that the paramount intention of article 38 was that two directors should retire and that the subsidiary intention disclosed by its language was that where the candidates were equally qualified their fate should be decided by lot. This advice appears to have been forgotten. Bennett armed himself against the meeting of the board with another counsel's opinion. The opinion obtained by Bennett was that the paramount intention of the article lay not in the number to retire but in the time directors had been in office, with the consequence that the two who had been in office an equal length of time must retire in addition to Bennett, who had been in office longest of all. This news was broken to the board on 7th February 1940, all five directors being present. A resolution was passed which, so far as material, was expressed as follows:—"It was resolved: A. That the annual general meeting of the Society be held at the head office at 3 p.m. on Wednesday, 10th April 1940, to—(1) receive and consider the annual report and balance-sheet for the year 1939; (2) elect three directors in the place of W. Bennett Esq., O. J. McDermott Esq., and M. J. O'Neill

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Esq., who will retire and are eligible for re-election." McDermott seems to have raised no effectual objection to the course stated in the resolution and ballot-papers were prepared and circulated in accordance therewith, McDermott's name appearing among the candidates for re-election. I am clearly of opinion that not more than two directors retired under article 38. The article does not in point of expression fit the exact case which has occurred; but it cannot be construed as calling upon more than two directors to retire. It was suggested by Mr. *Teece* that as article 38 did not literally cover the case, no directors retired. This pursuit of literalness appeals to me as little as the reading by which "two" is made to mean "three." But the two interpretations side by side show the courses between which one must steer. It seems to me to be clear that the object of the article was to secure the retirement of two directors annually, to use seniority as the ground of settling the order of retirement, and when seniority failed to do it by lot. Unfortunately, in referring to the contingency of seniority failing, the article uses words which do not cover all the combinations of circumstances in which that contingency may happen. But I think the implication is plainly there and by necessary intendment the article provides "the lot" as the solution. Before the actual day of the meeting McDermott did raise the objection that two only should retire and on the eve of the meeting he and O'Neill drew lots, O'Neill losing. The presiding officer at the poll refused to count the ballot-papers on this and other grounds, but the meeting directed him to do so. He certified the result of the count without relinquishing his objection but did not declare the result of the poll in the sense of stating who was elected. As the poll was taken upon a wrong basis prima facie it was ineffectual.

It was said, however, that McDermott's conduct amounted to a resignation on his part and that independently of article 38 his office became vacant. Even if this were so it seems doubtful whether two vacancies would occur. O'Neill might well say that as by that means there were two vacancies he did not retire and O'Neill is a plaintiff. But McDermott had no intention of resigning. He was told that he retired and he failed to show resistance at the earliest opportunity; that is all. His nomination for re-election does not mean that he intended to resign; it means that he wanted to remain a director. If the poll had been in all other respects regular and effective something, perhaps, might be said for treating McDermott as disabled, either on the ground of estoppel at common law or of acquiescence in equity, from obtaining relief on the footing that the poll was invalid. But after all McDermott did object before it was altogether too late, the

presiding officer did not treat the poll as effective and, apart from the number of vacancies, he had solid grounds for the view that the system of balloting was unsafe and inadequate.

Into the other objections I shall not enter, beyond saying that before next a poll is taken it would be well for the company to compile a proper register of members fulfilling all the legal requirements, to ascertain with precision what assignees of policies are entitled to vote, and to adopt some other method of discovering how many votes a member possesses rather than pencil numbering in a corner of the ballot-paper sent out capable of alteration defacement or destruction. Although it is no part of my province to look into the future it may not be a rash prophecy if I say that the best hope of ending the present discord and irregularity of procedure in the company's control, lies in adopting a well-drawn set of modern articles of association.

In my opinion the appeal should be dismissed.

STARKE J. Appeal from a decree of the Supreme Court of New South Wales in Equity dated 26th June 1940 whereby it was declared that proceedings of the City Mutual Life Assurance Society in April of 1940 purporting to be an election of directors of the society were abortive: that the appellants were not directors of the society, and that the respondent McDermott was a director of the society.

The society was incorporated in New South Wales in 1878 as a company limited by guarantee. The articles of association of the society provided:—Article 9: "After the close of each year, a general meeting of the society shall be held at such time and place as the board may determine and shall be known as the annual meeting." Article 38:—"At each annual meeting the two directors who have been longest in office shall retire, but shall be eligible for re-election. If more than two directors have been in office an equal length of time, the two to retire shall be decided by lot. Candidates for the position of director must give not less than thirty-five days' notice in writing of candidature to be lodged at the head office." Article 39: "In the event of there being more candidates than the number of vacancies to be filled a ballot of the members shall be taken in manner hereinbefore provided."

After the close of the year 1939 the directors of the society determined that the annual meeting of the society (the sixty-first) should be held on 10th April 1940. The directors of the society prior to the annual meeting were the chairman Bryant, Wall, the respondents O'Neill and McDermott, and Bennett the appellant. Bennett had been longest in office: O'Neill and McDermott had been in office an

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equal length of time and, with the exception of Bennett, had been longer in office than any other director. O'Neill at a board meeting said that Bennett and either McDermott or he (O'Neill) would retire in accordance with article 38. It appears in evidence that McDermott and O'Neill drew lots for the purpose of determining which of them should retire at the annual meeting. The result of the draw was that O'Neill should retire with Bennett. Bennett, however, said that he had counsel's opinion, which he produced, that all three should retire. Whereupon the board resolved that the annual meeting be held on 10th April 1940 to receive the annual report and balance-sheet and to elect three directors in the place of Bennett, McDermott and O'Neill, who would retire but were eligible for re-election.

The notice convening the annual meeting notified the day of the meeting, that it was to receive and consider the annual report and balance-sheet, and to elect three directors in the place of Bennett, McDermott and O'Neill, who would retire but were eligible for re-election. It was also notified that nominations for the position had also been received from the appellants Kearney and Taylor. The annual report also set forth that Bennett, McDermott and O'Neill retired in accordance with the articles of association but were eligible for re-election. All the candidates for the position of director had given due notice of their candidature. But the learned trial judge found that McDermott did not resign his office : he retired or intended to retire, as the annual report stated, in accordance with the articles of association. So soon as the board received the nominations of Kearney and Taylor, the chairman (Bryant) was appointed presiding officer to conduct the ballot. A form of ballot-paper was approved by the board, and ballot-papers were forwarded, about 18th March 1940, to policy holders of the society. The facts in connection with the ascertainment of policy holders and the forwarding of ballot-papers to them will be dealt with later. At present all that need be said is that the presiding officer did not consider the method satisfactory. Shortly after the appointment of the presiding officer, the board resolved that counsel be asked to advise whether " in the circumstances should both Messrs. McDermott and O'Neill (as well as Bennett) have retired, or only one of the former two have retired, such retiring director being determined by lot under article 38."

A board meeting was held on 10th April, when the chairman of the board submitted the following report :—" As presiding officer appointed by the board on 5th March ult. to conduct a ballot for the election of three directors in place of Messrs. Bennett, McDermott

and O'Neill, I have to report as follows :—1. That the ballot-papers were prepared in a certain form which made no provision for giving effect to article 27 and although officers of the society in sending out the ballot-papers endeavoured to meet the position, I am satisfied that what has been done does not afford sufficient safeguards for the taking of a ballot so as to give effect to the article. 2. Since I was appointed presiding officer, the society has taken " the opinion of counsel. " A copy of such opinion has been supplied to each director. I have also had the benefit of a conference with the same counsel and having carefully considered the said opinion and having read and re-read article 38 I hold the view that under article 38 only two directors should retire at the forthcoming annual meeting and therefore there will be only two vacancies to be filled. Consequently I am of opinion that the poll for the election of directors has been conducted upon a wrong assumption and that for this reason the ballot is informal and abortive and void. 3. I have accordingly refrained from examining the ballot-papers but have preserved them intact and carefully sealed up the boxes containing such ballot papers so as to have them safely and securely under control." The board adopted the report of the presiding officer and declared the ballot abortive.

The annual meeting was held on 10th April 1940 and at this meeting a resolution was carried that the meeting be adjourned to 15th April and that the presiding officer (Bryant) be requested to count the ballot-papers now in his custody in connection with the election of the directors and report the result of such ballot to the adjourned meeting. At the adjourned meeting the presiding officer's report, addressed to the directors, was read as follows :— " I have to report that following upon the resolution passed at the annual meeting last Wednesday, but without departing from the view as to the ballot being abortive already expressed by me, I have examined the ballot-papers, and these papers, omitting informal ones, show that votes were recorded as mentioned in the second column of the schedule hereunder for the gentlemen whose names appear in the first column thereof.

Schedule.

Name.	Number of votes.
McDermott	33,650
O'Neill	32,437
Bennett	44,622
Kearney	41,267
Taylor	42,687."

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No resolution was submitted or passed upon this report. Thereafter Bennett, Kearney and Taylor acted as directors of the society and McDermott was excluded from meetings of the directors.

Nicholas J., who tried the suit, was of opinion that the number of directors of the society who should have retired was two and not three and that when two were of equal seniority the one to retire should be decided by lot. This depends upon the construction of article 38. It must be conceded that the article does not explicitly provide for the present case. No doubt the meaning of the article must be collected from its terms, understood in their plain ordinary and popular signification, but as was said, long ago, by *Abbott* C.J., " the meaning of particular words . . . is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be attained " (*R.* v. *Hall* (1)). Plainly the object of article 38 is to secure a rotation of directors and that object is attained by providing that two directors shall retire at each annual meeting. True, the article provides that the directors who shall retire are the two who have been longest in office, but that is but a method of identifying the directors who shall retire. But how can they be identified if, as here, one director has been longest in office and two an equal length of time ? A clue is given in the article itself. " If more than two directors have been in office an equal length of time the two to retire shall be decided by lot." The present case is not within the precise terms of that provision, but it suggests that the method adopted by the society of identifying directors who should retire under article 38 is, in case of need, by lot. Indeed, that is the method which was adopted by the society on former occasions in like circumstances.

But it is contended that the act of Bennett, McDermott, and O'Neill in nominating as candidates for the position of directors necessarily created three vacancies in the directorship of the society. Under article 38, a director may resign his position or office, but there is an express finding in the present case that McDermott did not resign his office under article 26. But he treated his office or position as a director as vacant by reason of the provisions of article 38 and gave notice of his candidature for vacancies created by the article which were assumed to be three, though as a matter of law they were but two. McDermott then did not resign : he was not retired under article 38 : the board of directors of the society declared that the steps taken by the society for the election of directors were informal and abortive, the presiding officer, at the annual meeting,

(1) (1822) 1 B. & C. 123, at p. 136 [107 E.R. 47, at p. 51].

though he counted the votes, made substantially the same declaration, and the annual meeting of the society, though it directed the counting of votes, did not proceed to any declaration of the result of the poll taken pursuant to the proceedings that the board of directors and the presiding officer had declared informal and abortive.

Another ground was also taken in support of the decree of the learned judge. It is indicated in the report of the presiding officer, which stated that sufficient safeguards for the taking of a ballot so as to give effect to article 27 had not been observed.

The *Companies Act* 1936 (N.S.W.), sec. 78, provides (Similar provisions may be found in corresponding prior enactments) that every company should keep in one or more books a register of its members and enter therein particulars of the names, addresses, and occupations of the members and so forth. The relevant articles of association of the society provide :—" 3. Every person shall be deemed to have agreed to become a member of the society who shall contract with the board of directors for a policy to be issued to him, with the right of participation in profits to be allotted to such policy, and on the issue of every such policy the name of the contracting party shall be entered in the register of members in respect of the same as distinguished by its number, whether such contracting party shall have been previously registered as a member of the society or not. . . . 22. Ballot-papers initialled by the presiding officer, stating the question to be determined shall be sent . . . direct to the members of the society . . . and must be returned . . . addressed to the presiding officer. . . . 24. . . . The presiding officer shall have the control of the ballot-papers during their examination, and his decision as to the informality or otherwise of any such ballot-paper shall be held to be final. . . 27. Every member shall, where a poll is taken, be entitled to vote according to the following scale :—A member registered in respect of any policy for an assurance or an endowment amounting to one hundred pounds shall have one vote therefor, and for every additional one hundred pounds secured by such policy one additional vote. A member registered in respect of any policy for an annuity of five pounds shall have one vote therefor and for every additional five pounds of annuity secured by such policy one additional vote. Provided that " no " member shall have more than twenty votes."

The society has not any register of members which complies with the *Companies Act* or its articles of association. All that is kept is (*a*) a card index of policy holders in New South Wales with names, addresses and amounts of each policy ; (*b*) a policy register in each of the other States of policy holders there and amount of each policy ;

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but the names and addresses of the inter-State policy holders were not kept in Sydney though their names and addresses were kept at the branch offices in the other States. No doubt a register of members could be prepared from the material. But there is no book or books kept by the society that is or purports to be a register of members; what was kept were policy register cards or books. And it was "almost impossible," with this system, "to investigate and ensure that the rightful owner of each policy was posted a ballot-paper."

The procedure adopted in connection with the ballot to fill the vacancies in the office or position of director at the annual meeting of 1940 was as follows:—In New South Wales, envelopes were prepared from the card index, by means of an addressograph machine. On these envelopes were placed the name and address of each policy holder and the sum assured. The number of votes to which each holder was entitled was calculated and marked in pencil, I gather, on the ballot-paper. As to the other States, the branches there also prepared envelopes with the names and addresses thereon, the sum assured, which was "marked in pencil inconspicuously, generally on the lower left-hand corner." Officers at the head office thus calculated the number of votes each policy holder would be entitled to, according to the articles of association, and marked it in pencil on the ballot-paper. But it is plain there was no register nor any record in New South Wales from which the accuracy of the inter-State information could be checked or verified by the presiding officer or anyone else. It thus appears that ballot-papers were issued to policy holders whose names were not entered on any register of members and that no means were available to the presiding officer of determining the number of votes to which each member was entitled under the articles of association. It is not surprising in these circumstances that the presiding officer reported that he was not satisfied that sufficient safeguards had been afforded for taking a ballot so as to give effect to article 27.

In my opinion, the method adopted by the society did not comply with the provisions of article 27 and other articles. A register of members was not kept in accordance with the *Companies Act* or the articles, and the scale of voting powers prescribed by article 27 contemplates the registration of members in respect of their policies. The presiding officer and the board of directors were well warranted therefore in declaring that the ballot proposed to fill vacancies in the office or position of director for the year 1940 was abortive. And it is an additional reason for affirming the declarations of the learned judge that the proposed ballot and election was abortive.

The rule in *Foss* v. *Harbottle* (1) and *Mozley* v. *Alston* (2) is, however, relied upon. In other words, that prima facie the company alone can sue in respect of wrongs done to the company, that nothing connected with the internal disputes of a company is to be made the subject of legal proceedings by some one or more shareholder or shareholders on behalf of himself and others unless there be something illegal, oppressive, or fraudulent, or something *ultra vires* the company. "In my opinion," said *Mellish* L.J. in *MacDougall* v. *Gardiner* (3), "if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes." The rule as thus stated warrants the proposition, I think, that any member of a company can complain of acts which are beyond the powers conferred on the company or its members by its articles of association (*Salmon* v. *Quin & Axtens Ltd.* (4); *Australian Coal & Shale Employees' Federation* v. *Smith* (5)).

The present suit is brought by several plaintiffs on behalf of themselves and all other members of the society who did not vote for the appellants, but the society itself was not a plaintiff in the suit but was joined as a defendant. The position and right of the plaintiff McDermott as a director of the society is denied, and the appellants claim that they have been elected as directors of the society by the majority of its members, although the provisions of the articles of association have not been complied with. The election of Bennett, Kearney and Taylor as directors of the society is thus illegal, and the majority of the members could not elect them legally unless and until the articles of association are altered.

The appeal should be dismissed.

DIXON J. The City Mutual Life Assurance Society Ltd. is a company limited by guarantee. Membership is governed by the articles of association. Every person who obtains from the society a policy of insurance with a right to participate in profits is deemed to have become a member, and the articles require that, on the issue of the policy, his name shall be entered in the register of members. He may assign or transfer his policy, but, for the assignee to obtain

(1) (1843) 2 Ha. 461 [67 E.R. 189].
(2) (1847) 1 Ph. 790 [41 E.R. 833].
(3) (1875) 1 Ch. D., at p. 25.
(4) (1909) 1 Ch. 311, at p. 316; (1909) A.C. 442.
(5) (1937) 38 S.R. (N.S.W.), at p. 57; 55 W.N. (N.S.W.), at p. 23.

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full membership with a right to vote, the assignment must be absolute.

The transaction of the business of the society is placed under the authority of a board of directors, the number of whom, at present fixed at five, may be increased or reduced at a general meeting. The quorum for a meeting of the board is three. After the close of each year a general meeting of the society is to be held. It is called the annual meeting, and other meetings are special meetings. Directors retire in rotation, and those whose turn it is are required to retire " at " the annual meeting. They are eligible for re-election. If there are more candidates than vacancies, a ballot is taken in the manner prescribed by the articles which deal with polls demanded at meetings. Those articles do not exactly fit the case of a ballot for directors, which is only connected with a meeting by the fact that the office of the retiring directors becomes vacant " at " the meeting but otherwise must be taken independently of what is done at the meeting. When a poll is demanded on some question arising at a meeting a time is to be set apart for the determination of the question, that is, an adjournment of the meeting, or another meeting, is fixed for the " giving " of the vote. The meeting at which a poll is demanded must appoint two scrutineers. The board of directors then appoints a " presiding officer." His duties include initialling ballot-papers, which must state the question to be determined and must be sent from the head office of the society in Sydney direct to the members at least twenty-one days before the day set apart for determining the question and must be returned to the head office addressed to him at least twenty-four hours before that day. The presiding officer is to have control of the ballot-papers during their examination; his decision as to the informality or otherwise of any such ballot-paper is to be final; and he is to report to the board of directors the result of the poll. The number of votes of any member depends on the amount of his policy, but the number of votes one member may have is limited to twenty.

On 7th February the board of directors fixed 10th April 1940 as the date of the next annual meeting. The five directors then were Bennett, who was also general manager of the society, McDermott, O'Neill, Wall, and Bryant, who was chairman. There was a question as to who should retire. Bennett had held his office longest, then came McDermott and O'Neill, who had been last elected at the same time and therefore had been in office for the same period. The article governing the matter is expressed, so far as is material, in the following terms: " 38. At each annual meeting the two directors who have been longest in office shall retire, but shall be eligible for

re-election. If more than two directors have been in office an equal length of time, the two to retire shall be decided by lot."

The difficulty felt was that no two could be said to have been longest in office and there were two, viz., McDermott and O'Neill, and not more than two, who could be said to have been in office an equal length of time. It was not the first time that such a situation had arisen, and on an earlier occasion the board, acting under the advice of counsel, had solved it by requiring the two directors of equal standing to determine by lot which of them should join the director longest in office in making up the two to retire.

This time, however, Bennett, on his own account, obtained an opinion. Counsel advised that as there were no two who had been longest in office, and not more than two who had been in office an equal length of time, all three who had held office longest must retire.

In my opinion this advice was erroneous. The overriding intention of the article is that two directors shall retire annually. Then the article attempts to provide the means of choosing the two to go out. First, it gives length of time in office as the ground. Then, because length of time may not distinguish two from the rest of the directors, it goes on to provide for the case of its being found that more than two are of equal standing. In that case the article falls back on chance and directs that lots shall be drawn. If either Wall or Bryant had been in office for the same time as O'Neill and McDermott, the exact terms of the article would have been satisfied; though, doubtless, the case foreseen by the framer was rather that of three directors who had held office an equal length of time coming by rotation to be the most senior. The article is very badly drawn, but it plainly means to provide for the retirement of two directors annually by rotation and to direct the drawing of lots where the test of seniority proves insufficient. The failure of the draftsman to cover by his language every combination of conditions in which the test of seniority would be indecisive does not warrant either the conclusion that more than two directors must retire or the conclusion that no director shall retire. It is a case in which a necessary and quite certain implication arises that two directors should retire and that as between those of equal standing the choice should be by lot.

However, when Bennett produced the opinion he had obtained, both McDermott and O'Neill bowed to the necessity it appeared to impose upon them of submitting themselves for re-election. The directors authorized a notice of meeting stating that they and Bennett would retire but were eligible for re-election. They lodged a notice of candidature at the head office and availed themselves of a right, given by the articles to candidates, to have circulars on their behalf

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sent out to members. Bryant was appointed presiding officer, and they concurred with other candidates in a consent to his stamping instead of writing his signature. On 11th March a majority of the board, consisting of Bryant, O'Neill, and McDermott, Wall and Bennett dissenting, resolved summarily to dismiss Bennett from the position of general manager. It is unnecessary to go into the grounds for this step. In the meantime preparations for the taking of the poll had gone on. Bryant did not, it appears, give directions as to the course to be followed. Unfortunately the society had not maintained a register in strict compliance with the provisions of the *Companies Act*. There was a serial register of policies kept at the head office in Sydney, but the records of policy holders in alphabetical order containing the requisite information consisted of card indexes kept, not all at the head or registered office in Sydney as the law requires for a register of members, but at the office, whether in Sydney or elsewhere, from which the business of the particular insurance was done. The various branch offices prepared envelopes bearing the addresses of the members on their respective card indexes and noted on each envelope the sum assured, so indicating the number of votes to which the addressee appeared entitled. These were sent in bundles to the head office, where what appeared to be the proper numbers of votes was written on the ballot-paper, which was then enclosed in the envelope for dispatch to the member. The number was written in pencil in the corner of the ballot-paper. In sending out the envelopes many mistakes were made as to the person entitled to vote, particularly in the case of assignees whose assignments were not absolute. But it is denied that, in the event, the errors were sufficient in number to affect the result of the poll. Instead of sending their ballot-papers to the head office very great numbers of members sent them to branch offices. There, apparently, they were opened and sent in bundles to the head office. Not a few ballot-papers showed alterations or defacement of the figures in the corner indicating the number of votes.

At a meeting of 27th March Bryant expressed concern at the procedure and amazement at the want of foresight and efficiency in the conduct of the ballot. At about this time he consulted counsel, under the authority of a meeting of the board at which he, O'Neill and McDermott were present. This resulted in their taking up the position that only two directors retired and that the ballot should have been for two, not three, vacancies.

On 10th April the directors met before the time appointed for the annual meeting and Bryant submitted to them a report to the effect that the form of the ballot-papers did not give effect to the articles

and that he was satisfied that what was done did not afford sufficient safeguards to take a ballot; that, having conferred with counsel, he held the view that only two directors should retire, and that accordingly the poll was on the wrong basis and informal, abortive and void, and that accordingly he had not counted the ballot papers but had sealed them up. The board by a majority adopted the report and declared the ballot abortive. O'Neill and McDermott then drew lots and, according to the lot, it fell to O'Neill to retire. The annual general meeting began immediately afterwards. That meeting carried a resolution requesting the presiding officer (Bryant) to count the ballot-papers and adjourning the meeting in the meantime. Bryant, as presiding officer, then presented a report to the directors, which was read at the adjourned meeting. It was expressed thus:—"I have to report that following upon the resolution passed at the annual meeting last Wednesday, but without departing from the view as to the ballot being abortive already expressed by me, I have examined the ballot-papers, and these papers, omitting the informal ones, show that votes were recorded as mentioned in the second column of the schedule hereunder for the gentlemen whose names appear in the first column thereof." The schedule showed that, of the five candidates, the number of votes credited to each of the other three was considerably greater than either those credited to O'Neill or those to McDermott. Those three candidates, one of whom was Bennett, considered themselves elected and assumed office. A board meeting consisting of Bryant, Wall, Bennett and the two new directors *de facto* was held on the same day and resolutions were carried rescinding the dismissal of Bennett as general manager and re-appointing him. Thereafter McDermott was excluded from meetings of directors. To establish that he was still a director, that the poll was abortive and that neither Bennett nor the two candidates who were acting as directors *de facto* were duly appointed, a suit in equity was brought in the Supreme Court of New South Wales. The plaintiffs are McDermott and O'Neill and six other members of the society, suing on behalf of themselves and all other members who did not vote in favour of the three now claiming to hold office. The defendants are the five persons acting as directors and the society. *Nicholas* C.J. in Eq., who dealt with the suit, made a decree declaring McDermott to be a director and declaring that the ballot was abortive and void and granting the appropriate consequential relief by way of injunction. From this decree the present appeal is brought by Bennett and his two colleagues who assumed office as directors.

In my opinion the decree was rightly made.

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I have already stated the interpretation which I place upon the article of association governing the retirement of directors, and from that it follows that the basis upon which the poll proceeded was erroneous. The articles required only two directors to retire. But, notwithstanding that, as I think, it was unnecessary for McDermott and O'Neill both to retire, questions arise as to the effect of their conduct in failing to controvert the contrary view, in giving notice of their candidature and in causing circulars on their behalf to be sent out and in otherwise acting as candidates who had retired. Two views are suggested, either of which, it is said, precludes McDermott or O'Neill from contesting the validity of the poll on the ground that two vacancies only had occurred.

The first is that each of them by his actions vacated his office of director. An article of association provides that if a director resigns or, among other things, becomes unable to act, his office shall become vacant and the vacancy may be filled at an ordinary meeting of the board within three months. It is contended that what they did amounted to a resignation, and possibly to disabling themselves from acting, within the meaning of this article. The contention does not appear to me to be well founded. Neither of them intended to resign or was understood by anyone as voluntarily renouncing his office, and neither of them in any way rendered himself unable to act.

The second suggestion is that McDermott and also O'Neill are estopped from relying, for the purpose of invalidating the poll, upon the ground that two directors retired and no more. The suggestion was not developed but, as I understand, it depends upon the principle that a party who adopts an assumption as to a state of affairs for the purpose of exercising rights cannot afterwards disturb the assumption for the purpose of claiming inconsistent rights against others who have acted on the same common basis. The principle is expressed in various ways: Cf. *Cave* v. *Mills* (1), per *Wilde* B.; *Smith* v. *Baker* (2), per *Honyman* J., cited in *United Australia Ltd.* v. *Barclays Bank Ltd.* (3); *Yorkshire Insurance Co. Ltd.* v. *Craine* (4), per Lord *Atkinson*; *Ambu Nair* v. *Kelu Nair* (5), per Sir *George Lowndes*. I have discussed or referred to the principle on more than one other occasion (*Grundt* v. *Great Boulder Pty. Gold Mines Ltd.* (6); *Newbon* v. *City Mutual Life Assurance Society Ltd.* (7);

(1) (1862) 7 H. & N. 913, at p. 927 [158 E.R. 740, at p. 746].
(2) (1873) L.R. 8 C.P. 350, at p. 357.
(3) (1940) 4 All E.R. 20, at p. 47.
(4) (1922) 2 A.C. 541, at p. 547.
(5) (1933) L.R. 60 Ind. App. 266, at p. 271.
(6) (1937) 59 C.L.R. 641, at pp. 675-678.
(7) (1935) 52 C.L.R. 723, at p. 734.

Thompson v. *Palmer* (1); *Richardson* v. *Federal Commissioner of Taxation* (2))—See, too, *West* v. *Commercial Bank of Australia Ltd.* (3). It may be that McDermott, for his case is the more important, did adopt, with the other candidates and the society, a common assumption that three vacancies existed and did on that assumption exercise rights, which on the footing that he was a retiring director the articles would confer upon him, of candidature. I doubt whether he proceeded upon the assumption long enough to preclude him, even if the other elements necessary to create an estoppel existed. For, under the articles, his retirement would not take place until the annual meeting, and before that time he clearly disputed his liability to retire and contended that lots should be drawn. But what appears to me to be fatal to the argument is that the poll was not regular and valid in all other respects and the presiding officer never so treated it. In saying this I put on one side the procedural question whether a shareholder not claiming, as McDermott does, to be a director wrongfully excluded from the exercise and enjoyment of his office could invoke the jurisdiction of a court of equity, and obtain relief on the ground that, independently of the number of vacancies, the election was irregularly conducted and abortive. That is a question of parties. Clearly in a suit constituted with the society as plaintiff, a majority of shareholders could obtain that relief. But, considered apart from the constitution of a suit and independently of the question of the number of vacancies, the election was, in my opinion, abortive. The presiding officer never did depart from his opinion that the method of taking the poll was defective, and, in my judgment, his view was well founded. The register of members relied upon was not in accordance with law, and it may be that no other practical course was open to those conducting the poll. But, having regard to the return of the ballot-papers to the Melbourne branch office instead of to the Sydney head office, to the absence of any means by which the presiding officer could identify the voter and check the number of votes he could exercise, to the doubts as to the correctness of the numbers with which the candidates were credited, to the errors in relation to assigned policies, and other mistakes, I think that Bryant as presiding officer rightly refused to say who was elected and his mere counting of intelligible votes in compliance with the direction of the meeting does not amount to a return or report of the result of the poll.

(1) (1933) 49 C.L.R. 507, at p. 547.
(2) (1932) 48 C.L.R. 192, at pp. 205, 206.
(3) (1936) 55 C.L.R. 315.

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It follows that there was no poll or election which, but for the mistake in the number of vacancies, was valid and effectual in law. McDermott could not be estopped from claiming the seat upon the board which, on the proper interpretation of the articles, he did not vacate, unless by doing so he would invalidate an election otherwise resulting in a lawful appointment of directors and in a valid reconstitution of the board. The drawing of lots made it clear that he, and not O'Neill, retained his seat. I see nothing irregular in the drawing of lots on the occasion when it was done, but, even if it were considered irregular, probably the only result would be that neither McDermott nor O'Neill has yet vacated office. In these circumstances it appears to me that McDermott is a director and has a *locus standi* as plaintiff because he has been wrongfully excluded from the exercise of his office by defendants unjustifiably claiming to have been elected to the board. From this view it follows that the question becomes immaterial whether a suit could be maintained for relief against the poll by members of the society suing as plaintiffs on behalf of themselves and all other members who did not vote for Bennett and his two *de-facto* colleagues: See and compare *Bowen* v. *Hinchcliffe* (1); *Australian Coal & Shale Employees' Federation* v. *Smith* (2).

For these reasons I am of opinion that the appeal should be dismissed with costs. There is no reason why Bryant, though a submitting defendant, should not receive his costs of being represented upon the argument of the appeal.

Appeal dismissed with costs.

Solicitors for the appellants and for the respondents F. E. Wall and the City Mutual Life Assurance Society Ltd., *Minter, Simpson & Co.*

Solicitors for the plaintiffs respondents, *Murphy & Moloney.*

Solicitor for the respondent G. E. Bryant, *T. J. Purcell.*

J. B.

(1) (1924) 24 S.R. (N.S.W.) 262; 41 W.N. (N.S.W.) 32.

(2) (1937) 38 S.R. (N.S.W.) 48; 55 W.N. (N.S.W.) 19.