Dist at pp. 342. (1975) 2 NSWLR. 666.
(at 32) affd. 75 WN 299.
App 80 WN 546 : 63 SR 390
" 4. FLR. 69
REPORTS OF CASES App 80 WN 1218

DETERMINED IN THE See 91 CLR. 112
Ref to (1974) AC 821

HIGH COURT OF AUSTRALIA

C. 22 ALR. 161.
Foll 103 ALR 43.

[HIGH COURT OF AUSTRALIA.]

GRANT AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

JOHN GRANT AND SONS PROPRIETARY LIMITED AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1950.

SYDNEY, *Aug.* 20-24; *Dec.* 4.

Latham C.J. McTiernan, Williams, Fullagar and Kitto JJ.

Company—Management—Articles of association—Compliance therewith—Directors—Increase in number—Qualification—Appointment—Defect in appointment—Validation—Capital—Issue of further—Shares—Restriction on transfer—Transfer to non-members of company—Objection—Validity—Breach of articles—Right of member to restrain—Register—Rectification—Companies Act 1936 (*N.S.W.*) (*No.* 33 *of* 1936), *ss.* 83, 124.*

A company's articles of association, *inter alia*, provided, by art. 16, that no share in the company should be transferred to a person who was not a member of the company so long as any member was willing to purchase it at the "fair value" as stated in a notice to the company, and that if the company within a specified period found a member willing to purchase, the

* Section 83 of the *Companies Act* 1936 (N.S.W.) is as follows:—
"83. (1) If—
(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,
the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register."

Section 124 of the *Companies Act* 1936 (N.S.W.) is as follows:—
"124. The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

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proposing transferor was bound to sell to the member upon payment of the fair value: by art. 71, that the directors should not be less than two nor more than five in number and the qualification of a director should be the holding of shares of the nominal amount of £100. A director might act before acquiring his qualification but in any case he should acquire the same within three months from his appointment and unless he should do so he should be deemed to have agreed to take the shares from the company and they should be forthwith allotted to him but he might acquire the same by gift or transfer from any persons; by art. 86, that the company might from time to time in general meeting by extraordinary resolution increase or reduce the number of directors and determine in what rotation such increased or reduced number should go out of office; and by art. 93, that acts done by the directors or any person acting as director should notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a director.

At the date of the incorporation of the company, H. and W. each held substantially one-half of the issued capital. Thereafter a further issue was made to each of them and H. and W. respectively declared that they held the issued shares on trust for their children. After this date still further capital was issued to both H. and W. in consequence of which W. eventually held a greater number of shares than H. In 1940, H., without objection from W. and without complying with art. 16, transferred to his children the shares which he held in trust. In 1947 W. desired to transfer to his children, including D. and A., the shares which he held in trust, but H. and his children, all being entered in the register as shareholders, objected and insisted upon proper compliance with art. 16. This objection was admittedly made with the object of forcing W. to agree to the equalization of the shareholdings by the two families. Subsequently, at an extraordinary general meeting of the company, which was not in need of further capital, an ordinary resolution was passed, H. and the members of his family dissenting, providing that the number of directors be increased to five by the appointment of two additional directors. Later at the meeting a further resolution was passed, H. and the members of his family again dissenting, by which D. and A., two young married women, and children of W., were appointed directors. After the termination of the general meeting, a meeting of directors, at which H., W., D. and A. and one other were present, was held. At this meeting D. and A. applied pursuant to art. 71, for 100 shares each, and it was resolved, H. dissenting, that such shares be allotted to them. It was also resolved, H. dissenting, (i) that transfers of the shares held by W. in trust for D. and A. be approved and that D. and A. be entered in the register as the holders thereof, and (ii) that W. be appointed managing director for a period of five years at a salary of £2,000 per annum plus a percentage of profits.

Held, by *McTiernan*, *Williams* and *Kitto* JJ. (*Latham* C.J. dissenting), (1) That art. 86 required an extraordinary resolution before the number of

directors in office could be increased from three to five, and this not having been obtained the election of D. and A. as directors was void.

Worcester Corsetry Ltd. v. *Witting* (1936) Ch. 640, applied.

(2) That D. and A. not having been elected directors the issue of 100 shares to each of them pursuant to art. 71 was void and the register should be rectified accordingly.

(3) That the transfer to D. and A. of the shares held in trust for them by W. was in contravention of art. 16 and was void.

Hunter v. *Hunter* (1936) A.C. 222, applied.

(4) That as W. was disqualified from voting, and as D. and A. had not been *de jure* appointed directors, there were insufficient valid votes cast to carry the resolution for the appointment of W. as managing director; and further such purported resolution was not validated by s. 124 of the *Companies Act* or art. 93.

Morris v. *Kanssen* (1946) A.C. 459, applied.

Held by *Fullagar* J. (1) That the transfer of the shares to D. and A. involved a contravention of art. 16, but, as H. had previously acquiesced in a transaction involving a breach of art. 16, and, as his children were improperly on the register, rectification of the register should, in the exercise of the Court's discretion, be refused; and (2) that the appointments of D. and A. as directors were not in accordance with the articles, and that the allotment of 100 shares to each of D. and A. and the appointment of W. as managing director were defective, but these matters were validated by s. 124 of the *Companies Act* 1936 (N.S.W.) and art. 93.

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

APPEAL from the Supreme Court of New South Wales.

A suit by way of statement of claim was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Henry Cook Grant, Henry John Grant, Kenneth William Grant and Adelaide Emma Grant against John Grant & Sons Pty. Ltd., William Allison Grant, Donald Frederick Grant, Alison Eleanor Arnott and Margaret Winifred Dampney for the rectification of the share register of the company in respect of (i) certain transfers of shares from the defendant W. A. Grant to each of the other personal defendants, and (ii) the allotment of certain shares to the defendants Mrs. Arnott and Mrs. Dampney. The plaintiffs also sought (a) a declaration that the purported election of the defendants Mrs. Arnott and Mrs. Dampney as directors of the company was void and of no effect; (b) an injunction restraining those two defendants from acting and voting as directors of the company; and (c) an injunction restraining all the defendants from carrying

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into effect a certain resolution dealing with the appointment and salary of the defendant W. A. Grant.

The re-amended statement of claim was substantially as follows:—

1. The plaintiffs were and at all material times had been members and shareholders of the defendant company and sued herein on behalf of themselves and all other aggrieved shareholders. The plaintiffs at all material times had been and still remained registered in the books of the company as the holders of the following shares respectively:—Henry Cook Grant 13,500 shares; Henry John Grant 3,250 shares; Kenneth William Grant 3,000 shares; and Adelaide Emma Grant 5,898 shares.

2. The defendant company was a proprietary company within the meaning of the *Companies Act* 1936 and was duly incorporated under the provisions of that Act and was liable to be sued in its said incorporated name.

3. The principal objects for which the company was incorporated were as follows:—" (a) To acquire and take over as a going concern the business now carried on in Sydney in the State of New South Wales of builders and contractors under the style or firm of John Grant and Sons and all or any of the assets and liabilities of the proprietors of that business in connection therewith and for that purpose to enter into such agreement as the Directors may think fit and to carry such agreement into effect with or without modification. (b) To carry on the business of builders and contractors in all their branches and for that purpose to construct execute carry on equip improve work develop administer manage or control buildings works and conveniences of all kinds . . . ."

4. On or about 6th September 1922 the company commenced to carry on business and thereafter had conducted and still was conducting a large building and contracting business.

5. The defendant W. A. Grant was and at all material times had been a member and shareholder of the company and prior to the facts alleged in pars. 19 to 35 (both inclusive) of the statement of claim was registered in the books of the company as the holder of 27,250 shares.

6-11 inclusive. In these paragraphs it was stated that the defendant D. F. Grant was a son, and the defendants Mrs. Arnott and Mrs. Dampney were the daughters of the defendant W. A. Grant, and that prior to the facts alleged in pars. 19 to 35 (both inclusive) of the statement of claim the said son and the said daughters respectively were not the holder of any shares in the capital of the company.

12-16 inclusive and 18. In these paragraphs were set forth arts. 16, 59, 70, 71, 79 and 86 of the articles of association of the company. These articles, together with other articles, are sufficiently set forth in the judgment of *Fullagar* J. hereunder.*

17. Article 84 was as follows:—"84. No person not being a retiring Director shall be eligible for election to the office of Director at any General Meeting unless he or some other member intending to propose him at least fourteen clear days before the meeting left at the office of the Company a notice in writing duly signed signifying his candidature for the office or the intention of such member to propose him provided that in the case of a person recommended for election by the Directors ten clear days' notice only shall be necessary. Notice of each and every candidature shall seven days previously to the meeting at which the election is to take place be served on the registered holders of shares."

19. On or about 18th November 1947 W. A. Grant executed a document purporting to be a transfer of 4,000 shares in the capital of the company to D. F. Grant as transferee.

20. On or about 18th November 1947 W. A. Grant executed a document purporting to be a transfer of 2,500 shares in the capital of the company to Mrs. Arnott.

21. On or about 18th November 1947 W. A. Grant executed a document purporting to be a transfer of 2,750 shares in the capital of the company to Mrs. Dampney.

22. Prior to 9th December 1948 H. C. Grant and W. A. Grant were Governing Directors of the company within the meaning of art. 70 of the articles of association.

23. On or about 9th December 1948 W. A. Grant resigned his office as Governing Director and thereupon H. C. Cook became a permanent director by virtue of and in accordance with the provisions of art. 70.

24. On 17th December 1948 W. A. Grant and D. F. Grant were appointed directors of the company at an extraordinary general meeting of the company convened by H. C. Grant pursuant to the provisions of art. 70. On 14th January 1949 at a duly convened meeting of the directors there were issued to D. F. Grant 100 shares pursuant to the provisions of art. 71.

25. On or about 17th December 1948 at a meeting of the directors of the company the transfers referred to in pars. 19, 20 and 21 of the statement of claim were authorized to be registered in the books of the company.

* p. 23, *post*.

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26. On or about 17th December 1948 the transfers referred to in pars. 19, 20 and 21 were registered in the books of the company.

27. At the meeting of directors referred to in par. 25 W. A. Grant and D. F. Grant were present and each of them voted in favour of the resolution authorizing that registration. H. C. Grant was also present at that meeting and voted against the resolution.

28. Prior to the registration of those transfers no "transfer notice" (as defined in art. 16) was given by W. A. Grant, nor were any of the other provisions of art. 16 complied with. The plaintiffs were and each of them was at all relevant times and still remained willing to purchase all the shares the subject of those transfers under the provisions of art. 16 and for a fair value within the meaning of that article.

29. On 23rd February 1949 at an extraordinary general meeting of the company it was moved and seconded that Mrs. Arnott and Mrs. Dampney be elected as directors of the company and each of them was thereupon purported to be elected as a director. No notice in writing duly signed in accordance with the provisions of art. 84 was left at the office of the company or served on the plaintiffs as registered holders of shares.

30. At that extraordinary general meeting D. F. Grant, Mrs. Arnott and Mrs. Dampney were present and in respect of all the shares in respect of which they were registered in the books of the company voted as shareholders on all motions put to the meeting. Prior to that purported election of Mrs. Arnott and Mrs. Dampney as directors the plaintiffs opposed the appointment of directors under art. 70, but on the motion of W. A. Grant seconded by D. F. Grant it was resolved—"That the number of Directors be increased to five and that two additional Directors be appointed pursuant to Article 70 of the Company's Articles of Association". That motion was carried by six votes to four on a show of hands and on a poll by 33,198 votes in favour and 28,398 votes against. Each of the defendants W. A. Grant, D. F. Grant, Mrs. Arnott and Mrs. Dampney voted in favour of the resolution and each of the plaintiffs voted against it.

31. Thereafter Mrs. Arnott and Mrs. Dampney had purported to act as directors of the company and for that purpose had attended all meetings of directors held since the date of their purported election.

32. At a meeting of directors of the company held on 23rd February immediately after the conclusion of the extraordinary general meeting referred to in pars. 29 and 30 there were present

H. C. Grant, W. A. Grant, D. F. Grant, Mrs. Arnott and Mrs. Dampney.

33. At that meeting of directors it was resolved, H. C. Grant dissenting, that W. A. Grant be appointed managing director of the company for five years at a salary of £2,000 per annum, plus a percentage of profits to be decided upon by the directors each year. The remuneration the subject of that resolution increased by the sum of £804 per annum the remuneration payable to W. A. Grant by the company immediately prior to such meeting of directors.

34. At that meeting of directors Mrs. Arnott and Mrs. Dampney made application in purported pursuance of art. 71 for 100 shares each in the capital of the company and each tendered her cheque for £100. It was thereupon resolved, H. C. Grant dissenting, that 100 shares in the company be allotted to each of Mrs. Arnott and Mrs. Dampney and Mrs. Arnott and Mrs. Dampney were thereupon entered as the holders of such shares in the books of the company.

35. At that meeting of directors it was also resolved, H. C. Grant dissenting, that the following confirmatory share transfers be accepted as the transferees were members of the company: William Allison Grant to Mrs. Margaret Winifred Dampney—2,750 shares; William Allison Grant to Mrs. Alison Eleanor Arnott—2,500 shares.

36. The plaintiffs charged and alleged that the facts were that the said election of Mrs. Arnott and Mrs. Dampney as directors of the company was solely and exclusively for the purpose of avoiding and evading the incidence of art. 16 of the articles of association by: (a) enabling an issue of shares to be made to each of Mrs. Arnott and Mrs. Dampney; and (b) lending colour to those confirmatory transfers of shares and thereby enabling Mrs. Arnott and Mrs. Dampney to become registered in respect of the shares referred to in pars. 20 and 21 without following the procedure prescribed by art. 16.

36A. Alternatively to the facts charged in par. 26 the plaintiffs charged and alleged that the fact was that that election was substantially for the purposes set forth.

37. The plaintiffs further charged the fact to be that the election of Mrs. Arnott and Mrs. Dampney was not made bona fide or at all in the interests of the company or for any purposes directly or indirectly connected with the administration of the company or the conduct of its business or affairs, but was made solely and exclusively for the purpose of avoiding and evading the incidence

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of art. 16 by :—(a) enabling new issue of shares to be made to each of Mrs. Arnott and Mrs. Dampney ; and (b) lending colour to those confirmatory transfers of shares and thereby enabling Mrs. Arnott and Mrs. Dampney to become registered in respect of the shares referred to in pars. 20 and 21 respectively without following the procedure prescribed by art. 16.

37A. Alternatively to the facts charged in par. 37 the plaintiffs charged the facts to be that that election was not made bona fide in the interests of the company or substantially for purposes connected with the administration of the company or the conduct of its business or affairs but was made substantially for the purposes set forth in par. 37.

38. In the alternative the plaintiffs charged that W. A. Grant, D. F. Grant, Mrs. Arnott and Mrs. Dampney, in voting for the election of Mrs. Arnott and Mrs. Dampney as directors, did so solely and exclusively for the purposes alleged in par. 37 and that without the votes of W. A. Grant, D. F. Grant, Mrs. Arnott and Mrs. Dampney the two last-mentioned persons could not and would not have been so elected.

39. By reason of the facts so charged and alleged the plaintiffs submitted :—(a) that the election of Mrs. Arnott and Mrs. Dampney as directors of the company was *ultra vires* and void, and (b) that the names of D. F. Grant, Mrs. Arnott and Mrs. Dampney had been improperly and unlawfully entered on the share register of the company as holders of the shares referred to in pars. 19, 20, 21 and 34 and that the share register should be rectified accordingly by deleting their names therefrom.

40. By reason of the facts so charged and alleged the plaintiffs submitted that the resolution referred to in par. 33 was void and of no effect.

The plaintiffs claimed :—

1. That the transfers of shares referred to in pars. 19, 20 and 21 might be declared to have been made in contravention of art. 16 of the articles of association and void and that the register of members of the company be rectified accordingly.

2. That the purported election of Mrs. Arnott and Mrs. Dampney as directors of the company was void and of no effect.

3. That Mrs. Arnott and Mrs. Dampney be restrained from acting and voting as directors of the company.

4. That the company and W. A. Grant, D. F. Grant, Mrs. Arnott and Mrs. Dampney be restrained from implementing or carrying into effect the resolution referred to in par. 33.

5. That the issue of shares referred to in par. 34 be declared to be void and that the register of members of the company be rectified accordingly.

6. That the defendants other than the company be ordered to pay the costs of the plaintiffs.

7. That the plaintiffs be given such further or other relief as the nature of the case required.

The statement of defence of the personal defendants was, so far as material to this report, substantially as follows :—

4. In answer to par. 36 of the statement of claim they denied that the election of Mrs. Arnott and Mrs. Dampney as directors of the company was solely and exclusively for the purpose of avoiding and evading the incidence of art. 16 by either enabling an issue of shares to be made to each of Mrs. Arnott and Mrs. Dampney or by lending colour to the confirmatory transfers of shares as alleged in par. 36.

5. In further answer to par. 36 they said that the fact was that the election of Mrs. Arnott and Mrs. Dampney as directors was for the following among other reasons :—(a) to prevent the plaintiffs in purported reliance on art. 16 seeking to acquire shares in a manner which would, by reason of the matters alleged in the statement of defence, have been unjust and inequitable and which would to the knowledge of the plaintiffs or some of them have involved a breach of trust on the part of W. A. Grant ; and (b) to aid the effective administration of the company and the proper conduct of its affairs by, *inter alia*, the prevention of deadlocks and the overcoming of disputes between the existing directors.

6. In answer to par. 37 of the statement of claim they denied (i) that the said election was not made bona fide ; (ii) that it was not made in the interests of the company or for any purpose directly or indirectly connected with the administration of the company or the conduct of its business and affairs ; and (iii) that it was made solely and exclusively for the purpose of avoiding and evading the incidence of art. 16 in the manner alleged in par. 37 or at all. In further answer to par. 37 they repeated what they had said in par. 5 of their statement of defence.

7. In answer to par. 38 of the statement of claim they denied that in voting for the election of directors alleged in that paragraph they did so solely and exclusively for the purposes alleged in that paragraph. And they did not know and were not able to admit that without their votes Mrs. Arnott and Mrs. Dampney could not have been or that they would not have been so elected.

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8. In further answer to the statement of claim they relied upon the following matters which they said were true in substance and in fact.

(a) Upon the formation of the company the plaintiff H. C. Grant and one Illingworth Keith Harrison became the joint holders of certain shares in the company. By deed duly executed in the year 1922 H. C. Grant and I. K. Harrison duly declared themselves to be trustees of certain parcels of the shares which included the following: as to one parcel, namely 3,250 enumerated shares, for the plaintiff H. J. Grant and as to another parcel, namely 3,000 enumerated shares, for the plaintiff K. W. Grant upon certain trusts and conditions set forth in the deed. At the time of the execution of the deed H. J. Grant and K. W. Grant, who were children of H. C. Grant, were infants under the age of twenty-one years.

(b) Upon the formation of the company W. A. Grant and I. K. Harrison became joint holders of certain other shares in the company. By a second deed duly executed at or about the same time as the execution of the deed mentioned in sub-par. (a) W. A. Grant and I. K. Harrison declared themselves to be the trustees of certain parcels of those shares which were, *inter alia*, as follows: as to one parcel, namely 2,000 enumerated shares, for D. F. Grant; as to another parcel, namely 2,750 enumerated shares, for M. W. Grant (now Mrs. M. W. Dampney), and as to another parcel, namely 2,500 enumerated shares, for A. E. Grant (now Mrs. A. E. Arnott) upon certain trusts and conditions set forth in the deed. At the time of the execution of that deed D. F. Grant, Mrs. Dampney and Mrs. Arnott, who were the children of W. A. Grant, were infants under the age of twenty-one years.

(c) H. C. Grant was at all material times aware of the provisions of the declaration of trust deed of W. A. Grant and I. K. Harrison.

(d) Before and at the time of the execution of that deed and of the above-mentioned deed of declaration of trust by H. C. Grant and I. K. Harrison in favour of H. J. Grant and K. W. Grant and at the time of the allotment of the shares settled by those deeds it was agreed by and between H. C. Grant and W. A. Grant that in due course the several parcels of shares the subject of those declarations of trust should be transferred by the registered holders thereof to the persons who by virtue of those deeds were beneficially entitled thereto. It was on the faith of that agreement that W. A. Grant assented to the allotment of those shares in the aforesaid manner.

(e) In or about the year 1934 I. K. Harrison died. Thereafter H. C. Grant became registered as the holder of the above-mentioned shares theretofore held by him and I. K. Harrison jointly. And W. A. Grant became registered as the holder of the above-mentioned shares theretofore held by him and I. K. Harrison jointly.

(f) On or about 16th February, 1940 H. C. Grant purported to transfer to H. J. Grant the 3,250 shares he held in trust for him and to K. W. Grant the 3,000 shares he held in trust for him. Those transfers were duly registered although no " transfer notices " were given in accordance with art. 16. H. J. Grant and K. W. Grant were now shareholders in the company by reason only of the transfer of those shares to them and those shares were the same shares in respect of which they were now registered in the books of the company as alleged in par. 1 of the statement of claim.

(g) The transfers made by W. A. Grant to D. F. Grant, Mrs. Arnott and Mrs. Dampney as alleged in pars. 19, 20 and 21 of the statement of claim were transfers to those transferees of the parcels of shares held by W. A. Grant upon trust for D. F. Grant, Mrs. Arnott and Mrs. Dampney respectively under the provisions of the above-mentioned declaration of trust deed as modified by a deed of revocation and re-settlement dated 18th November 1947.

9. In further answer to the statement of claim they said that they were ready to consent and they offered to consent to a rectification of the register of the company by registering H. C. Grant as the holder of all those shares formerly held by him and which were the subject of the above-mentioned declaration of trust deed to be held by him again upon the trusts thereof and by registering W. A. Grant as the holder of all those shares formerly held by him and which were the subject of the above-mentioned declaration of trust deed to be held by him again upon the trusts thereof as modified by the above-mentioned deed of 18th November 1947.

Roper C.J. in Eq. refused the relief sought under claims 1, 3 and 4, but made a declaration that the purported election of Mrs. Arnott and Mrs. Dampney as directors of the company was void and of no effect and granted a consequential injunction.

From that decision the plaintiffs appealed and the defendants cross-appealed to the High Court.

Further facts appear in the judgments hereunder.

G. Wallace K.C. (with him *B. P. Macfarlan* and *D. Godfrey Smith*), for the appellants. The register of members of the company

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should be rectified in respect of the shares transferred to the children of W. A. Grant. The transferees were not members of the company and the shares had not been offered to such members as required by art. 16. Not even the company in general meeting could commit a fraud on the minority (*Peters' American Delicacy Co. Ltd.* v. *Heath* (1)). One of the appellants' rights was to insist upon compliance with the provisions of art. 16. A company may not act *ultra vires* or take away from the minority their rights in the company. Article 4 had nothing to do with the transfers. The judge of first instance meant that the company, under art. 4, could issue shares to the daughters of W. A. Grant so that the shares could be transferred to them as members thus avoiding art. 16. That would deprive art. 16 of any force. It was not open to members as part of a plan to issue shares under art. 4 and then to allow art. 16 to be avoided. Article 70 works once only and before the election of the said daughters as directors it was exhausted. Those appointments if made at all should have been made by extraordinary resolution under art. 86. Estoppel and "clean hands" are not applicable to this case (*Meyers* v. *Casey* (2) ; *Mosely* v. *Koffyfontein Mines Ltd.* (3). *Towers* v. *African Tug Co.* (4) is distinguishable). Article 4 is a fiduciary power and is exercisable only for the purpose of obtaining capital needed by the company (*Punt* v. *Symons & Co. Ltd.* (5) ; *Piercy* v. *S. Mills & Co. Ltd.* (6)). W. A. Grant was not validly appointed managing director. The board was unqualified, the directors having been invalidly appointed. The judge of first instance overlooked art. 75. That article expressly delegates to directors power to appoint a managing director ; therefore the company in general meeting has no power to do so (*Thomas Logan Ltd.* v. *Davis* (7) ; *Buckley* on *The Companies Acts* 12th ed. (1949), p. 890 ; *Gore-Browne's Handbook* on *Joint Stock Companies* 40th ed. (1910), pp. 402, 403). There was no deadlock on the board and therefore there was no inherent jurisdiction in the company to appoint a managing director (*Barron* v. *Potter* (8) ; *Foster* v. *Foster* (9)). The appointment was not validated by art. 93. The function of that article was to protect the dealings of persons who were not members of the company with the company.

[WILLIAMS J. referred to *Morris* v. *Kanssen* (10).

KITTO J. referred to s. 124 of the *Companies Act* 1936 (N.S.W.).]

(1) (1939) 61 C.L.R. 457, at p. 505.
(2) (1913) 17 C.L.R. 90.
(3) (1911) 1 Ch. 73.
(4) (1904) 1 Ch. 558.
(5) (1903) 2 Ch. 506, at pp. 515, 516.
(6) (1920) 1 Ch. 77.
(7) (1911) 104 L.T. 914 ; 105 L.T. 419.
(8) (1914) 1 Ch. 895.
(9) (1916) 1 Ch. 532.
(10) (1946) A.C. 459.

The issue of the shares to the daughters of W. A. Grant was not bona fide for the benefit of the company. New capital was not needed by the company. The shares were not equally issued among the shareholders. The transfers were registered in violation of art. 16. The transaction was either a nullity or an irregularity that could be approved only by the unanimous consent of all shareholders. It could not be validated by action under art. 4. The question of the transfers is completely divorced from any question of control of the company. The types of activity which if wrongly done would be prevented by the court are not closed. Article 16, which gave the minority a right to acquire shares in preference to non-members, was deliberately avoided (*Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (1); *Hunter* v. *Hunter* (2)).

[McTIERNAN J. referred to *Inland Revenue Commissioners* v. *Crossman* (3).]

The principle relied on is shown in *Punt* v. *Symons & Co. Ltd.* (4); *Piercy* v. *S. Mills & Co. Ltd.* (5); *Peters' American Delicacy Co. Ltd.* v. *Heath* (6); *Mills* v. *Mills* (7); *Palmer's Company Precedents*, 15th ed. (1938), vol. 1, p. 598—re art. 4; and *Buckley* on *The Companies Acts*, 11th ed. (1930), pp. 20, 37. In relation to the appointment of a managing director and to art. 93 see *Morris* v. *Kanssen* (8); *Craven-Ellis* v. *Canons Ltd.* (9); and *A. M. Spicer & Son Pty. Ltd.* v. *Spicer* (10).

W. J. V. Windeyer K.C. (with him *B. B. Riley*), for the respondents. The judge of first instance was right, for reasons which he gave, except as to art. 86. All that was done was within the powers of the directors, or justifiable by a majority of the shareholders. The only ground for challenging the acts of the majority is fraud on the minority. There was not any fraud. The majority acted as they did so as to prevent art. 16 from being used as a vehicle of unfair conduct. Article 16 has no special sanctity. If there be a way round it, that way may be taken unless it effect a fraud on the minority. Section 37 of the *Companies Act* 1936 is amply satisfied by art. 16. Article 16 does not give a right of pre-emption and is different from the articles considered in *Hunter* v. *Hunter* (11) and *Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (12), which were designed to give all members equal oppor-

(1) (1901) 1 S.R. (N.S.W.) Eq. 37, at p. 47.
(2) (1936) A.C. 222, at pp. 245, 248.
(3) (1937) A.C. 26.
(4) (1903) 2 Ch. 506.
(5) (1920) 1 Ch. 77.
(6) (1939) 61 C.L.R. 457.
(7) (1938) 60 C.L.R. 150.
(8) (1946) A.C. 459.
(9) (1936) 2 K.B. 403, at p. 413.
(10) (1931) 47 C.L.R. 151, at p. 176.
(11) (1936) A.C. 222.
(12) (1901) 1 S.R. (N.S.W.) Eq. 37.

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tunity of acquiring shares. Article 16 was directed to enabling the company to keep shareholding among its members. The daughters of W. A. Grant were not unqualified to act as directors. The qualifications required by a director were discussed in *In re Brazilian Rubber Plantations and Estates Ltd.* (1). The reference in art. 86 to " number " was a reference to the number stipulated in the preceding article. It referred to the numerical composition of the board, not personnel. There was not any specific provision for election of personnel; therefore they are to be elected by a general meeting (*Worcester Corsetry Ltd.* v. *Witting* (2)). If the said daughters were validly appointed, an issue of one hundred shares was mandatory, unless, for example, W. A. Grant transferred some shares to them. It followed, if they were validly appointed, that his appointment as managing director was valid. If the judge of first instance was right in relation to art. 86, his conclusion is still sound, because the allotment could be justified, as he said, under art. 4 : *Palmer's Company Precedents*, 15th ed. (1938), vol. 1, p. 598. The court will never inquire into a matter if the majority approve—unless there be a fraud on the minority. The duty of directors as to allotment is fiduciary; but in this case the director was voting in a general meeting, called to ratify the actions of the directors. That is the distinction between this case and *Punt* v. *Symons & Co. Ltd.* (3), *Mills* v. *Mills* (4), and such cases. An appointee was entitled to vote on his appointment as a director, unless a salary was attached to the office. His salary could then be fixed under art. 76. Article 79 could be suspended or relaxed by general meeting (*Foster* v. *Foster* (5)).

[WILLIAMS J. referred to *People's Prudential Assurance Co. Ltd.* v. *Australian Federal Life and General Assurance Co. Ltd.* (6).]

The amount of salary paid to W. A. Grant as managing director was not evidence of impropriety, nor was his share of profits improper. Any abuse in that respect could be challenged in court. If his daughters were not validly appointed as directors then his actual appointment was bad, but this Court would not interfere because at a board meeting W. A. Grant and his son could appoint W. A. Grant as managing director, he being entitled to vote (*Foster* v. *Foster* (5)). Without the title of managing director he could carry on and be paid under art. 72. Any director could vote on a resolution under art. 72, because all were interested (*Foster* v.

(1) (1911) 1 Ch. 425, at pp. 436, 437.
(2) (1936) Ch. 640.
(3) (1903) 2 Ch. 506.
(4) (1938) 60 C.L.R. 150.
(5) (1916) 1 Ch. 532.
(6) (1935) 35 S.R. (N.S.W.) 253; 52 W.N. 72.

Foster (1)). A minority can sue to enforce compliance with the articles only when they show an *ultra vires* action or fraud on the minority; but otherwise if there were a mere irregularity because then the majority could set the irregularity right in general meeting (*Foster* v. *Foster* (2); *Burland* v. *Earle* (3); *Foss* v. *Harbottle* (4)). In those circumstances the power of appointing a managing director has not been taken away from the company by art. 75 (*Clifton* v. *Mount Morgan Ltd.* (5)). "Fraud on the minority" was dealt with in *Palmer's Company Precedents*, 15th ed. (1938), Part I., pp. 67, 1178-1180. There is not any such fraud unless the minority has been deprived of some proprietary right which they had as shareholders of the company (*Miles* v. *Sydney Meat Preserving Co. Ltd.* (6)). There was nothing fraudulent in the majority desiring W. A. Grant to continue to control the management of the company. If that control should be used oppressively the assistance of the court could be sought. It was in the interests of the company that the *cestuis que trustent* daughters of W. A. Grant should be registered in respect of their trust shares. The minority have not been deprived of any rights under art. 16. If that article applied W. A. Grant would not transfer and they would not have any opportunity or right to acquire his share. In *Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (7) and *Hunter* v. *Hunter* (8) the article was designed to give members an equal opportunity to purchase shares proffered or available for sale. In this case the article is different: it is designed to ensure merely that shares should not go outside the family membership. The article is appropriate only to sales of shares. It should be construed strictly (*Greenhalgh* v. *Mallard* (9); *Moodie* v. *W. J. Shepherd (Bookbinders) Ltd.* (10)). The article does not give any rights to prospective purchasers. At most it gives a member an opportunity of being selected by the company as purchaser. There was not any fraud in getting round art. 16. Nothing was taken away from existing members. Fresh shares may be allotted even though the company does not actually need further funds (*Piercy* v. *S. Mills & Co. Ltd.* (11)).

[WILLIAMS J. referred to *Mills* v. *Mills* (12).]

In determining whether there was a fraud one is entitled to have regard to the whole of the circumstances, and examine the

(1) (1916) 1 Ch., at pp. 545, 548, 549.
(2) (1916) 1 Ch., at p. 547.
(3) (1902) A.C. 83.
(4) (1843) 2 Ha. 461 [67 E.R. 189].
(5) (1940) 40 S.R. (N.S.W.) 31, at p. 44; 57 W.N. 35, at p. 37.
(6) (1912) 16 C.L.R. 50, at pp. 71-75.
(7) (1901) 1 S.R. (N.S.W.) Eq. 37.
(8) (1936) A.C. 222.
(9) (1943) 2 All E.R. 234.
(10) (1949) W.N. (Eng.) 482; (1949) 2 All E.R. 1044.
(11) (1920) 1 Ch. 77.
(12) (1938) 60 C.L.R., at pp. 185, 186.

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conduct of the other party (*Towers* v. *African Tug Co.* (1)). Here, the " fraud " has been on the part of the appellants. The appellants are estopped by defensive equities (*Grundt* v. *Great Boulder Pty. Gold Mines Ltd.* (2) ; *Greater Sydney Development Association Ltd.* v. *Rivett* (3) ; *Automobile and General Finance Co. Ltd.* v. *Hoskins Investments Ltd.* (4)). The appellants have not come to the court with " clean hands " (*Langman* v. *Handover* (5)). This case does not fall within the rule in *Foss* v. *Harbottle* (6) because there was not any fraud in the sense in which that word was there used (*Bennett* v. *Murray* (7)).

G. Wallace K.C., in reply. Article 86 means that the company can appoint individuals by name within the prescribed limits, that is to say, increase or reduce the actual sitting directors—not the numerical composition of the board : *Buckley* on *The Companies Acts*, 12th ed. (1949), p. 884. The company's power to appoint directors is inherent, but exercisable only in the absence of special provisions in the articles (*Worcester Corsetry Ltd.* v. *Witting* (8)). The appointment of Mrs. Arnott and Mrs. Dampney as directors is further challengeable on the ground that the purpose was to ensure the transfer to them of the trust shares by avoiding art. 16. The doctrine that the court will not interfere where there is a mere irregularity is inapplicable (*People's Prudential Assurance Co. Ltd.* v. *Australian Federal Life and General Assurance Co. Ltd.* (9)). The appointment of a managing director is an appointment to an office of profit ; it cannot be separated into two steps ; it carries with it an implication of reward. It is an " arrangement " within art. 79. Article 16 applies to all transfers, whether they be in respect of sales or not. Anyone taking those shares takes them as they are with those restrictions. The general principle was referred to and discussed in *Burland* v. *Earle* (10) and *Peters' American Delicacy Co. Ltd.* v. *Heath* (11). In *Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (12) and *Hunter* v. *Hunter* (13) a similar article was held to confer rights. The position in this case, where the appellants are seeking to prevent a future breach, is very similar to the position which was dealt with in *Mosely* v.

(1) (1904) 1 Ch. 558.
(2) (1937) 59 C.L.R. 641, at pp. 674-676.
(3) (1929) 29 S.R. (N.S.W.) 356 ; 46 W.N. 99.
(4) (1934) 34 S.R. (N.S.W.) 375, at p. 389 ; 51 W.N. 129, at p. 131.
(5) (1929) 43 C.L.R. 334, at pp. 342-351.
(6) (1843) 2 Ha. 461 [67 E.R. 189].
(7) (1940) 64 C.L.R. 382, at p. 399.
(8) (1936) Ch. 640.
(9) (1935) 35 S.R. (N.S.W.), at pp. 266, 267 ; 52 W.N., at pp. 73, 74.
(10) (1902) A.C., at p. 93.
(11) (1939) 61 C.L.R., at pp. 505, et seq.
(12) (1901) 1 S.R. (N.S.W.) Eq. 37.
(13) (1936) A.C. 222.

Koffyfontein Mines Ltd. (1). There was no equity being sought from W. A. Grant. The appellants are not estopped. The court has a duty to apply the established principles to this case.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This litigation has arisen out of disputes between two brothers, the plaintiff Henry Cook Grant and the defendant William Allison Grant, each supported by three members of their families, with respect to the management of the defendant company, John Grant & Sons Pty. Ltd. The company, which was formed in 1922, had a large business as builders and contractors. The defendant W. A. Grant was the active manager. He and H. C. Grant were " governing directors " and there were no other directors until 1948. Originally the plaintiff H. C. Grant and the defendant W. A. Grant held equal numbers of shares. Each of the brothers on 10th October 1922 executed separate deeds of trust of 9,000 shares in the company in favour of their respective children when they should attain twenty-five years of age. In the case of H. C. Grant the beneficiaries under the deed executed by him were his son H. J. Grant, his son K. W. Grant and his daughter Alison Jean Grant. In the case of W. A. Grant the beneficiaries (in 1948) were his son Donald Frederick Grant, his daughter Margaret Winifred Grant (now Mrs. Dampney) and his daughter Alison Eleanor Grant (now Mrs. Arnott).

In 1940 without any dissent from W. A. Grant and his family the shares which were subject to H. C. Grant's deed of trust were transferred to the beneficiaries, who thereupon became shareholders in the company. Article 16 of the articles of association provided that no share in the company should be transferred to a person who was not a member of the company so long as any member was willing to purchase the same at the " fair value " as stated in a notice to the company and that if the company within twenty-eight days found a member willing to purchase, the proposing transferor was bound to sell to the member upon payment of the fair value. In 1940 when H. C. Grant's shares were transferred no attention was paid to art. 16 and the shares were transferred without objection from W. A. Grant. In 1947 W. A. Grant wished to transfer to his children the shares held in trust by him in the same way as H. C. Grant had done in 1940 but H. C. Grant, wishing to enlarge the total shareholding of himself and his family, objected,

(1) (1911) 1 Ch. 73 ; on appeal (1911) A.C. 409.

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and sought to insist that the procedure prescribed by art. 16 should be followed so that he or his family could buy the shares which W. A. Grant wished to transfer. Disputes had arisen in relation to payment to be made to an employee of the company, J. T. Wilson, the conduct of a quarry and other matters, and feeling was strained. Though W. A. Grant had or controlled a majority of shares so that he could procure the passing of an ordinary resolution at a meeting of the company he did not have or control the necessary number of shares (three-fourths) to pass an extraordinary resolution. Further, there were only two directors and deadlocks were obviously probable. H. C. Grant, in objecting to the transfer of shares to W. A. Grant's children, was using art. 16 as a lever to obtain the equality which he desired. W. A. Grant quite frankly said in evidence that he was determined to change the position and to take steps to obtain the registration of his children as shareholders and to increase the number of directors by procuring the appointment of his children to the board.

The plaintiffs, on behalf of themselves and other aggrieved shareholders, sued the company, W. A. Grant and his three children, and made the following claims :—

(1) That appointments of the two daughters of W. A. Grant as directors were void because they were not appointed by extraordinary resolution as required by art. 86 of the articles of association.

(2) That accordingly there was no authority to issue to them 100 shares in their assumed capacity as directors under art. 71, so that they did not properly become members of the company, and that the share register should be rectified accordingly.

(3) That therefore the transfers to W. A. Grant's children of the shares held in trust for them by their father W. A. Grant were invalid, because they were authorized by a board which was invalidly constituted.

(4) When his son and daughters were added to the board W. A. Grant was appointed managing director at a salary of £2,000 a year and a share of profits. It was contended that this resolution was passed by a board which was invalidly constituted and was therefore invalid.

The appointment of Donald, W. A. Grant's son, as a director was not challenged, and objection to the allotment of qualifying shares to him and the transfer to him of shares held in trust was not pressed.

It was further argued on behalf of the plaintiff that what was done in appointing the daughters as directors and allotting one

hundred qualifying shares to each of them was a manoeuvre for the purpose of avoiding the application of art. 16, and that this procedure was a fraud upon other shareholders of the company, who were deprived of an opportunity of purchasing the shares which were transferred to the daughters.

The learned judge, *Roper* C.J. in Eq., held as follows :—(1) The appointment of the daughters as directors was bad because it involved an increase in the number of directors and an increase in the number of directors could be made only by extraordinary resolution—art. 86. The appointment of the daughters was made by ordinary resolution. Accordingly a declaration was made that the election of the daughters as directors was void and of no effect and they were restrained from acting and voting as directors of the company in so far as the claim to act and vote rested upon the said alleged appointment. (2) It was held that the allotment of one hundred shares to each of the daughters was not valid under art. 71, which allowed the appointment as director of a person who was not a member of the company and the allotment of shares to him. The allotment was not valid because it had been held that the daughters were not validly appointed as directors. But art. 4 provided that, save as otherwise provided by the company in general meeting, the shares should be at the disposal of the directors, who might allot or otherwise dispose of them to such persons at such times and on such terms as they might think proper. His Honour held that under this article the company or the directors could allot the shares to the daughters. If there had been any irregularity it could be set right by the company in general meeting, and the court, under the principle of *Foss* v. *Harbottle* (1), should not, in the absence of fraud, declare irregular acts to be invalid where the acts of which complaint was made were within the power of the company, could be confirmed by a majority of shareholders, and the majority of shareholders in fact approved them. (3) It was held that the transfers of the shares held in trust should not be set aside because what was done, though done irregularly (the daughters not truly being members of the company), it could be done by a proper board of directors or a simple majority of the shareholders in a general meeting and the majority of the shareholders plainly approved what was done. (4) It was held that the appointment of W. A. Grant as managing director and the fixing of a salary to be paid to him was a transaction which was within the power of the company and in view of the opinion of the majority of the shareholders there was

(1) (1843) 2 Ha. 461 [67 E.R. 189].

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no reason for the court to interfere. It was a matter merely of internal management as to which no question of *ultra vires* arose.

The plaintiffs appealed from the decree except in so far as it was declared thereby that the appointments of the daughters as directors were invalid and the defendants cross-appealed in so far as it declared those appointments to be invalid.

A majority of shareholders in a company is not entitled to use its powers to defraud a minority or to oppress them by depriving them of rights to which they are justly entitled (*Burland* v. *Earle* (1); *Dominion Cotton Mills Co. Ltd.* v. *Amyot* (2)). But if the action taken is action which is authorized by the articles of association of the company there must be clear evidence of over-reaching or injustice in some manner before a court will interfere to prevent what has been done having its effect according to the articles. It is contended that in the present case the admitted fact that W. A. Grant wished to avoid the application of art. 16, which involved offering the trust shares to other shareholders before he could be free to transfer them to his daughters, constituted a fraud upon the other shareholders. But if that which was done was done in conformity with the articles of association this proposition cannot be supported unless there is evidence of something in the way of deceit or oppressiveness. There is no such evidence. Everybody knew that W. A. Grant wished to bring his daughters in as shareholders and to put them on the board. Everybody knew also that H. C. Grant was determined to prevent this if he could and to force W. A. Grant to agree to making the shareholdings of the two families equal. W. A. Grant had the majority and was able to achieve his object without in any way deceiving his brother and the members of his family. It is not oppressive to use a majority of shareholders, acting bona fide, to outvote a minority.

The articles of association provided that the two brothers should be governing directors. Article 70 as amended gave W. A. Grant the opportunity of getting round art. 16. Article 70 provided that, when a governing director resigned, the remaining governing director should become a permanent director, that the permanent director should convene an extraordinary general meeting, and that, if no other directors had been appointed (as was the case), then at least two, but not more than four, directors should be appointed by the shareholders in addition to the permanent director. On 9th December 1948 W. A. Grant resigned his position as governing director. H. C. Grant then became permanent director. He duly convened an extraordinary general meeting of share-

(1) (1902) A.C. 83. (2) (1912) A.C. 546.

holders, which was held on 17th December 1948. At this meeting W. A. Grant and his son D. F. Grant were appointed directors. The result was that then there were three directors, H. C. Grant, W. A. Grant and D. F. Grant. On the same day the new board of directors met, and it was decided to approve the transfer of the trust shares to Mrs. Arnott and D. F. Grant and Mrs. Dampney. At a later meeting of directors on 14th January H. C. Grant stated that he objected to these transfers and a notice which had been given under art. 16 by W. A. Grant was revoked and the revocation was sanctioned by the board, H. C. Grant dissenting.

At this meeting it was resolved that one hundred (qualifying) shares be allotted to D. F. Grant under art. 71. No objection has been taken by the plaintiffs to the allotment of these shares.

On 23rd February 1949 an extraordinary general meeting of shareholders of the company was held for the purpose of considering and if thought fit increasing the number of directors to five and appointing two additional directors " pursuant to article 70" of the company's articles of association. At this meeting it was decided by a majority of 33,198 votes to 28,398 that the number of directors be increased to five and that two additional directors be appointed " pursuant to article 70 " of the company's articles of association. It was then resolved that Mrs. Dampney be appointed a director and by another resolution that Mrs. Arnott be appointed a director. All these resolutions were carried as ordinary and not as extraordinary resolutions.

These proceedings were taken " pursuant to article 70 ". But art. 70 refers only to the powers of the meeting summoned by a permanent director after a governing director had ceased to be a governing director. Such a meeting had been held on 17th December 1948. Article 70 plainly had no application to the circumstances which existed in February 1949.

Article 86 is as follows :—" The Company may from time to time in general meeting by extraordinary resolution increase or reduce the number of directors and determine in what rotation such increased or reduced number shall go out of office."

Roper C.J. in Eq. held that this article applied not merely where the minimum or maximum number of directors was altered, but also where it was determined to appoint an additional director so as to increase the number of directors actually in office, even though the maximum number permitted by the articles of association was not increased. As W. A. Grant's daughters were appointed by ordinary resolutions their appointments were held to be void.

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This view was based upon *Worcester Corsetry Ltd.* v. *Witting* (1). That case did decide that under an article in the same terms as art. 86 in the present case (except that an extraordinary resolution was not required) the company could appoint a person as director, although the directors also had powers to appoint directors to fill casual vacancies (as in the present case—art. 87) and to appoint an additional director to hold office until the next ordinary general meeting of the company. The point of the decision is that the articles conferring power upon the directors to appoint a director in certain cases did not deprive the company of its "inherent power to nominate and appoint its own directors" (2)—per *Lawrence* L.J. No such question arises in the present case. But it is true that the article corresponding to art. 86 was interpreted as authorizing not only the alteration of the maximum and minimum number of directors but also the actual additional appointment of a person as a director. But the reason for this conclusion was found in the fact clearly stated by *Slesser* L.J. (3) that there was another article (art. 12) which "contained within itself all the machinery for fixing the maximum and minimum number of directors." Thus if any effect was to be given to the article corresponding to art. 86 it was necessary to interpret it as authorizing the actual appointment of additional directors. But there is no such other article in the present case. On the contrary, art. 71 fixes a minimum and maximum number of directors and does not contain any machinery for altering that number. Article 71 is as follows:—"Whilst and whenever there shall be directors of the Company in office and no Governing Director the following provision shall have effect that is to say:—The directors shall not be less than two nor more than five in number . . . "

When W. A. Grant's daughters were appointed directors there were only three directors in office and there was no Governing Director. Accordingly the provision that the directors should be not less than two or more than five in number was applicable. This provision could be altered by an extraordinary resolution under art. 86 but there was no need to use art. 86 to increase the maximum number to five. The maximum number was already fixed at five by art. 71 and the shareholders therefore had power to appoint by ordinary resolution any number of directors up to five. Accordingly in my opinion W. A. Grant's daughters were validly appointed as directors and the cross-appeal should be allowed.

(1) (1936) Ch. 640.
(2) (1936) Ch., at p. 650.
(3) (1936) Ch., at p. 653.

If the appointment as directors of the daughters is valid then the directors had authority under art. 71 to allot the necessary qualifying shares (shares to the nominal amount of £100) to the daughters. Such allotments were made on 23rd February 1949. The daughters thereby became members of the company. Article 16 prevents transfers of shares to persons who are not members of the company so long as any member of the company is willing to purchase the shares at the fair value determined in accordance with the article. But if the daughters were members of the company the article had no application. Thus the transfers of the trust shares (approved by the directors on 23rd February 1949) were valid.

If the daughters were directors of the company the board was validly constituted when it passed the resolution appointing W. A. Grant managing director and fixing his salary.

Thus in my opinion everything that was done was done in accordance with the articles of association. No deceit was practised. The W. A. Grant faction used their superior voting power to achieve their ends, but there is no evidence which shows that they were not bona fide in everything that they did. They genuinely believed that the interests of the company as well as of themselves would be promoted by placing W. A. Grant in a position of real control and by strengthening his position upon the board of directors by adding his daughters as well as his son thereto. Accordingly, in my opinion, the appeal should be dismissed, the cross-appeal allowed and the decree of the Supreme Court should be varied by striking out the declaration that the appointment of the daughters was void and the injunction restraining them from acting as directors in pursuance of their appointment in February 1949.

McTIERNAN J. I am of the opinion that the appeal should be allowed, and the cross-appeal should be dismissed. I agree that in the appeal the order which is contained in the reasons for judgment of my brother *Williams* should be made. I have had the advantage of reading those reasons and agree with them.

WILLIAMS J. This suit is the sequel of certain unfortunate differences which have arisen in the administration of the defendant company, John Grant & Sons Pty. Ltd. The company was incorporated on 6th September 1922 to acquire and take over as a going concern the business of builders and contractors then being carried on in Sydney under the name of John Grant & Sons. The founder of the business was John Grant, but he was then

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dead and the business was being carried on by his two sons, the appellant H. C. Grant, and the respondent W. A. Grant. The nominal capital of the company was £100,000 divided into 95,000 ordinary shares of £1 each and 5,000 employees' shares. Upon incorporation 50,000 ordinary shares were issued, H. C. Grant and his wife and H. C. Grant and Harrison as trustees for the family of H. C. Grant holding 25,000 shares, and W. A. Grant and his wife and W. A. Grant and Harrison as trustees for the family of W. A. Grant holding 25,000 shares. H. C. Grant and W. A. Grant were appointed governing directors of the company by art. 70 of the articles of association and jointly controlled its operations, W. A. Grant taking the predominant part in the management and drawing a greater remuneration than his brother.

The brothers re-invested part of their remuneration in acquiring further fully-paid shares in the capital of the company. Originally they each held 10,000 shares in their own right, but W. A. Grant so re-invested a greater sum than H. C. Grant, with the result that by the end of 1926 H. C. Grant had only acquired 3,500 additional shares whereas W. A. Grant had acquired 8,000 additional shares. Harrison died in 1934 and in that year the trust shares which had been registered in the joint names of H. C. Grant and Harrison became registered in the sole name of H. C. Grant, and the trust shares which had been registered in the joint names of W. A. Grant and Harrison became registered in the sole name of W. A. Grant.

At a meeting of the Board of Directors held on 16th February 1940 transfers of the H. C. Grant trust shares to his children, H. J. Grant, K. W. Grant and Mrs. A. J. Walker, were approved and they became registered as holders of 3,250, 3,000 and 3,750 shares respectively in the capital of the company. These transfers, which were to non-members, were made in breach of art. 16 of the articles of association, but no objection has ever been raised by W. A. Grant or his family to the transfers on this account.

The business of the company prospered until the depression, when building operations almost ceased, and the company then speculated to some extent in gold mining, which turned out badly, and this led to some friction between H. C. Grant and W. A. Grant, the former complaining that the company had been led into this venture by the latter. The main cause of the friction which developed between the two branches of the family was, however, the objection of H. C. Grant and his family to the transfer of the W. A. Grant trust shares to his family, after the latter family had not objected to the transfer of the H. C. Grant trust shares to his family.

At a special general meeting of the company held on 28th July 1947, art. 70 of the articles of association relating to governing directors was cancelled and replaced by a new art. 70, which provided that H. C. Grant and W. A. Grant should each be a governing director of the company until either one of them resigned the office or died or ceased to hold at least 6,000 shares. On 9th December 1948 W. A. Grant resigned the office and under the new article H. C. Grant thereupon ceased to be a governing director but remained a permanent director. Article 70 provides that the number of directors inclusive of a permanent director shall not be less than three nor more than five and the business of the company shall be managed and the powers of the company exercised in all respects as set forth in art. 96. Article 96 is the usual article vesting the management of the business of the company in the directors. Article 70 also provides that for the purpose of electing a board of directors the permanent director shall convene an extraordinary general meeting of the company within fourteen days from the termination of the original management.

This meeting was convened by H. C. Grant and held on 17th December 1948. At this meeting the struggle for the control of the company began between the two branches of the family. The H. C. Grant branch proposed the appointment of three directors in addition to the permanent director. They desired that the board should consist of H. C. Grant and his son H. J. Grant and W. A. Grant and his son D. F. Grant. This proposal was defeated by the votes of the W. A. Grant branch. This branch carried a resolution that two directors should be appointed to the board in addition to H. C. Grant. W. A. Grant and his son D. F. Grant were then appointed to the board. At a meeting of directors held later on the same day transfers of the W. A. Grant trust shares to his three children were approved, H. C. Grant not objecting. These were transfers of 4,000 shares to D. F. Grant, 2,750 shares to Mrs. M. W. Dampney and 2,500 shares to Mrs. A. E. Arnott. Although these transfers were registered in the register of members on the same day, the question of their invalidity in view of art. 16 came up for discussion at a subsequent meeting of the board of directors held on 14th January 1949. A resolution was carried by the votes of W. A. Grant and D. F. Grant (H. C. Grant dissenting) that the revocation of the transfers of the W. A. Grant trust shares by W. A. Grant to his three children be sanctioned. But the register of members was not rectified accordingly.

Article 71 of the articles of association of the company provides that the qualification of a director shall be the holding of shares

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of the nominal amount of £100. It also provides that a director may act before acquiring his qualification, but in any case he shall acquire the same within three months from his appointment and unless he shall do so he shall be deemed to have agreed to take the said shares from the company and the same shall be forthwith allotted to him accordingly, but he may acquire the same by gift or transfer from or as the nominee or trustee of any person or in any other way by which shares can be legally acquired. Although the transfer of the 4,000 trust shares to D. F. Grant had been registered, the registration was invalid and he was therefore under an obligation to acquire his qualification shares within three months of his appointment or be deemed to have agreed to take them from the company. At the meeting of directors held on 14th January 1949 D. F. Grant applied for one hundred ordinary shares pursuant to art. 71, accompanied by a cheque for £100, and it was resolved that one hundred ordinary shares should be allotted to him. No objection could be raised to this allotment or to the transfer of 4,000 W. A. Grant trust shares to D. F. Grant after this date.

At a meeting of directors held on 11th February 1949 a requisition was received from W. A. Grant and his wife that an extraordinary general meeting of the company be called for the purpose of increasing the number of directors to five and appointing two additional directors pursuant to art. 70 of the articles of association. It was resolved that the acting secretary convene an extraordinary general meeting for 23rd February 1949. At this meeting W. A. Grant was appointed to the chair and it was resolved that the number of directors be increased to five and that two additional directors be appointed pursuant to art. 70 of the articles of association. This resolution was carried by the votes of the W. A. Grant branch of the family. At a later stage of the meeting a resolution was carried by the same votes that Mrs. M. W. Dampney and Mrs. A. E. Arnott be appointed directors of the company. A meeting of directors was held later on the same day. Mrs. Dampney and Mrs. Arnott each applied for one hundred shares in the capital of the company and tendered cheques for £100 and it was resolved that in accordance with art. 71 of the articles of association one hundred shares each be allotted to them and that they be registered as the holders of these shares. Confirmatory transfers of the W. A. Grant trust shares to Mrs. Dampney and Mrs. Arnott were then tendered, and it was resolved, H. C. Grant dissenting, that these transfers be accepted as the transferees were members of the company and that they be registered in the share register when

duly stamped. At this meeting it was also resolved that a managing director be appointed for a period of five years at a salary of £2,000 per annum plus a percentage of profits, this percentage to be decided upon by the directors each year. W. A. Grant offered his services to the company on this basis and on the votes of D. F. Grant, Mrs. Dampney and Mrs. Arnott (H. C. Grant dissenting) it was resolved that W. A. Grant be appointed managing director on these terms.

The plaintiffs in the suit (the appellants in this Court) are H. C. Grant, his wife and his two sons, and they are suing on behalf of themselves and all other aggrieved shareholders of the company. The defendants are the company, W. A. Grant and his three children. In the re-amended statement of claim the plaintiffs seek relief under four heads. They pray (1) that it may be declared that the transfers of the W. A. Grant trust shares to his three children contravene art. 16 of the articles of association and are void and that the register of members may be rectified accordingly; (2) that it may be declared that the election of Mrs. Dampney and Mrs. Arnott as directors of the company is void and that they may be restrained from acting as directors of the company; (3) that it may be declared that the allotments of one hundred shares to Mrs. Dampney and Mrs. Arnott are void and that the register of members may be rectified accordingly; (4) that the company may be restrained from implementing or carrying into effect the resolution of directors of 23rd February 1949 appointing W. A. Grant the managing director of the company at a salary of £2,000 and a percentage of the profits.

The learned trial judge refused the relief prayed for under the first, third and fourth heads, but made a declaration that the purported election of Mrs. Dampney and Mrs. Arnott as directors of the company was void and of no effect and granted a consequential injunction. The respondents (the defendants in the suit) have given a notice of cross appeal from this declaration and injunction of his Honour. Mrs. Dampney and Mrs. Arnott were appointed directors by ordinary resolution at the extraordinary general meeting of the company held on 23rd February 1949. The number of directors then in office was three. The appointment was purported to be made under art. 70 of the articles of association but the extraordinary general meeting required to be held under this article on the resignation of a governing director had already been held on 17th December 1948 and only two directors, W. A. Grant and D. F. Grant, had then been appointed in addition to H. C. Grant, the permanent director. Power for the extraordinary

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general meeting of 23rd February 1949 to appoint Mrs. Dampney and Mrs. Arnott to the board must therefore be found in some other article of association. Article 71 provides that the directors shall not be less than two nor more than five in number. Article 86 provides that the company may from time to time in general meeting by extraordinary resolution increase or reduce the number of directors and determine in what rotation they shall go out of office. This article follows a series of articles providing for the order in which directors shall retire from office, for retiring directors being eligible for re-election and for the company filling up the vacated office of the director so retiring by electing a person thereto. They are articles dealing with directors actually in office. I agree with his Honour that art. 86 only authorizes the company by extraordinary resolution to increase or reduce the number of directors who are actually to hold office within the limits permitted by art. 71. It does not authorize the company to alter the minimum or maximum number of directors fixed by art. 71. This could only be done by altering art. 71 by special resolution. The articles are not the same as those discussed in *Worcester Corsetry Ltd.* v. *Witting* (1), but the reasoning of the members of the court of appeal in that case, especially the judgment of *Lawrence* L.J., supports the view that art. 86 only operates within the limits prescribed by art. 71. The purpose of the resolution of 23rd February 1949 was to increase the number of directors in office from three to five. But this could only be done by extraordinary resolution, so that there were no vacancies to which Mrs. Dampney and Mrs. Arnott could be appointed and their appointments as directors of the company were void and the cross-appeal should be dismissed.

I shall now turn to the appeal. Article 16 of the articles of association provides that no share shall be transferred to a person who is not a member so long as any member is willing to purchase the same at the fair value. The person, whether a member or not, proposing to transfer the shares, must give notice to the company that he desires to transfer the same and specify the fair value. The notice constitutes the company his agent for the sale of the shares to any member of the company at the fair value. If the company within the space of twenty-eight days after being served with such notice finds a member willing to purchase all or some portion of the shares and gives notice to the proposing transferor, he shall be bound, upon payment of the purchase money, to transfer the shares to the purchasing member. If the

(1) (1936) Ch. 640.

company shall not within the space of twenty-eight days after being served with the transfer notice find a member willing to purchase all or any of the shares and give notice to the proposing transferor, he shall within the next three calendar months be at liberty to sell and transfer the shares to any person but not at a price less than that placed by him upon the shares in his transfer notice. This article gives the members of the company a pre-emptive right over the shares of any member or other person proposing to transfer any shares in the company to a non-member (*Greenhalgh* v. *Mallard* (1); *W. & S. Moodie* v. *W. & S. Shepherd (Bookbinders) Ltd.* (2); *Delavenne* v. *Broadhurst* (3)). Shares might be sold to any member so that no member can place this right any higher than a right to have the shares offered to him at their fair value before they are offered to a non-member. This is an individual right sufficient to entitle any shareholder to maintain a suit against the company to restrain shares being transferred to non-members in breach of it or, if the shares have been transferred, to have the register rectified (*Davis* v. *Commercial Publishing Co. of Sydney Ltd.* (4); *Hunter* v. *Hunter* (5)). Further, a transferee to whom shares are transferred in breach of art. 16 would be wrongly placed on the register of members and his name would be without cause entered on the register and under s. 83 of the *Companies Act* 1936 (N.S.W.) the person aggrieved, or any member of the company or the company may apply to the court for rectification of the register. Every member of the company in respect of this pre-emptive right would be a person aggrieved within the meaning of this section, but it is not necessary under the section that a member should even be a person aggrieved. It is sufficient that he is a member to enable him to sue for rectification of the register. Under art. 16 the W. A. Grant trust shares could not be validly transferred to the children of W. A. Grant unless they were members of the company without these shares being first offered to the existing members at their fair value.

His Honour found, and his finding is amply supported by the evidence, that: "The object or motive of W. A. Grant in seeking to have Mrs. Arnott and Mrs. Dampney appointed as directors was twofold. He wished to have a board favourably disposed to him and large enough to overcome any deadlock on questions on which because of his personal interest he did not wish to vote or was precluded from voting. Further he wished to have his daughters

(1) (1943) 2 All E.R. 234.
(2) (1949) W.N. (Eng.) 482; (1949) 2 All E.R., at p. 1051.
(3) (1931) 1 Ch. 234.
(4) (1901) 1 S.R. (N.S.W.) Eq. 37.
(5) (1936) A.C. 222.

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become members of the company by the acquisition of qualifying shares under Article 71 so that he could then transfer to them the shares held upon trust for them, without bringing Article 16 into operation." If Mrs. Dampney and Mrs. Arnott had been validly appointed directors of the company, it may well be that the plaintiffs could not complain even though the W. A. Grant branch of the family used their voting power to place Mrs. Dampney and Mrs. Arnott on the board of directors so that they could lawfully apply for one hundred qualification shares and thus become members to whom the trust shares might lawfully be transferred without a breach of art. 16. But Mrs. Dampney and Mrs. Arnott were not validly appointed directors, and so, as his Honour said, " not entitled under Article 71 to become members of the company by the allotment to them of qualifying shares ". Accordingly it would seem that the plaintiffs have established a case for rectification of the register. But it was submitted, and the submission was upheld by his Honour, that there was no case for rectification of the register as all that was done was within the power of the directors or a majority of the shareholders. His Honour said : " In my opinion if what was done though done irregularly was such that it could have been done by a proper board of directors or by a simple majority of the shareholders in a general meeting of the company this court should not interfere in this action. It would be futile and therefore is unnecessary to order the holding of a general meeting of the company to pass any ratifying resolutions as we know how the majority of the shareholders shall vote on any such resolutions. It appears to me that although the directors treated the applications of Mrs. Arnott and Mrs. Dampney for the one hundred shares each as being made under Article 71 and that Article was not available to them it was open to them to allot unissued shares under the provisions of Article 4 which provides that ' Save as otherwise provided by the company in general meeting the shares shall be at the disposal of the directors and they may allot or otherwise dispose of them to such persons at such times and on such terms as they think proper '. Under this Article the company in general meeting may provide for the allotment of shares to particular persons and except to the extent to which the company otherwise provides in general meeting the directors have a similar power. Of course, directors' powers must be exercised bona fide for the benefit of the company as a whole (see as to this *Mills* v. *Mills* (1) ; *Richard Brady Franks Ltd.* v. *Price* (2)) ; but if in the circumstances of this case the

(1) (1938) 60 C.L.R. 150. (2) (1937) 58 C.L.R. 112.

directors had resolved to issue some shares to Mrs. Arnott and Mrs. Dampney so as to qualify them as members of the company to take a transfer of the shares held in trust for them without the provisions of Article 16 being called into operation I do not think that it could be said that they had acted from an improper motive or arbitrarily or capriciously and the exercise of their discretion therefore could not be successfully attacked (*Mills* v. *Mills* (1)). The company in general meeting too could have made an allotment to Mrs. Arnott and Mrs. Dampney for the purpose of obviating the application of Article 16. The only restriction which would have applied to the majority in the exercise of such a vote would be that it must not commit a fraud upon a minority and in my opinion there would be no fraud upon the minority in the company taking the steps necessary to get these two defendants registered in respect of the shares held upon trust for them."

With all respect to his Honour, I cannot agree with this reasoning. He evidently regarded the irregular allotment of the shares as a wrong done to the company. In *Burland* v. *Earle* (2), Lord *Davey*, delivering the judgment of the Privy Council, said that " it is clear law that in order to redress a wrong done to the company . . . the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* (3) and *Mozley* v. *Alston* (4), and in numerous later cases which it is unnecessary to cite." His Lordship went on to say that there is an exception : " where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company " (2). But these remarks do not, in my opinion, apply to an action brought to rectify the register of members of a company. Section 83 of the *Companies*

(1) (1938) 60 C.L.R., at p. 163.
(2) (1902) A.C., at p. 93.
(3) (1843) 2 Ha. 461 [67 E.R. 189].
(4) (1847) 1 Ph. 790 [41 E.R. 833].

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Act gives a shareholder an individual right to have the register rectified if a name is entered on the register without sufficient cause. The Act treats the wrong not as one done to the company but as a wrong to every shareholder and gives every shareholder an individual remedy. Further, the power to allot shares conferred on the directors by art. 4 is a fiduciary power to be exercised bona fide for the benefit of the company as a whole. When a company is not in need of further capital directors are not entitled to use this power for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company or merely for the purpose of defeating the wishes of the existing majority of shareholders (*Punt* v. *Symons & Co. Ltd.* (1); *Piercy* v. *S. Mills & Co. Ltd.* (2); *Mills* v. *Mills* (3)).

The one hundred shares were not allotted to Mrs. Dampney and Mrs. Arnott because the company was in need of further capital. The only bona-fide reason for allotting these shares would be to qualify Mrs. Dampney and Mrs. Arnott as directors of the company if validly elected. It could not be for the general benefit of the company that the shares should be allotted to them so that they should become members to whom the W. A. Grant trust shares could be transferred without infringing art. 16. An allotment for this purpose could only be an allotment for the benefit of Mrs. Dampney and Mrs. Arnott.

I do not agree that art. 4 gives the company any power in general meeting to allot shares. The company in general meeting can give directions to the directors with respect to the disposal of shares, but the article confers on the directors and not on the company in general meeting the power to allot shares and they could not be deprived of this power except by a special resolution altering art. 4 (*Thomas Logan Ltd.* v. *Davis* (4)). Even if the company in general meeting has power to allot shares, it has not done so, and I fail to see how it can be a defence to an application to remove shares from the register which have been invalidly allotted to set up that the shares could be validly allotted in some other way. I am therefore of opinion that the appellants are entitled to an order for the rectification of the register in respect of the one hundred shares allotted to Mrs. Dampney and Mrs. Arnott and in respect of the W. A. Grant trust shares transferred to them respectively.

The statement of claim also prays relief in respect of the trust shares transferred to D. F. Grant, but he was duly elected a director

(1) (1903) 2 Ch. 506.
(2) (1920) 1 Ch. 77.
(3) (1938) 60 C.L.R. 150.
(4) (1911) 104 L.T. 914; 105 L.T. 419.

of the company at the extraordinary general meeting on 17th December 1948 so that the one hundred qualification shares allotted to him without dissent at the meeting of directors held on 19th January 1949 were validly allotted. He thereby became a member of the company to whom the 4,000 trust shares could be transferred without infringing art. 16. His Honour said that registration of the transfer to him of these shares was ratified after this allotment. I have not been able to find this evidence, but since a new transfer could immediately be made if the register was rectified, I do not think an order should be made in respect of these shares.

There remains the question whether W. A. Grant was validly appointed managing director of the company at a salary of £2,000 and a percentage of profits by the resolution of directors of 23rd February 1949. The directors present at the meeting were W. A. Grant in the chair, H. C. Grant, D. F. Grant, Mrs. Dampney and Mrs. Arnott. There were in form two resolutions carried at the meeting, H. C. Grant dissenting on each occasion. The first resolution was that a managing director be appointed at the remuneration already mentioned and the second resolution was that W. A. Grant be appointed to this office at this remuneration. Under the articles of association the quorum of directors is two. Article 79 provides that no director shall be disqualified by his office from contracting with the company, but no director shall as a director vote in respect of any contract in which he is interested and if he does so vote his vote shall not be counted. Assuming that there were two separate resolutions and that W. A. Grant could vote on the first resolution, as to which it is unnecessary to express an opinion, he was certainly interested in the second resolution appointing him the managing director at a remuneration and on this resolution W. A. Grant could not vote and if he voted his vote could not be counted (*Foster* v. *Foster* (1)). Accordingly there were only three votes in favour of the resolution, namely those of D. F. Grant, Mrs. Dampney and Mrs. Arnott. But Mrs. Dampney and Mrs. Arnott had not been *de jure* appointed directors of the company, so that they could not *de jure* vote as directors. The vote of D. F. Grant was therefore the only *de jure* vote in favour of the resolution. Section 124 of the *Companies Act* 1936 provides that the acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment. Article 93 of the articles of association of the company provides that all acts done by any meeting of the directors or by any person acting as director shall, notwithstanding that it

(1) (1916) 1 Ch. 532.

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be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every person had been duly appointed and was qualified to be a director. The effect of this section and article was recently considered by the House of Lords in *Morris* v. *Kanssen* (1). Lord *Simonds* pointed out (2) that there is a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment, and (b) no appointment at all. His Lordship said " that the section and the article, being designed as machinery to avoid questions being raised as to the validity of transactions where there has been a slip in the appointment of a director, cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment " (3). The appointments of Mrs. Dampney and Mrs. Arnott were invalid because no extraordinary resolution had been passed under art. 86 increasing the number of directors and thereby creating vacancies to which they could be appointed. This was a substantive provision which had to be fulfilled before they could be appointed, and one that could not be overridden by a section of an Act or an article dealing with slips or irregularities in appointments. It follows that, in my opinion, the only valid vote in favour of W. A. Grant's appointment as managing director was that of D. F. Grant, and that the appointment was invalid. Article 75 authorizes the directors to appoint one or more of their body to be managing director of the company either for a fixed term or without any limitation as to period and from time to time to remove or dismiss him from office and appoint another or others in his place. The articles therefore entrust to the directors and not to the company in general meeting the appointment of the managing director. Under art. 79 the prohibition against a director voting in respect of any contract in which he is interested may be suspended or relaxed to any extent by a general meeting, but this was not done to enable W. A. Grant to vote and he did not in fact vote on the resolution. There was only one valid vote in favour of the resolution where two were required and it was a complete nullity. It was not a resolution which could be confirmed by the company in general meeting: *Peoples Prudential Assurance Co. Ltd.* v. *Australian Federal Life and General Assurance Co. Ltd.* (4). On this point I am unable to agree with the views expressed by

(1) (1946) A.C. 459.
(2) (1946) A.C. at p. 471.
(3) (1946) A.C., at p. 472.
(4) (1935) 35 S.R. (N.S.W.), at pp. 266, 267; 52 W.N., at p. 73.

Petersen J. in *Foster* v. *Foster* (1). Whether it be anomalous or not suits brought by shareholders in the form of the present suit against the company and the shareholders who hold and control the majority of shares to restrain persons who are not validly appointed acting as directors or managing directors of a company have been frequently entertained and the jurisdiction of the court to entertain such suits seems to be well established (*Spencer* v. *Kennedy* (2); *Cousins* v. *International Brick Co. Ltd.* (3); *Morris* v. *Kanssen* (4); *Australian Coal & Shale Employees' Federation* v. *Smith* (5); cf. *Bennett* v. *Murray* (6)). His Honour regarded the appointment of W. A. Grant as managing director as a mere incident in the internal management of the company. But it is a serious matter that a person should be acting as the managing director of a company and drawing a large salary and share of profits when he has not been validly appointed. In my opinion the relief prayed for under the fourth head should be granted.

I would therefore allow the appeal and dismiss the cross-appeal and on the appeal grant the relief prayed for in the statement of claim except in respect of the transfer of the W. A. Grant trust shares to D. F. Grant.

FULLAGAR J. This is an appeal from a judgment of *Roper* C.J. in Eq. There is also a cross-appeal. The case is concerned with the internal affairs of the defendant company, and arises out of unfortunate differences between two brothers and their families. The two brothers are the plaintiff Henry Cook Grant (who is the elder) and the defendant William Allison Grant. The brothers are sons of the late John Grant and they hold or control between them practically the whole of the issued shares of the company. The case is one, I think, in which an examination of the facts in some detail is unavoidable.

The company was incorporated under the name of John Grant & Sons Ltd. on 6th September 1922 under the *Companies Act* of New South Wales. In April 1937 it became a proprietary company, altering its articles so as to comply with the *Companies Act*. It will be convenient to set out at once those of its existing articles of association which are relevant to the present proceedings. These are the following :—

"4. Save as otherwise provided by the Company in General Meeting the shares shall be at the disposal of the Directors and

(1) (1916) 1 Ch., at pp. 550, 551.
(2) (1926) Ch. 125.
(3) (1931) 2 Ch. 90.
(4) (1946) A.C. 459.
(5) (1937) 38 S.R. (N.S.W.) 48, at pp. 56-58; 55 W.N. 19, at p. 21.
(6) (1940) 64 C.L.R. 382.

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they may allot or otherwise dispose of them to such persons at such times and on such terms as they think proper."

"16. Subject to the restrictions of these presents the following provisions shall have effect:—(1) No share shall be transferred to a person who is not a member so long as any member is willing to purchase the same at the fair value. (2) The person whether a member of the Company or not proposing to transfer any shares (hereinafter called 'the proposing transferror') shall give notice in writing (hereinafter called 'the Transfer Notice') to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value and shall constitute the Company as his agent for the sale of the share to any member of the Company at the fair value. The transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the Directors. (3) If the Company shall within the space of twenty-eight days after being served with such notice find a member willing to purchase all or some portion of the shares (hereinafter called 'the Purchasing Member') and shall give notice thereof to the proposing transferror he shall be bound upon payment of the fair value to transfer the shares to the purchasing member. (4) If in any case the proposing transferror after having become bound as aforesaid makes default in transferring the share the Company may receive the purchase money and shall thereupon cause the name of the purchasing member to be entered in the Register as the holder of the share and shall hold the purchase money in trust for the proposing transferror. The receipt of the Secretary for the purchase money shall be a good discharge to the purchasing member and after his name has been entered in the Register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person. (5) If the Company shall not within the space of twenty-eight days after being served with the transfer notice find a member willing to purchase all or some of the shares and give notice thereof in manner aforesaid the proposing transferror shall at any time within three calendar months afterwards be at liberty to sell and transfer the shares (or those not placed) to any person but not at a price less than that placed by the proposing transferror upon the shares in his transfer notice."

"59. On a show of hands every member present in person shall have one vote and upon a poll every member present in person or by proxy shall have one vote for every ordinary share held by him but employees' shares shall not entitle the holder thereof to any vote."

"70. The following provisions shall have effect :—

(a) Henry Cook Grant and William Allison Grant shall each be a Governing Director of the Company until either one of them resigns the office or dies or ceases to hold at least 6,000 shares and whilst each retains the said office he shall in conjunction with the other Governing Director have authority to exercise all the powers authorities and discretions by these presents expressed to be vested in the Directors generally and all the other Directors (if any) for the time being of the Company shall be under the control of the Governing Directors and shall be bound to conform to their directions in regard to the Company's business.

(b) The said Governing Directors may from time to time and at any time appoint any other persons to be Directors of the Company for such period as they think fit and may define limit and restrict their powers and may fix and determine their remuneration and duties and may at any time remove any Directors howsoever appointed and may at any time convene a general meeting of the Company. Every such appointment or removal must be in writing under the hand of the Governing Directors. Upon either of the said Governing Directors ceasing to be Governing Director then any existing Director appointed under the terms of this paragraph shall thereafter be considered a Director of the Company appointed by the shareholders with powers and duties accordingly.

(c) The remuneration of the Governing Directors whilst they hold office as Governing Directors shall be such annual sum as the Directors may from time to time decide.

(d) In the event of either of the said Governing Directors ceasing to be a Governing Director for any of the reasons set out in paragraph (a) of this Article which event is hereinafter referred to as the termination of the original management then notwithstanding anything contained in these Articles the remaining Governing Director shall thereupon cease to be a Governing Director but shall remain a Permanent Director until he resigns the office or dies or ceases to hold at least 6,000 shares or comes within the provisions of Article 74 (a) and (b) and shall not be subject to retirement under Article 80 or to be removed under Article 89 and the number of Directors inclusive of a Permanent Director shall not be less than three or more than five and the business of the Company

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shall be managed and the powers of the Company exercised in all respects as set forth in Article 96."

"71. Whilst and whenever there shall be Directors of the Company in office and no Governing Director the following provision shall have effect that is to say:—The Directors shall not be less than two nor more than five in number and the qualification of a Director shall be the holding of shares of the nominal amount of £100. A Director may act before acquiring his qualification but in any case he shall acquire the same within three months from his appointment and unless he shall do so he shall be deemed to have agreed to take the said shares from the Company and the same shall be forthwith allotted to him accordingly but he may acquire the same by gift or transfer from or as the nominee or trustee of any person or in any other way by which shares can be legally acquired."

"75. The Directors may from time to time appoint one or more of their body to be Managing Director or Managing Directors or Manager or Managers of the Company either for a fixed term or without any limitation as to the period for which he or they is or are to hold such office and may from time to time remove or dismiss him or them from office and appoint another or others in his or their place or places."

"76. A Managing Director or Manager may either by provision made by the Company in General Meeting or if no such provision is made then by agreement with the Directors be remunerated by way of salary or commission or participation in profits or by any or all of these modes."

"79. No Director shall be disqualified by his office from contracting with the Company either as vendor purchaser or otherwise nor shall any such contract or any contract or arrangement entered into by or on behalf of the Company in which any Director shall be in any way interested be avoided nor shall any Director so contracting or being so interested be liable to account to the Company for any profit realised by any such contract or arrangement by reason of such Director holding that office or of the fiduciary relation thereby established but it is declared that the nature of his interest must be disclosed by him at the meeting of Directors at which the contract or arrangement is determined on if his interest then exists or in any other case at the first meeting of the Directors after the acquisition of his interest and that no Director shall as Director vote in respect of any contract or arrangement in which he is so interested as aforesaid and if he does so vote his vote shall not be counted, but this prohibition shall not

apply to any contract by or on behalf of the Company to give to the Directors or any of them any security by way of indemnity and it may at any time or times be suspended or relaxed to any extent by a General Meeting."

"86. The Company may from time to time in General Meeting by extraordinary resolution increase or reduce the number of Directors and determine in what rotation such increased or reduced number shall go out of office."

"93. All acts done by any meeting of the Directors or by any person acting as Director shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such Director or person acting as aforesaid or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a Director."

Article 70 was amended on 28th July 1947, and has existed in its present form only since that date. Under the old art. 70 the remuneration of each Governing Director was fixed at £2,000 per annum. Paragraph (d) was not in the old art. 70.

The business of the company is that of builders and contractors. It is a very large business. It was founded many years ago by John Grant, but for some time before 1922 it had been carried on by the two sons, John Grant taking no active part in it. There appears to have been no partnership deed, but, when the company was formed in 1922, the allotment of shares proceeded on the footing that the brothers were owners of the business in equal shares. The nominal capital of the company was and is £100,000, divided into shares of £1 each, 5,000 of which are employees' shares which carry no voting rights. Immediately after the incorporation of the company 50,000 shares were issued. To H. C. Grant 10,000 shares were allotted, and to W. A. Grant 10,000 shares. To Adelaide Emma Grant, the wife of H. C. Grant, 5,898 shares were allotted, and to Winifred Eleanor Grant, the wife of W. A. Grant, 5,648 shares. The remainder of the allotted shares (apart from 204 shares, which went outside the families) may be conveniently described as the "trust shares". Of these shares 9,000 were allotted to H. C. Grant and one Harrison jointly, and 9,250 to W. A. Grant and Harrison jointly. The result of these allotments was, of course, in effect, to divide the issued capital equally, what may be called the H. C. Grant group receiving 24,898 shares and what may be called the W. A. Grant group also receiving 24,898 shares. The difference of 250 shares between the holdings of the wives seems to have been compensated by the difference between the holdings represented by the trust shares.

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Why this was done does not appear. Harrison died some time before 1940.

On 10th October 1922 H. C. Grant and Harrison executed a deed of trust of the above-mentioned 9,000 shares, and W. A. Grant and Harrison executed a deed of trust of the above-mentioned 9,250 shares. The beneficiaries under the former deed were the plaintiff Henry John Grant, the plaintiff Kenneth William Grant, and Alison Jean Grant, children of H. C. Grant. The beneficiaries under the latter deed were Alan Charles William Grant and the defendants Donald Frederick Grant, Alison Eleanor Arnott (then Alison Eleanor Grant) and Margaret Winifred Dampney (then Margaret Winifred Grant), all of whom were children of W. A. Grant. The precise terms of the trusts created by the deeds are not of importance, but it should be noted here that Alan Charles William Grant was killed during the war, with the result that, under the terms of the W. A. Grant deed, there was an accruer of his share to the shares of his brother and sisters. Each deed contained a power of revocation and re-settlement. The power was exercised by H. C. Grant on 14th November 1934 by giving to the trustees a power to apply the whole or any part of corpus for the benefit or advancement of the daughter, whose interest was a life interest with " remainder " to children. It was exercised by W. A. Grant on 18th November 1947 by converting the life interests of his two daughters, which they had under the original deed, into absolute interests, and also by vesting the whole of the interest of his deceased son in his surviving son, Donald Frederick Grant. It would seem clear that each brother knew of the execution of the original deed by the other, and was aware, at least in a general way, of its contents.

From its incorporation until the depression years the business of the company prospered greatly. H. C. Grant and W. A. Grant were governing directors under art. 70, but it seems clear that from the beginning W. A. Grant was more active in the business than his elder brother. He was not only a governing director but was managing director under art. 75. In each of the years 1923-1929 inclusive, while a large salary of equal amount was paid to each governing director, a large bonus was paid in addition to W. A. Grant. These bonuses were paid with the knowledge and consent of H. C. Grant. It is also clear, I think, that, in addition to being the more active director, W. A. Grant was the dominant director in the sense that, if a difference of opinion occurred, his will generally prevailed. H. C. Grant now blames his brother for certain bad investments which the company made, but it is clear that he was

a party to them and signed the necessary cheques. It may be noted that at all meetings before that of 29th September 1925 H. C. Grant acted as chairman, but at the meeting held on that date and at all subsequent meetings W. A. Grant acted as chairman. During and since the depression years the company has been less prosperous; in some years it sustained losses. No dividend has been declared since 1926. For each of the years 1930-1946 inclusive the brothers received the same remuneration, except that in each of the years 1938, 1939 and 1940 W. A. Grant received £1,000 more than his brother, and that for 1947 W. A. Grant received £1,052 and H. C. Grant £832, and for 1948 W. A. Grant £1,219 and H. C. Grant £848. Up to the year 1947 there is no evidence of serious dissension between the two brothers, though their two families appear to have been estranged and on unfriendly terms.

On 9th January 1925, 2,000 further shares in the company were allotted to W. A. Grant, the allotment being made at a meeting of directors at which H. C. Grant was present. On 29th September 1925, 3,500 additional shares were allotted to W. A. Grant, and 3,500 to H. C. Grant. Between September and November 1926, 2,500 further shares were allotted to W. A. Grant. No further shares were allotted until 1949. When, therefore, the "time of troubles" began, H. C. Grant owned or controlled 28,398 shares and W. A. Grant 32,898 shares.

Some time before 1940 H. J. Grant and K. W. Grant, the sons of H. C. Grant, had attained absolutely vested interests under the H. C. Grant settlement. At a meeting of the governing directors held on 16th February 1940 transfers to them of the shares held in trust for them, and also a transfer to Alison Jean Walker (the daughter of H. C. Grant, who had in the meantime married) of the shares in which she had a life interest, were submitted for approval. The transfer to the daughter was presumably made in pursuance or purported pursuance of the power to apply corpus for her advancement or benefit. Whether it was justified by the terms of the trust need not be considered. All three transfers were approved by the meeting and in due course registered. W. A. Grant raised no objection to any of them. No steps had been taken under art. 16. It may or may not have occurred to anybody that a contravention of art. 16 would or might be involved. The transfers comprised the whole of the 9,000 "trust shares". They made no difference to the total holding of the H. C. Grant group, but H. J. Grant became and remains the holder of 3,250 shares, K. W. Grant the holder of 3,000 shares, and

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Mrs. Walker the holder of 2,750 shares, H. C. Grant's own original holding being reduced by 9,000 shares.

The sons of H. C. Grant and W. A. Grant had apparently been taken into the service of the company before the war. After the war the two sons of H. C. Grant, who had served in the armed forces, and the surviving son of W. A. Grant, who had also served in the armed forces, returned to the service of the company. H. J. Grant is aged about thirty-seven years and K. W. Grant about thirty-five years. D. F. Grant is younger, being about twenty-seven years of age. There can be little doubt, I think, that it was the return of these three sons that began the trouble that has led to this most regrettable litigation. It was most probably due to a realization by H. C. Grant and his sons that they held a minority of the shares in the company, followed by a fear of what this might ultimately mean to the future of the two sons in view of personal antagonisms which existed. H. J. Grant, who had acquired qualifications abroad, was probably assertive and critical, and this would not unnaturally be resented by his more experienced uncle. However, it is not very profitable to pursue such antagonisms to their sources.

It would appear that in 1947 W. A. Grant determined to make his children shareholders in the company. This would give him no advantage in voting power which he did not already possess, but it would give to his own children a direct interest in the company and place them on the same footing as his brother's children. On 18th November 1947 he took the first step by executing the deed of alteration of trusts which I have already mentioned. On or about the same date he executed transfers of 4,000 shares to his son, D. F. Grant, and transfers of 2,500 and 2,750 shares respectively to his daughters, Mrs. Arnott and Mrs. Dampney. The transfers do not appear to have been formally presented for approval to a meeting of governing directors until some considerable time later, but it would appear that H. C. Grant had informed his brother at an early stage that he would not be a party to approval of the transfers for registration. It would appear also that H. C. Grant and his sons had given consideration to the effect of art. 16, because the two sons on 12th December 1947 addressed to the two governing directors and the secretary of the company a letter in which they stated that, in the event of any shareholder wishing to transfer any part of his holding they desired " to exercise their option under " art. 16. The same letter stated that, in the event of a new issue of shares, each desired to take up his due proportion of shares. Ultimately, at a meeting

which may have been informal (for it is not recorded in the minutes, and H. J. Grant and K. W. Grant were present as well as the governing directors), W. A. Grant produced the three transfers and moved that their registration be authorized. The other three said that they objected, and W. A. Grant said that he would withdraw them and proceed in another way. This meeting was, I think, held shortly before 9th December 1948. The motive for refusing to agree to registration of the transfers was quite frankly admitted by H. C. Grant. It was to put pressure on W. A. Grant to agree to a redistribution of shareholdings which would make the holdings of the two groups equal. H. C. Grant and his sons have at all times been ready to agree to registration of the transfers if the holdings were redistributed so as to produce equality. W. A. Grant, for his part, was willing not to press for registration of the transfers if the other parties would revert to the position which existed before 1940, when all the H. C. Grant shares were held by H. C. Grant himself. All parties seem (naturally enough) to have regarded registration of the transfers as a vital matter, though, if the transfers involved a contravention of art. 16, I should have thought that the registration could be challenged by any shareholder who had not agreed to it.

After the " meeting " to which I have last referred W. A. Grant proceeded promptly. It will be convenient to enumerate the material acts and events.

1. On 9th December 1948 W. A. Grant resigned his office of governing director. This step is, of course, not challenged.

2. On his resignation the consequences prescribed by art. 70 followed. H. C. Grant ceased to be a governing director, and became a " permanent director ". It was required thenceforth (since the special provisions of art. 70 would, I should think, override the general provisions of art. 71) that there should be not less than three nor more than five directors, inclusive of the permanent director, and H. C. Grant was under the duty of convening an extraordinary general meeting for the purpose of electing a board of directors. This he did forthwith, and the meeting was held on 17th December 1948. At this meeting resolutions were passed, the H. C. Grant faction opposing, that there should be two directors in addition to the permanent director and that those two directors should be W. A. Grant and his son D. F. Grant. The appointment of D. F. Grant as a director is not challenged.

3. Immediately after the general meeting on 17th December 1948 a meeting of the new board of directors was held, at which

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the transfers to the three children of W. A. Grant were " approved ", and on the same day the three were entered in the share register as holders of the numbers of shares specified in the respective transfers. H. C. Grant is not recorded by the minutes of this meeting as dissenting, and he admits that he voted in favour of the transfer to D. F. Grant. He says, however, that he was unaware that the transfers to the two daughters were being submitted to the meeting. He was cross-examined as to this, and I should think his statement probably false, but *Roper* C.J. in Equity made no finding upon the point, and I do not think that anything turns upon it.

4. At a meeting of directors held on 14th January 1949 it was resolved that one hundred shares (the qualification required for a director by art. 71) be allotted to D. F. Grant, and on the same day he was registered as the holder of these shares. This allotment is not challenged.

5. On 11th February 1949 an extraordinary general meeting of the company, convened on the requisition of W. A. Grant and Mrs. W. E. Grant, was held. At this meeting a resolution was carried that the number of directors be increased from three to five. The voting was on " party lines ". Immediately afterwards, H. C. Grant and H. J. Grant having withdrawn, resolutions were passed that Mrs. Arnott and Mrs. Dampney be appointed directors of the company. These resolutions were not extraordinary resolutions.

6. At a meeting of directors held on 23rd February 1949 it was resolved that Mr. W. A. Grant be appointed managing director of the company for five years at a salary of £2,000 per annum plus a percentage of profits to be decided upon by the directors each year. It was also resolved that he be allotted 1,000 shares at par. (He was entered in the share register as the holder of these shares on 2nd March 1949.)

7. At the same meeting one hundred shares were allotted to Mrs. Arnott and one hundred shares to Mrs. Dampney, and on the same day each was registered as the holder of one hundred shares. The purpose of this seems to have been twofold. It was, firstly, to qualify them as directors, and, secondly, to render them retrospectively qualified to receive their trust shares without infringing art. 16. How far it was possible to achieve these purposes by the means adopted is, of course, another matter.

8. In furtherance of the second of the above purposes, what are described in the minutes as " confirmatory share transfers " of their trust shares to Mrs. Arnott and Mrs. Dampney were

" presented to " the meeting of 23rd February 1949, and it was resolved (H. C. Grant dissenting) that they " be accepted, as the transferees are members of the company and that they be registered in the share register when duly stamped ". These " confirmatory transfers " were not put in evidence. No alteration was made in the share register in consequence of the resolution. It continued simply to show Mrs. Arnott and Mrs. Dampney as holders respectively of 2,500 and 2,750 shares acquired on 17th December 1948.

9. Finally, at an extraordinary general meeting of the company held on 12th December 1949, Mrs. Arnott and Mrs. Dampney, having been duly nominated, were appointed directors of the company. The purpose of this seems to have been to cure a defect in their original appointment on 23rd February in that they had not then been nominated in accordance with art. 84. This defect appears to have been effectively cured by the " re-appointment " on 12th December, but it does not, of course, follow that this appointment is not open to attack on other grounds.

In this series of steps the plaintiffs, H. C. Grant, H. J. Grant, K. W. Grant, Mrs. Adelaide Emma Grant and Mrs. Walker, by suit commenced on 26th May 1949, challenged the following:— 1. the transfer of trust shares to D. F. Grant, Mrs. Arnott and Mrs. Dampney; 2. the appointment of Mrs. Arnott and Mrs. Dampney as directors of the company; 3. the allotments of 100 shares each to Mrs. Arnott and Mrs. Dampney; 4. the appointment of W. A. Grant as managing director.

In the pleadings and in the argument allegations of want of bona fides, and of acting in his own interests as opposed to the interests of the company, have been made against W. A. Grant, and the cases relating to what has been called " fraud on a minority " have been invoked. With great respect, it does not appear to me that those cases have any bearing on the present case. I think it right, however, to say that those allegations are, in my opinion, without foundation. In cases of this kind it is, of course, quite impossible to divide motives into mutually exclusive watertight compartments: see *Mills* v. *Mills* (1). That W. A. Grant had the interests of himself and his family in mind is, of course, obvious. That therein lay his dominant motive, or that he intended to further those interests at the expense of the interests of other shareholders, I am as unable to believe as was *Roper* C.J. in Eq. I think it highly probable, indeed, that everything that he did was, in truth and in fact, in the best interests

(1) (1938) 60 C.L.R., at pp. 163, 164 [per *Latham* C.J.], and 185, 186 [per *Dixon* J.].

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of the company as a whole, but that is beside the point. His main desire, at first, was to have his children made shareholders in respect of their trust shares. That was a perfectly legitimate and reasonable desire, and it was opposed for no worthier purpose than to bring pressure upon him to alter a state of affairs in which H. C. Grant had acquiesced, most probably for the best of reasons, and which had existed for over twenty years. His appointment as managing director appears to me to have been a perfectly reasonable and proper appointment at a reasonable and proper remuneration. He had been managing director for twenty-five years before he resigned the office of governing director, the company's business is a very large one, and it seems impossible to say that £2,000 per annum plus a share of profits was an unreasonable remuneration for its managing director. It is nothing to the point to say that he might in the future be voted an unreasonable share of profits by a board favourably disposed to him.

I have thought it fair and right to say these things, but they are not, in my opinion, decisive of this case. They would be, I think, decisive if, but only if, all the challenged acts had been done in compliance with the articles of association. It is now necessary to consider the challenged acts step by step.

1. I think, in the first place, that the transfers of trust shares to the children of W. A. Grant involved a contravention of art. 16. So, in my opinion, did the transfers of trust shares to the children of H. C. Grant in 1940. It is, I think, a misconception to suppose that those transfers were, in either case, validated, in the sense of becoming unchallengeable, by the approval of governing directors or of a board of directors or by entry in the register. No doubt they could not be effectively challenged by any person who had acquiesced in them. W. A. Grant probably could not now successfully challenge the registration of the children of H. C. Grant as shareholders. But there is nothing in the evidence to suggest that Mrs. W. A. Grant or (perhaps) D. F. Grant could not do so. Anyhow, so far as the present proceedings are concerned, I am of opinion that, whether the board which purported to approve of their registration was validly constituted or not, the transfers of trust shares to the children of W. A. Grant are open to challenge by the plaintiffs. The registration of those children as shareholders involved an infringement of art. 16, and their names are "without sufficient cause entered in the register" (*Companies Act* 1936, s. 83).

2. I am of opinion in the next place that the appointments of Mrs. Arnott and Mrs. Dampney were not in accordance with the articles. As to this matter I agree with the view taken by *Roper* C.J. in Eq. It was, I think, duly determined by the company in general meeting under art. 70 (d) that there should be two directors in addition to H. C. Grant, who was a permanent director, and that those two directors should be W. A. Grant and D. F. Grant. That meeting could have appointed two or three or four directors in addition to the permanent director. But, two having been appointed, I think that the number of directors could not be increased or reduced except in accordance with art. 86, which requires an extraordinary resolution. No extraordinary resolution was (or could have been) passed. It was argued that art. 86 was concerned solely with alterations in the maximum or minimum number of directors fixed by art. 70 (d) and art. 71. But this is not, in my opinion, its meaning. When it first becomes necessary to appoint directors, the company may appoint any number it likes within the limits fixed, but, if thereafter it wishes to have a smaller or larger number than it has, it can only carry its wishes into effect by means of an extraordinary resolution. This view is, I think, as a matter of construction, supported by *Worcester Corsetry Co. Ltd.* v. *Witting* (1), to which *Roper* C.J. in Eq. referred. But, if it were given the other meaning, a question would arise, in view of the form it takes, as to its validity, because it might be said that it purports to enable the company to alter its articles by extraordinary resolution, whereas the Act (s. 20) requires a special resolution (see s. 97). This affords an additional reason for preferring the construction which I would adopt. Not having been effected by extraordinary resolution, the appointment of Mrs. Arnott and Mrs. Dampney was, in my opinion, invalid.

3. It follows from what I have just said that the allotments of 100 shares each to Mrs. Arnott and Mrs. Dampney were not made by a properly constituted board. These were supposed to be justified by art. 71, but, if Mrs. Arnott and Mrs. Dampney were not validly appointed directors, art. 71 has nothing to do with the matter. I shall have later to consider the effect of art. 71.

4. It follows also from the invalidity of the appointment of Mrs. Arnott and Mrs. Dampney as directors that the appointment of W. A. Grant as managing director is prima facie invalid. At the meeting which purported to appoint him five "directors" were present, but two of these, Mrs. Arnott and Mrs. Dampney, were not validly appointed directors. That left W. A. Grant,

(1) (1936) Ch. 640.

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H. C. Grant and D. F. Grant. H. C. Grant voted against the appointment, and W. A. Grant was, by virtue of art. 79, not entitled to vote on the resolution. There was thus one valid vote for, and one valid vote against, the resolution, and it could not be carried.

The result of what I have so far said is that the plaintiffs are prima facie entitled to relief under all four of their heads of claim, not on the footing that there has been any abuse of power (for I am clearly of opinion that there has not), but on the footing that there have been breaches of the provisions of the articles of association and that any member of the company who has not assented to such breaches is prima facie entitled to enlist the aid of the courts for the purpose of undoing the effect of such breaches. Nor am I able to agree with the argument that relief should be refused because the W. A. Grant group has a majority and the company in general meeting could sanction all that has been done. I do not think that the company in general meeting could do this. A general meeting has no power to override articles of association. A departure from the articles is always prima facie challengeable, unless *all* the members of the company have agreed to the departure and the transaction is not otherwise open to objection. Nor am I able to agree that the difficulties of the W. A. Grant group (with which I sympathize) can be overcome by further allotments of shares. The powers given to the board by art. 4 cannot be used for the purposes of one group of shareholders however deserving that group may be.

It is now necessary, however, to refer to art. 93 and to s. 124 of the *Companies Act* 1936, neither of which appears to have been referred to before *Roper* C.J. in Eq. I have set out art. 93 at the beginning of this judgment. I do not think that, for any presently material purpose, there is any difference between the effect of the article and the effect of the statutory provision.

It is now well settled that such provisions operate not merely as between a company and outsiders but with respect to the internal affairs of the company and as between the company and its members. This has been the view uniformly accepted ever since the decision of the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co. Ltd.* (1). See *British Asbestos Co. Ltd.* v. *Boyd* (2), and *Channel Collieries Trust Ltd.* v. *Dover St. Margaret's and Martin Hill Light Railway Co.* (3). In *Tyne Mutual Steamship Insurance Association* v. *Brown* (4) and in *Morris* v.

(1) (1898) 1 Ch. 6.
(2) (1903) 2 Ch. 439.
(3) (1914) 2 Ch. 506.
(4) (1896) 74 L.T. 283.

Kanssen (1), there had been no appointment at all, and the persons whose positions were in question well knew that there had been no appointment at all. There is nothing in either of these cases to derogate from the authority of the three cases I have cited, and in the last-mentioned case (2) Lord *Simonds* refers to those cases with apparent approval. The statute and the article apply, in my opinion, in all cases where (1) there has been an irregularity in appointment, (2) " the slip has occurred because the parties have not had present to their minds the legal difficulties in the way of doing what they honestly think they are entitled to do ", and (3) " the ' acts ' have been done in good faith " (per *Swinfen Eady* L.J. in the *Channel Collieries Case* (3), cf. the *British Asbestos Case* (4)). It should be pointed out, I think, that the headnote to the *British Asbestos Case* (5) is inadequate, and the facts need to be carefully read.

In the present case I have expressed my opinion that Mrs. Arnott and Mrs. Dampney were not appointed as directors in accordance with the articles. *Roper* C.J. in Eq. has made a declaration to this effect and granted a consequential injunction, and I think that the cross-appeal as to those orders fails. But the defect in their appointment seems to me to have been clearly no more than an irregularity within the meaning of the authorities. It depends indeed on a very technical question—a question of construction, as to which differences of opinion may be legitimately entertained, and as to which it is with respect and hesitation that I have formed an opinion differing from that of the learned Chief Justice. It is the very kind of irregularity with which the statute and the article were designed to deal. If my opinion is correct, the cross-appeal, as I have said, fails. But the invalidly constituted board, while it believed itself to be in office, did, in good faith and in ignorance of its defective constitution, two things that are challenged. It allotted one hundred shares each to Mrs. Arnott and Mrs. Dampney, and it appointed W. A. Grant managing director for five years at a salary of £2,000 per annum plus a share of profits.

In my opinion the allotments of the shares to Mrs. Arnott and Mrs. Dampney are saved by s. 124 and art. 93. I do not, indeed, think that the allotments were justified by the terms of art. 71, because the agreement to take the shares and the corresponding *duty* to allot them do not, I think, arise until the three months have passed and the director has failed to obtain his qualifying

(1) (1946) A.C. 459.
(2) (1946) A.C., at p. 472.
(3) (1914) 2 Ch., at p. 515.
(4) (1903) 2 Ch., at p. 444 [per *Farwell* J.].
(5) (1903) 2 Ch. 439.

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shares otherwise, and art. 93 and s. 124 will not save any transaction which would not be valid if the board were a duly constituted board. But art. 71 is concerned with requiring that the necessary shares *shall* be held. It is primarily a compelling, and not an enabling provision, and I am of opinion that the provisions of art. 4 authorize the allotment of qualifying shares to a person who is duly appointed a director. If this is so, art. 93 and s. 124 validate the allotments in the present case. It is to be noted that the facts in this case bear a marked resemblance to those in the *British Asbestos Case* (1) and the *Channel Collieries Case* (2).

I am also of opinion that the statute and the article validate the appointment of W. A. Grant as managing director. If the board which purported to make the appointment was validly constituted, there was a sufficient majority to carry the resolution without W. A. Grant's own vote, and art. 93 and s. 124 require the position to be regarded as if there had been a validly constituted board. I do not think that the section or the article validates the fixing of the managing director's remuneration, because art. 76 requires his remuneration to be fixed by a general meeting, and it is only, I think, if a general meeting before which the matter is brought declines or omits to fix the remuneration that the matter becomes one for agreement between the managing director and the other directors. But this does not warrant the interference of the court, because the matter can be brought before a general meeting. The matter " is one with which a general meeting of the company can deal, and recourse must be had to a general meeting ". I may add that art. 79 deals only with directors voting as directors, and I can see no reason why W. A. Grant himself should not vote on the matter as a shareholder (see *Pender* v. *Lushington* (3), *North-West Transportation Co. Ltd.* v. *Beatty* (4) and *Burland* v. *Earle* (5)).

It remains to consider the registration of the children of W. A. Grant as shareholders in respect of their trust shares. This is, of course, not directly affected by art. 93, because, as I think, no approval or authority of directors could convert a transaction which was in breach of art. 16 into a transaction which was not in breach of art. 16. I am of opinion, nevertheless, that rectification of the register should be refused for two reasons. In the first place, it would be futile to order rectification, because each of the children of W. A. Grant now holds one hundred shares in the company. Since each is now a shareholder, W. A. Grant could now transfer

(1) (1903) 2 Ch. 439.
(2) (1914) 2 Ch. 506.
(3) (1877) 6 Ch. D. 70, at p. 75.
(4) (1887) 12 App. Cas. 589, at p. 593.
(5) (1902) A.C., at p. 94.

the trust shares to them without infringing art. 16. But I think myself, in any case, that rectification must be refused here on a broader ground of discretion.

The power to order rectification of the register must clearly, I think, be in all cases discretionary. The person claiming rectification must show that he has some equity which the court will protect. If he is a shareholder, then prima facie he shows such an equity if he establishes that a name is wrongly included in or omitted from the register of his company. Some definite reason must be shown, I would think, for refusing rectification before rectification will be refused. But there may be circumstances which justify, or even compel, refusal. There are many passages in the reports which assert that the power given by provisions corresponding to s. 83 of the *Companies Act* is discretionary. See, e.g., *Ex parte Shaw* (1) and *Ward and Henry's Case* (2). It has, however, frequently been said that provisions corresponding to s. 83 are procedural in character (though it is at least doubtful whether this is true of s. 83 itself—contrast s. 39 of the Victorian *Companies Act* 1928), and many of the references to discretion should probably be read as referring to the discretion which the court has in deciding whether it will act on motion or summons under the statute or will leave the party complaining to bring an action or suit: cf. *Re Irrigable Estates Co. Ltd.* (3). But the power of a court of equity to order rectification is no more and no less than a part of its general jurisdiction to "act *in personam*" in aid of a legal right, and it must be subject to the same principles which apply generally to equitable remedies. Section 35 of the *Companies Act* 1862 said that the court might "if satisfied of the justice of the case" rectify the register. Lord *Macnaghten* in *Trevor* v. *Whitworth* (4) referred to those words, and said: "Although they have been sometimes overlooked, Lord *Cairns*, I may observe, relied upon them in *Sichell's Case* (5) as showing that the Court is bound to go into all the circumstances and to consider what equity the applicant has to call for its interposition". What Lord *Cairns* actually said was that the court must have "regard to who is the applicant and to all the circumstances of the case". Otherwise, he asked, "how could the Court be 'satisfied of the justice of the case?'". But the position cannot be different if it is the general equitable jurisdiction of the court that is invoked.

(1) (1877) 2 Q.B.D. 463, at p. 472 [per *Cleasby* B.].
(2) (1867) L.R. 2 Ch. App. 431, at p. 436.
(3) (1894) 20 V.L.R. 492.
(4) (1887) 12 App. Cas. 409, at p. 440.
(5) (1867) L.R. 3 Ch. App. 119.

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Equitable remedies are not, generally speaking, granted unless the court is " satisfied of the justice of the case ".

In the present case three of the plaintiffs are themselves, in my opinion, wrongly on the register. Another, H. C. Grant, was instrumental in their being so placed on the register. Neither the interests of the company nor the interests of any of the plaintiffs are in the slightest degree adversely affected by the presence on the register of the names to which objection is taken. The sole object of the plaintiffs is to obtain from W. A. Grant his assent to an alteration in a position in which, as I have said, H. C. Grant was glad enough to acquiesce in the days of the company's prosperity, and which has existed for nearly twenty-five years. Finally, the position is very like that which existed in *Sichell's Case* (1). In that case Lord *Cairns* said :—" If the object is, as the 35th section would seem to imply, to put the register in the form in which it should throughout have been . . . this would be done not by putting on the name of Mr. *Sichell* only but by removing the *Imperial Mercantile Credit Association* and *Ashton*, and putting on not merely *Sichell* but also his transferors, *Stafford & Hogben* " (2).

In all these circumstances I am of opinion that rectification should have been refused unless the plaintiffs were prepared to agree to a corresponding rectification of the entries which were made in 1940, and this they have refused to do.

In my opinion the appeal should be dismissed with costs. The cross-appeal should, in my opinion, be dismissed without costs.

KITTO J. I agree with the judgment of my brother *Williams* on all points in the case, and I shall add only a few words in relation to the question, which is one of general importance, as to the applicability of s. 124 of the *Companies Act* 1936 and art. 93 of the company's articles of association.

The actual decision in *Morris* v. *Kanssen* (3) was that where a person assumes to act as a director without any purported appointment the section and article do not operate to validate his acts. But the passage quoted by my brother *Williams* from the speech of Lord *Simonds*, with which the whole House agreed, shows, I think, that the case justifies a broader proposition. The passage points out that the section and article relate only to the case where a slip has been made in appointing a director, and it draws a distinction between such a case and a case in which substantive

(1) (1867) L.R. 3 Ch. App. 119.
(2) (1867) L.R. 3 Ch. App., at p. 123.
(3) (1946) A.C. 459.

provisions relating to an appointment have been ignored or overridden. The reason for the distinction is, I think, that a defect in an appointment can be said to exist only where some requirement has been neglected in exercising a power to make an appointment. The section and the article presuppose an appointment in fact made by a person or body having power to appoint, and they refer to a slip in the making of the particular appointment in question. It is therefore necessary to distinguish between the defective exercise of a power to appoint and the non-exercise or non-existence of such a power. The proposition which I think is justified by *Morris* v. *Kanssen* (1) is that where a person acts as a director, either without being appointed or in pursuance of a purported appointment made by a person or body not authorized to make an appointment, neither the section nor the article operates to validate his actions.

In the present case the purported appointments of Mrs. Dampney and Mrs. Arnott as directors were made at a time when, in the absence of an extraordinary resolution increasing the existing number of directors, there was no power to make any new appointment to the board. Their appointments were therefore invalid, not by reason of any defect in the making of them, but because substantive provisions of the articles precluded any such appointments being made. I share my brother *William's* opinion that neither the section nor the article enables the acts of these ladies as directors to be treated as valid.

I would allow the appeal, and grant the relief sought in the suit except in respect of the transfer of trust shares to D. F. Grant. The cross-appeal in my opinion should be dismissed.

Appeal allowed with costs. Decree in terms of pars. 1 (*omitting reference to par.* 19 *of statement of claim*), 2, 3, 4, 5, *and* 6 *of prayers in statement of claim. Share register to be rectified by defendant company within twenty-eight days. Cross-appeal dismissed with costs.*

Solicitors for the appellants, *Robert Burge & Co.*
Solicitors for the respondents, *Allen, Allen & Hemsley.*

J. B.

(1) (1946) A.C. 459.