[HIGH COURT OF AUSTRALIA.]

MORRISON . . . . . APPELLANT;
PLAINTIFF,

AND

O'BRIEN AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 29, 30;

SYDNEY, *Aug.* 28.

Williams A.C.J., Webb, Kitto and Taylor JJ.

Companies (Q.)—Registration—Partnership—Unincorporated joint stock company—Constituted by contract "otherwise duly constituted by law"—The Companies Acts, 1931 *to* 1942 (*Q.*) (22 *Geo. V., No.* 53—6 *Geo. VI, No.* 23), *s.* 342 (1) (ii).

Section 342 (1) of *The Companies Acts* 1931 *to* 1942 (Q.) provides *inter alia*: "(1) Any company consisting of seven or more members which was in existence on the first day of September 1863 . . .; and (ii) any company formed after the date aforesaid . . . in pursuance of any Act of Parliament other than this Act, or of letters patent, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee".

Held, that an unincorporated joint stock company consisting of more than seven members and constituted solely by agreement between the members in November 1919, is not a company "otherwise duly constituted according to law" within the meaning of s. 342 (1) (ii) of *The Companies Acts* 1931 *to* 1942 (Q.) and is not entitled to be registered as a company under Pt. XII of those Acts.

Reg. v. *Registrar of Joint Stock Companies*; *Ex parte Johnston* (1891) 2 Q.B. 598, applied.

Decision of the Supreme Court of Queensland (Full Court), *Morrison* v. *O'Brien* (1954) Q.S.R. 180, reversed.

APPEAL from the Supreme Court of Queensland.

The Defiance Milling Co. was a partnership constituted on 29th November 1919, by an agreement called articles of association executed by the appellant and nine other persons. By such articles provision was made for the introduction of new partners and a limitation placed upon the number of partners until after the

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registration of the partnership pursuant to Pt. VI of *The Companies Act of* 1863 (Q.) (Pt. XII of the 1931 Act) should that event occur. The objects of the company were to carry on the business of flour millers and the business of general merchants. As constituted the company came within the definition of a joint stock company in s. 343 of *The Companies Acts* 1931 *to* 1942 (Q.). In an action commenced in the Supreme Court of Queensland, the appellant sought an injunction to restrain the other partners, the present respondents, from proceeding with a proposal to register the partnership as a company limited by shares under the provisions of Pt. XII of *The Companies Acts* 1931 *to* 1942 (Q.).

The motion was heard by *Philp* J. who held that the partnership was not capable of registration pursuant to such part and granted the injunction sought.

On appeal the Full Court (*Macrossan* C.J., *Mansfield* S.P.J. and *O'Hagan* J.) held that the partnership could be registered under s. 342 (1) (ii) of the Acts and set aside the judgment.

From this decision the plaintiff in the action appealed to the High Court.

A. L. Bennett Q.C. (with him *M. B. Hoare*), for the appellant. The relevant section of *The Companies Acts* 1931 *to* 1942 contains the same provisions as s. 174 of the *Companies Act of* 1863 (Q.), which was taken from s. 180 of the English Act of 1862, with the exception of the clause relating to the Stannaries. That clause would have no application in Queensland, where there are no such companies. In England until the decision in *Reg.* v. *Registrar of Joint Stock Companies* ; *Ex parte Johnston* (1) it was the practice to register under s. 180 contractual companies consisting of more than seven but not more than twenty persons : *In re Cussons Ltd.* (2) ; *In re George Newman & Co.* (3) ; *Hammond* v. *Prentice Bros. Ltd.* (4). In *Reg.* v. *Registrar of Joint Stock Companies* ; *Ex parte Johnston* (1) it would appear from the dicta of *Lindley* L.J. (5), of *Fry* L.J. (6) and of *Lopes* L.J. (7) that a contractual partnership is not a company " otherwise duly constituted by law " within the meaning of s. 180 of the English Act and cannot be registered. The words " being otherwise duly constituted by law ", mean a company which is created directly or indirectly pursuant to some legal right by some means analagous to a statute, Royal Charter or letters patent. They do not mean a contractual partnership or company.

(1) (1891) 2 Q.B. 598.
(2) (1904) 73 L.J. Ch. 296.
(3) (1895) 1 Ch. 674.
(4) (1920) 1 Ch. 201.
(5) (1891) 2 Q.B., at pp. 610, 611.
(6) (1891 2 Q.B., at p. 612.
(7) (1891) 2 Q.B., at p. 614.

If it were otherwise then company promoters could form a partnership, have it registered under Pt. XII of the Act and then escape their liabilities under the Act. The textbooks on companies show that the former practice of allowing contractual partnerships to register under the Act is no longer followed: *Stiebel's Company Law*, 3rd ed. (1929), p. 19; *Buckley* on the *Companies Acts*, 12th ed. (1949), p. 723.

T. J. Lehane (with him *T. D. McCawley*), for the respondents. As s. 342 (1) of *The Companies Act* 1931 (Q.) was taken from s. 174 of *The Companies Act* 1863 (Q.), which had been taken, with certain inapplicable omissions from s. 180 of the *Companies Act* 1862 (Imp.), whatever meaning the words "otherwise duly constituted by law" had in s. 180 of the English Act of 1862, they must have in s. 342 (1) (ii) of the Queensland Act of 1931. Consequently these submissions are based on s. 180 of the English Act of 1862. In the *Companies Act* 1856 (19 & 20 Vict., c. 47) the legislature had used the phrase "duly constituted by law" in s. 110, which provided that any company not completely registered under the Act of 1844 which was duly constituted by law previously to the passing of that Act and consisting of seven or more shareholders might at any time register itself as a company under that Act. The Act of 1844 (7 & 8 Vict., c. 110), s. 7, required certain future companies to be registered completely. Section 58 of the Act of 1844 compelled companies then existing to send in certain particulars, "whether incorporated by Act of Parliament or charter or privileged by letters patent or established by virtue of a deed of settlement or any other instrument or by virtue of any authority whatsoever or in any other way whatsoever". Such companies then obtained a certificate of provisional registration. Section 59 of the Act of 1844 entitled certain existing companies to obtain a certificate of complete registration. The reference in s. 110 of the Act of 1856 to "any company not completely registered under the Act of 1844 which was duly constituted by law previously to the passing of this Act" must include the companies referred to in s. 58 of the Act of 1844, and consequently the term "company . . . duly constituted by law" must have been used by the legislature in s. 110 of the Act of 1856 to include a company "established by virtue of a deed of settlement or any other instrument or by virtue of any authority whatsoever or in any way whatsoever". When six years later in the Act of 1862, the legislature used the same phrase "duly constituted by law" it must be assumed, unless there is something in the context to rebut the

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presumption, that it used that phrase as including companies established by virtue of a deed of settlement such as Defiance Milling Co. It is submitted that, not only is there nothing in s. 180 of the English Act of 1862 to indicate that the legislature used that phrase in a different sense from that in which it had used it in the Act of 1856, but the context of s. 180 supports its use in the same sense. The inclusion in s. 180 immediately before the words " or being otherwise duly constituted by law" of a company engaged in working mines within and subject to the jurisdiction of the Stannaries, a class of company which was a purely contractual company (*Vide Halsbury's Laws of England*, 2nd ed., vol. V. at pp. 822 (par. 1406), 824 (par. 1410) and at pp. 817-819) strongly supports the use by the legislature of the term " duly constituted by law " in s. 180 of the Act of 1862 in the same sense as it used it in the Act of 1856. The *Stannaries Act* 1869 (32 & 33 Vict. c. 19) which was an Act to regulate, not to constitute such companies, even if it did alter their nature, which it is submitted it did not, could not affect their nature retrospectively to the time when the Act of 1862 was passed and consequently cannot in any way affect the interpretation of s. 180 of the Act. Sections 183 (2), 196 (6) and 209 of the English Act of 1862 are consistent with the above contention. As to the meaning of the phrase " duly constituted by law " see *Buckley* on *Companies Acts*, 9th ed. (1909), p. 532. The change from " in pursuance of " in the earlier part of s. 180 to " constituted by " in the latter part of that section supports the view of *Buckley*. Nobody has satisfactorily stated what class of company, which did not come within any of the specific classes set out in the earlier part of s. 180, was left to fall within the general class at the end of it, other than companies constituted by agreement such as a deed of settlement. Nor has any satisfactory reason been given why the legislature should make a distinction between contractual companies formed before and those formed after the Act of 1862 came into operation. Until 1891 it was assumed that contractual companies came within the words " otherwise duly constituted by law " in s. 180 of the English Act of 1862 ; *vide* the judgment in *Reg.* v. *The Registrar of Joint Stock Companies* ; *Ex parte Johnston* (1). The appellant relies on certain dicta in the judgments in the Court of Appeal in that case (2) and certain statements made in text books since that case. The decision itself of the Court of Appeal in that case would not exclude the Defiance Milling Co. from registration. *Lindley* L.J. conceded the possibility

(1) (1891) 2 Q.B., at pp. 601-604.

(2) (1891) 2 Q.B., at pp. 610-612, 614.

of a purely contractual joint stock company being qualified for registration. *Fry* L.J. and *Lopes* L.J. merely expressed the inclination of their opinion that consensual companies did not come within the phrase "otherwise duly constituted by law". This would not be sufficient to overrule the considered judgment of the divisional court on that point and the previously accepted view. The statements in text books relating to the rejection of applications for registration since that case, are based on that case, which is always cited in the note, apparently as the authority for such rejection. Consequently such statements should be taken as applying to the type of company in that case, that is a company formed not for the purpose of carrying on business, but merely for the purpose of being registered and then wound up under the *Companies Act*, unless it is shown that companies such as Defiance Milling Co. genuinely formed for the purpose of carrying on business had applied for registration and their applications had been rejected. This had not been shown. Consequently those statements should not be applied to the application of Defiance Milling Co. for registration under Pt. XII of *The Companies Acts* (Q.).

A. L. Bennett Q.C., in reply, referred to *Reg.* v. *Registrar of Joint Stock Companies*; *Ex parte Johnston* (1).

Cur. adv. vult.

Aug. 28.

The following written judgments were delivered :—

WILLIAMS A.C.J., KITTO AND TAYLOR JJ. This is an appeal by the plaintiff in the action from an order of the Full Supreme Court of Queensland allowing an appeal from the judgment of *Philp* J. who heard the action and ordering that this judgment be set aside and that in lieu thereof judgment be entered in the action for the defendants. The action was brought by one of twelve partners against the other partners in a partnership carrying on the business of flour millers in Queensland under the name of Defiance Milling Co. to restrain the defendants from proceeding with the proposal to register the partnership as a company limited by shares under the provisions of Pt. XII of *The Companies Acts* 1931 *to* 1942 (Q.). The partnership was constituted by an agreement called articles of association executed by the plaintiff and nine other persons on 29th November 1919. The articles provide for the introduction of new partners with the limitation that until after the registration of the company pursuant to Pt. VI of *The Companies Act* 1863 (Q.) (Pt. XII of the present Act), should that event occur,

(1) (1891) 2 Q.B., at pp. 604, 605.

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there should not be at any time more than twenty members. The objects for which the company was established were to carry on the business of flour millers and also to carry on the business of general merchants and any other trade or business whatsoever wholesale or retail which in the opinion of the directors for the time being could be advantageously or conveniently carried on by the company in connection with any such business, or was calculated directly or indirectly to develop any branch of the company's business or to increase the value of the company's assets, property or rights. The original capital of the company was £50,000 divided into 50,000 shares of £1 each but this capital was increased in 1924 to £100,000 divided into 100,000 shares of £1 each. Clause 14 of the articles of association provides for the management of the business of the company being vested in the directors who, in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not thereby or by statute expressly directed or required to be exercised or done by the company in general meeting. Clauses 25, 26 and 33 to 38 inclusive provide for the transfer of the shares of the members. The constitution of the company complies with the definition of a joint stock company in s. 343 of *The Companies Acts* 1931 *to* 1942 (Q.). *Philp* J. ordered that the defendants and each of them should be restrained from registering or proceeding further with the registration of the partnership firm known as Defiance Milling Co. as a company limited by shares in pursuance of Pt. XII of *The Companies Acts* 1931 *to* 1942 (Q.) under the name of Defiance Milling Co. Limited. That judgment was, as we have said, set aside on appeal by the Full Supreme Court. From the order of the Full Supreme Court the plaintiff purported to appeal to this Court as of right and objection was taken by the defendants under r. 8 of O. 70 of the rules of this Court to the competency of the appeal. We over-ruled this objection which in the end was but faintly pressed, held that the appeal was competent as of right and ordered that the costs of the objection be costs in the appeal.

The only question argued before us on the merits was the same question as that argued in the courts below—whether an unincorporated joint stock company formed by contract after 1st September 1863 consisting of seven or more members is entitled to apply for registration under Pt. XII of *The Companies Acts* 1931 *to* 1942 (Q.). The reasons of *Philp* J. and of *Macrossan* C.J. who delivered the reasons of the Full Court explain the genesis of this

Part and it is unnecessary to cover this ground again. Section 342 (1) which it contains provides that:—" (1) With the exceptions and subject to the provisions mentioned and contained in this section— (i) Any company consisting of seven or more members which was in existence on the first day of September, one thousand eight hundred and sixty-three, including any company registered under the repealed Acts; and (ii) Any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act, or of letters patent, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up ".

Defiance Milling Co. was formed after 1st September 1863, so that it can only be registered under Pt. XII if it can bring itself within the scope of s. 342 (1) (ii). It is not a company formed in pursuance of any Act of Parliament or of letters patent so the material words of par. (ii) are " or being otherwise duly constituted by law ". Part XII replaces Pt. VI of *The Companies Act* 1863 (Q.) which came into force on 1st September 1863 and was the first Companies Act passed in Queensland. It was modelled on the *Companies Act* 1862 (Imp.). Section 174 of the Queensland Act of 1863 contains the same provisions as those contained in pars. (i) and (ii) of s. 342 (1) of the present Act. The companies which are entitled to apply for registration under par. (ii) fall into three classes: any company formed after 1st September 1863 (a) in pursuance of any Act of Parliament other than this Act; or (b) in pursuance of letters patent; or (c) being otherwise duly constituted by law. The equivalent section in the *Companies Act* 1862 (Imp.) is s. 180, but this section contains between classes (b) and (c) of the Queensland Act a further class " or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries ". This class was naturally omitted from the Queensland Act because there were no such companies in Queensland.

It appears that until 1890 the view was taken in England (and elsewhere) that contractual companies having for their object the acquisition of gain with transferable shares consisting of more than seven but not more than twenty persons formed after the date of the *Companies Act* 1862 (Imp.) (and of the equivalent Acts elsewhere) were entitled to apply for registration as companies

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duly constituted by law: *In re Cussons Ltd.* (1); *In re George Newman & Co.* (2); *Hammond* v. *Prentice Bros. Ltd.* (3). In 1891 the case of *Reg.* v. *Registrar of Joint Stock Companies*; *Ex parte Johnston* (4) came before the Court of Appeal in England. The actual decision was that a partnership formed not for carrying on a business, but simply for the purpose of being incorporated under the *Companies Act* 1862, in order that it might be forthwith wound up, could not be registered as a company under Pt. VII of that Act (which contains s. 180), but the members of the Court of Appeal all referred to the question whether a partnership with transferable shares which is constituted solely by contract between the members is "a company duly constituted by law" under s. 180 of the *Companies Act* 1862, so as to be qualified for registration under Pt. VII of that Act. *Lindley* L.J. said "The argument is, that as this is a company, it is within s. 180, because it is brought within the expression, 'duly constituted by law', by reason of there being no law against it. I am not prepared to say that there may not possibly be cases—I do not know that there are—but I will not go so far as to negative the possibility of a company being formed after 1862 of less than twenty members with transferable shares which might possibly be registered under s. 180" (5). On the other hand *Fry* L.J., after setting out the provisions of s. 180, said: "Now, with regard to the general meaning of those words I shall only express what is the inclination of my opinion upon them. I am not prepared to hold that these words do include a mere private partnership the shares in which are transferable without the consent of all the partners. I am inclined to think that the true meaning of these words is confined to a company which is constituted in some manner analogous to those with which this section begins, namely, constituted by registration under some Act of Parliament, or in pursuance of an Act of Parliament, or under letters patent. I am inclined to think it must be some constitution *ejusdem generis* with those—that those words refer to cases in which the constitution of the company does not arise merely from the consensual agreement of the parties, but in which that constitution is either determined or modified, or affected in some way by something other than mere consent—by something which the law imposes—something, I say, like an Act of Parliament or letters patent; and that the probable reason for introducing these words is that the legislature contemplated that other modes of constituting companies might

(1) (1904) 73 L.J. Ch. 296.
(2) (1895) 1 Ch. 674.
(3) (1920) 1 Ch. 201.
(4) (1891) 2 Q.B. 598.
(5) (1891) 2 Q.B., at pp. 610-611.

come into existence besides the modes then known. Indeed, an illustration of that very fact has occurred, for a new mode of constituting companies by certificate has arisen since the Act of 1862 was passed. That is the inclination of my opinion with regard to the meaning of these words" (1).

Lopes L.J. said: "It is not necessary to decide what the meaning of the words 'duly constituted by law' is; but if it had been necessary to define those words I entirely agree with the view that has been enunciated by my brother Fry. I am inclined to think that the true meaning of those words is this, that they refer to companies constituted by the intervention of the legislature or other tribunal competent to constitute companies, and do not refer to consensual contracts such as the present" (2).

Since that decision the invariable practice appears to have been to refuse to register companies formed on a purely contractual basis and to accept the meaning placed on the words "or being otherwise duly constituted by law" by *Fry* L.J. It will be sufficient to refer to *Gore-Browne, Handbook on Joint Stock Companies*, 41st ed. (1952), at p. 559, where it is said:—"Before 1890 it was not uncommon for partnerships to form themselves into what were called 'Companies at Common Law', and then to register themselves under the Companies Acts, and thus obtain limited liability. But all applications from companies which were not in existence before 1862, unless formed under some Act of Parliament or Royal Charter, have since 1890 been rejected".

In the Full Supreme Court the learned Chief Justice said that it appeared to him that the opinion of *Fry* L.J. was open to serious criticism in three respects. Firstly, he said that his Lordship, in purporting to apply what is commonly called the *ejusdem generis* rule of construction to the words in question, completely ignored the presence in the section of the words "or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries". His Honour added "That such companies are purely consensual companies is not open to doubt". Secondly, he said that the restrictive rule of construction that *Fry* L.J. was inclined to apply has fallen into disrepute. We agree with his Honour that many of such companies formed on the cost-book principle were consensual companies and existed in England prior to 1862. But we do not think that *Fry* L.J. ignored the presence of this class of company in the section. His Lordship must have been fully aware of the nature of companies working mines within

(1) (1891) 2 Q.B., at p. 612.

(2) (1891) 2 Q.B., at p. 614.

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and subject to the jurisdiction of the Stannaries, and of the peculiar privileges enjoyed and special position occupied by persons and companies engaged in this work. Nor do we think that his Lordship meant that a narrower construction should be placed on the words " or being otherwise duly constituted by law " than they would otherwise naturally bear by construing them *ejusdem generis* with the commencing words of the section. All that he meant was that he was inclined to think that on their own natural grammatical construction the words of the fourth class were confined to companies which were constituted in some manner analogous to those with which the section began.

The third respect in which his Honour criticised the opinion of *Fry* L.J. appears in the following passage in his Honour's judgment : " Finally the illustration given by *Fry* L.J. of a new mode of constituting companies by certificate as being an instance of a company ' being otherwise duly constituted by law ' is difficult to understand. He was, I think, referring to such legislation as *The Railways Construction Facilities Act* 1864 which enabled the promoters of a scheme for making a railway to apply to the Board of Trade for a certificate in a prescribed form and empowered the Board to issue a certificate and provided further that where the promoters were not a company incorporated by special Act or by previous certificate under the Act and were seven or more in number a company should be incorporated by the certificate for the purposes thereof. This surely is merely an instance of the kind of company expressly covered by the earlier words in s. 180 ' any company hereafter formed in pursuance of any Act of Parliament other than this Act '. It is not, in my opinion, a possible instance of a company ' being otherwise duly constituted by law ' within the meaning of s. 180 of *The Companies Act* 1862 " (1). His Honour was probably right in thinking that *Fry* L.J. was referring to the incorporation of railway companies by a certificate of the board of trade under the *Railways Construction Facilities Act* 1864 (Imp.). But we do not think that his Honour was right in assuming that his Lordship meant that companies so incorporated necessarily fell into the final class. Section 13 of the Act provides that the certificate may be in the form set forth in the schedule to the Act and the form in the schedule states that the board of trade do, by their certificate in pursuance of the Act, certify &c. His Lordship said that the probable reason for introducing the words " or being otherwise duly constituted by law " was that the Legislature contemplated that other modes of constituting

(1) (1954) Q.S.R., at p. 188.

companies might come into existence besides the modes then known, and we believe all that his Lordship meant was that the constitution of new companies by such certificates instead of by the special Acts by which companies such as railway and canal companies had previously been incorporated illustrated the way in which new modes of constituting companies might come into existence besides the modes then known.

The words " or being otherwise duly constituted by law " are difficult words, but in their natural grammatical meaning they do not appear to us apt to describe a company which derives its constitution from nothing but the mutual agreement of the members. We are fortified in this conclusion by the fact that since the case of *Reg.* v. *Registrar of Joint Stock Companies* ; *Ex parte Johnston* (1) this meaning has been generally accepted by eminent text writers and acted upon by registrars of companies whose duty it is to decide whether applications for registration should be accepted or not. Section 12 of *The Companies Acts* 1931 *to* 1942 (Q.) contains the usual provisions that no company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament or of letters patent ; and that no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act or is formed in pursuance of some other Act of Parliament or of letters patent. This section corresponds with s. 3 of the Queensland Act of 1863 and s. 4 of the English Act of 1862, save that at the end of s. 4 of the English Act there appear the additional words " or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries ". Accordingly under the English Act consensual companies working mines within the Stannaries were still lawful, although they consisted of more than twenty persons. This addition to s. 4 of the English Act seems to explain the additional class in s. 180 of that Act. It would appear that the provisions of s. 180 of the English Act and par. (ii) of s. 342 (1) of the Queensland Act were intended to be complementary to ss. 4 and 12 of those Acts respectively and to authorize companies of more than seven members which were still lawfully constituted

(1) (1891) 2 Q.B. 598.

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within those sections, however many members they contained, to register under the *Companies Acts* and that the words "or being otherwise duly constituted by law" were added to ensure that companies not falling within the literal description of a "company formed in pursuance of any Act of Parliament other than this Act, or of letters patent", but were of a similar character, should be entitled to apply for registration. The difficulty of determining whether some companies could be said to be formed in pursuance of some Act of Parliament or of letters patent where their constitution depends partly upon an Act of Parliament and partly upon the exercise of the Royal Prerogative or the action of some department of the Crown is illustrated by such cases as *In the matter of the Islington Market Bill* (1); *Elve* v. *Boyton* (2) and *In re Smith*; *Davidson* v. *Myrtle* (3), and by the provisions of the *Chartered Companies Act* 1837 (Imp.).

For these reasons we are of opinion that the appeal should be allowed with costs, the order of the Full Supreme Court set aside, and the judgment of *Philp* J. restored. The respondents must pay the costs of the appeal to the Full Supreme Court.

WEBB J. The facts and relevant statutory provisions are set out in the reasons for judgment of *Williams* A.C.J., *Kitto* and *Taylor* JJ. with whom I find myself in substantial agreement. I, too, do not venture to disregard the fact that since the Court of Appeal decided *Reg.* v. *Registrar of Joint Stock Companies*; *Ex parte Johnston* (4), the invariable practice has been to refuse to register companies formed on a purely contractual basis. But in any event I must say, with great respect, that I am not convinced that the Queensland Full Court's view of the meaning of the phrase "duly constituted by law" appearing in s. 174 of the *Companies Act* 1863 (Q.), and re-enacted in s. 342 (1) (ii) of the Queensland Acts of 1931 to 1942, is necessarily supported by the passage in *Buckley's Law and Practice of the Companies Act*, 9th ed. (1909), p. 532, upon which their Honours in the Full Court relied. That appears to be the broadest meaning given to the phrase in any English or Australian textbook on companies. To me that passage suggests at most that the Legislature in using the phrase "duly constituted by law" in s. 180 of the *Companies Act* 1862 (Imp.), from which s. 174 of the Queensland Act of 1863 was taken, meant "according to law" in the sense of "in conformity with law".

(1) (1835) 3 Cl. & Fin. 513 [6 E.R. 1530].
(2) (1891) 1 Ch. 501.
(3) (1896) 2 Ch. 590, at p. 594.
(4) (1891) 2 Q.B. 598.

The meanings of the word " by " in the Shorter Oxford English Dictionary include the old English meaning " in conformity with ". But to say that " duly constituted by law " is interchangeable with " in conformity with law " is not to concede that it also means " consistent with law ", that is, simply " lawful ". Ordinarily conformity involves action in accordance with some standard ; compliance ; acquiescence.

It could be that the correct solution of this problem is to be found in the adoption of what might appear to be the suggestion in the passage from Lord Justice *Buckley's* work, that the Legislature intended that there should be eligible for registration as companies limited by shares those companies within the definition of joint stock company enacted in s. 175 of the Act of 1863, and re-enacted in s. 343 of *The Companies Acts* 1931 *to* 1942, whose articles of association could be said to conform with other statutory requirements. The articles of association of this partnership bring it within the definition of joint stock company in the Queensland Companies Acts referred to above, and no doubt were intended so to do. To this extent the partnership can be said to be in conformity with those Acts. But s. 342 (1) (ii) must, I think, be taken to contemplate statutory requirements, other than the definition provision, which must also be met to ensure the valid creation or continuance or operation or functioning of the particular companies to render them eligible for registration under the section. If the Legislature meant to include companies as to which no more could be said than that they were within the definition of joint stock company and that the provisions of the agreements bringing them into existence were lawful, I think that very different language would have been used : a few simple words would have sufficed. Moreover the discrimination displayed in singling out the Stannaries companies as eligible is a strong indication that the legislature had in view a narrower range of eligible companies and tends to negative the liberal view contended for by the respondents and taken by the Full Court. The effect of the reference to the Stannaries companies is the same whether they are viewed as words of restriction or as words of extension : in either case they suggest a limited range of eligible companies. It is not contested that the scope of the Queensland legislation is to be determined with regard to that of the parent English legislation, as indeed the Full Court indicated.

I may add that I can suggest no reason why purely consensual companies should be ineligible. My conclusion that they are

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ineligible is based solely on the meaning of the phrase "duly constituted by law" as I understand it. The broadest meaning that I can find for it is still too restricted to include this partnership. I would allow the appeal.

Appeal allowed with costs. Order of the Full Supreme Court set aside and judgment of Philp J. restored. Respondents to pay costs of the appeal to the Full Supreme Court.

Solicitor for the appellant, *James P. Morrison.*
Solicitors for the respondents, *McGregor, Given & Capner.*

B. J. J.