DIVISION OF POWER BETWEEN DIRECTORS AND GENERAL MEETING AS A MATTER OF LAW, AND AS A MATTER OF FACT AND POLICY

By K. A. AICKIN*

One must begin a topic of this generality by asking and answering the question: With what kind of companies are we concerned? One conspicuous feature of English company law, as developed both in England and in Australia, is its flexibility. The same basic legal structure has served in the past hundred years or so to deal both with all forms of private (*i.e.* proprietary) companies, even the 'one-man' company, and with very large financial and business structures employing enormous sums of capital contributed by many thousands of investors. It has served to deal both with the developmental or, if you will, speculative venture—and with the long established enterprise, the future of which is safe and predictable as long as the social and economic system into which it fits continues without violent interruption or change. The questions posed by the topic of this article cannot usefully be answered, or even examined, in general terms in relation to companies as such.

Nor can any useful conclusions be drawn from an examination of the basic structure of private or proprietary companies. Such companies will normally be either subsidiary companies, which raise problems quite distinct from those of companies with human shareholders, or will be independent companies designed, whether well or ill, to suit a particular family or group situation and the needs of a small number of people. In such a case the company structure will reflect the wishes of a founder or founders and the views of his or their legal or accounting advisers with respect to the particular business or financial objectives (including tax or tax planning) which the founder or founders may have had in mind. It is of course true that the solution of disputes relating to the internal management of such companies and the relationships between majority and minority groups may be assisted by general principles laid down in relation to companies in general terms or in relation to companies governed by the kind of system of government envisaged by the model Articles contained in Table 'A' of the Companies Act[1]. Occasionally one may obtain general guidance from a decision dealing with such a company. But in general the problems raised by such companies depend so much on the particular structure of the company that an examination of the relationship between the directors and shareholders of such

*LL.M. (Melb.), Q.C.

[1] Except where otherwise indicated references are to the Victorian Companies Act 1961, a version of the co-called Uniform Companies Act.

companies yields no useful general principles and will not serve to guide those who seek enlightenment as to the basic theories, if such there be, of the law.

Moreover, consideration of the latter part of the topic proposed for this paper requires that the kind of circumstances involved be defined with some particularity, because any view as to policy must depend on the circumstances with which one is dealing. Generally speaking a question of that kind cannot usefully be answered in generic terms, especially not in an article of this kind.

Accordingly, this discussion is concerned with the usual form of public company, the Articles of which are substantially in the form of Table 'A'. Under the Companies Act the relationship between, and the respective powers of, the company in general meeting and the directors are left almost entirely to the Articles of Association. Very few matters are by the Act itself required to be done by a general meeting. In an Act designed to provide a general means of incorporation for a wide range of different needs, this is both necessary and desirable. Reference is made below to one fairly recently introduced provision of the Act which made an important change in the powers of a general meeting.

The historical development of this matter, in common with many other aspects of company law, shows clear signs in its early stages of the influence of notions derived from the law of partnership. The view appears to have been entertained in the early stages of modern company law that the directors were agents of the members, in a sense agents of all the members and perhaps more particularly, agents of the majority of members. This view, of course, would produce the result that a majority of members at a general meeting (at all events when dealing with a matter properly on the agenda) had complete control over the actions of the directors in relation to the ordinary conduct of the company's business. This view (which was, however, not universally entertained even in the 1860's) seems to be derived from a combination of the position of one partner, who would be the agent of all partners, and of the long estabished rule that a majority of members should prevail in a corporation.[2] However, one should not overlook the fact that it was not uncommon for a partnership deed to contain provisions giving managing partners control of the conduct of the business, thus excluding the other partners from any part or say therein. The only course open to a dissatisfied partner in such a case would be to seek a winding up.

This general view may have led to the provisions which were inserted in the Companies Clauses Consolidation Act 1845 which established a standard set of rules (or as would now be said) 'Articles

[2] See Holdsworth, *History of English Law* Vol VIII p. 202; *Bacon's Abridgment*, 'Corporation' E.7; *Rex. v. Varlo* (1775) 1 Cowp. 248; *A-G. v. Davey* (1741) 2 Atk. 212.

of Association', for corporations established by private Act. Section 90 provided as follows:

> The directors shall have the management and superintendence of the affairs of the company and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the Special Act to be transacted by a general meeting of the company; but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the Special Act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting.

Although the point did not arise under the Companies Clauses Consolidation Act in any decided case until 1883, it is worth noting that one of the standard works on corporations[3] in the first half of the nineteenth century expressed the general rule in relation to statutory corporations in much these terms even prior to that Act. Much the same view was expressed, in relation to a company incorporated by private Act, by Wigram V. C. in *Foss v. Harbottle*[4] where he said: 'The result of these clauses is that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the Act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.'[5]

The material provision in the standard form of Articles of Association contained in Table 'A' to the Companies Act 1862 proved to be

[3] *Wordsworth on Joint Stock Companies* (6th ed 1851) pp. 114, 126.

[4] (1842) 2 Hare 461, 492-3.

[5] It is however with some surprise that one finds that the private Act in question provided that:

> 38. That the business affairs and concerns of the company shall, from time to time, and at all times hereafter, be under the control of five shareholders (to be appointed directors), who shall have the entire ordering, managing and conducting of the company, and of the capital, estates, revenue, effects and affairs, and other the concerns thereof, and who shall also regulate and determine the mode and terms of carrying on and conducting the business and affairs of the company, conformably to the provisions contained in this Act; and no proprietor, not being a director, shall, on any account or pretence whatsoever, in any way meddle or interfere in the managing, ordering or conducting the company, or the capital, estates, revenue, effects or other the business, affairs or concerns thereof, but shall fully and entirely commit, entrust and leave the same to be wholly ordered, managed and conducted by the directors for the time being, and the persons whom they shall appoint, save as hereinafter mentioned.

The only sections reproduced in the report dealing with the powers of a general meeting are concerned with election of the directors, sale of the undertaking, winding up and such matters. It is fair to say that the report does not set out all the sections enumerated in the judgment, but this famous statement reads somewhat oddly alongside the section quoted above.

significantly different, notwithstanding that at first glance the language bears some apparent resemblance to that in section 90 of the Companies Clauses Consolidation Act. Article 55 in Table 'A' in 1862 was as follows:

> The business of the company shall be managed by the directors who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these Articles required to be exercised by the company in general meeting, subject nevertheless to any regulations of the Articles, to the provisions of the foregoing Act and such regulations being not inconsistent with the aforesaid regulations, or provisions, as may be prescribed by the company in general meeting; but no such regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.[5a]

No express comment on this difference appears to have been made at the time, but it may be significant that *Wordsworth* in the edition published in 1865 did not repeat the observation made in the 1851 edition, but used much more general language.[6] Another contemporary writer[7] took a contrary view and expressed what is in effect the modern position by saying: 'The ordinary members of a Joint Stock Company have no voice in its management, but elect directors or managers, to whom they commit the entire control of their affairs.'

Apart from *Foss v. Harbottle*[8], the first case dealing with the relative positions of a general meeting and the directors was *Isle of Wight Railway Co. v. Tahourdin*[9] where the Court of Appeal dealt with some aspects of this problem in relation to a company established by private Act and governed by the Companies Clauses Consolidation Act 1845. The matter arose upon an appeal from an order granting an injunction which prevented the holding of a meeting.

The required number of shareholders had requisitioned a meeting, the objects of which were stated to be: (i) to appoint a committee to enquire into the working and management of the company and the means of reducing working expenses; to remove employees and appoint others and to require and authorize the directors to carry out the recommendations of the committee, and (ii) empowering it also to remove and appoint directors. The directors of the company issued a notice convening a meeting to consider only the appointment

[5a] In fact this Article is transcribed almost word for word from the Joint Stock Companies Act 1856, one of the Acts which were in substance 'consolidated' into the Companies Act 1862.

[6] *Wordsworth on Joint Stock Companies* (10th ed. 1865) which dealt with the Companies Act 1862 where the author at pp. 145 and 167 merely reproduces the words of Table 'A' without commenting on their meaning.

[7] *Thring on Joint Stock Companies* (1861) Vol. 1, p. 1, speaking of the position under the various Acts passed in the 1850's and consolidated in the 1862 Act.

[8] (1842) 2 Hare 461, the significance of which is referred to below.

[9] (1884) 25 Ch. D. 320.

of a committee, but not the remaining objects. The requisitionists thereupon themselves issued a notice of meeting, themselves specifying all the matters referred to, as they would have been entitled to do if there had been a valid requisition on which the directors had failed to act. The directors then brought an action in the name of the company to restrain the requisitionists from holding that meeting. It was held by Kay J. that all of the first object other than the appointment of the committee was illegal in that the terms of the notice of requisition proposed to transfer the powers of the directors to the committee; that the second object was defective because it did not specify which directors should be removed, and that the directors were justified in not acting on those parts of the requisition. Accordingly, he granted an injunction upon the ground that the directors had not failed to call a meeting in accordance with the requirements of the Act. It was held by the Court of Appeal that the directors were not justified in excluding from the business of the meeting matters other than the appointment of the committee, because all of the first object was capable of being carried out by a general meeting in a legal manner, (*i.e.* by resolutions calling for the committee's recommendations to be brought back to a general meeting to consider giving instructions thereon to the directors) and that the court would not restrain the holding of the meeting on the ground that the object, as expressed in the notice calling the meeting, was so expressed that resolutions to give effect to it might be *ultra vires*, and as to the second object on the ground that as all the directors knew they were under attack the object was definite enough. Accordingly, the injunction was discharged. Cotton L.J. observed[10] in the course of discussing various sections of the Companies Clauses Consolidation Act, that if a shareholder complains of the conduct of directors while they keep within their powers, then 'the Court says to him, "If you want to alter the management of the affairs of the company go to a general meeting, and if they agree with you they will pass a resolution obliging the directors to alter their course of proceeding"'. He also said 'The adjourned special meeting having undoubtedly a power to direct and control the board in the management of the affairs of the company, when they see what the committee recommend will say whether they will or will not require their board to carry those recommendations into effect.'[10a]

Lindley L.J. begins his judgment by reference to the decision in *Foss v. Harbottle* and says 'We must bear in mind the decisions in *Foss v. Harbottle* and the line of cases following it, in which this court has constantly and consistently refused to interfere on behalf of shareholders, until they have done the best they can to set right the

[10] (1884) 25 Ch. D. 320, 330-1.
[10a] *Ibid.* 331-332.

matters of which they complain, by calling general meetings.' Nothing was said, and no decision was given, as to whether any of the actual resolutions proposed would have been valid and effective if passed. *Tahourdin's* case in fact contained no discussion of section 45 and most of the argument appears to have been directed to the power to appoint and remove directors. As Cozens-Hardy L.J. later observed it contains only a *dictum* (*i.e.* that of Cotton L.J. cited above) on the point.

On the strength of *Tahourdin's Case* the view was apparently entertained that in relation to all companies, including those incorporated under the Companies Act 1862, the position was the same as that prevailing under the Companies Clauses Consolidation Act. Thus Buckley[11] writing in 1897 said that a company in general meeting had power to direct and control the board of directors in relation to the conduct of the company's affairs, a view which he no longer held when sitting in the Court of Appeal in 1908.[12]

In a series of cases in the first decade of this century, the matter came, though not without some difference of opinion, to be substantially settled. The first of these cases was *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame.*[13]

In this case, at a general meeting of the company an ordinary resolution was passed by a majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors, however, were of opinion that a sale on those terms was not for the benefit of the company and declined to carry the sale into effect. An action was brought by one of the shareholders on behalf of himself and all other shareholders, and also in the name of the company, for an order that the directors forthwith affix the seal of the company to the contract and carry it into effect. It was held that the directors could not be compelled to comply with the resolution. Warrington J. relied in part upon the fact that the directors could only be removed from office by a special resolution, and also upon Article 96 of the company's Articles which was in substantially the same terms as Article 73 of Table 'A' save that the 'regulations' referred to required an extraordinary resolution. He observed that on the true construction of the Articles, 'the management of the business and the control of the company are vested in the directors and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration, of course, requiring a special resoution'. In distinguishing *Tahourdin's*

11 *Companies Act* (6th ed. 1891) p. 492; (7th ed. 1897) p. 530.
12 *Gramophone and Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89.
13 [1906] 2 Ch. 34.

Case, he observed that it arose under the Companies Clauses Consolidation Act and also that the decision only dealt with the question whether the court would interfere with the holding of a meeting of the shareholders and that no decision was given as to what the result would be of a resolution requiring directors to carry on the business of the company in some particular way. This decision was affirmed in the Court of Appeal. Collins M.R. adverted to the fact that Article 96 was not in exactly the same form as Table 'A' in that the 'regulations' referred to in the final words were 'such regulations as may from time to time be made by extraordinary resolution'. He does not, however, appear to have based his decision upon this point; at all events this becomes clear in the later cases. He dealt with the argument that the relationship between the shareholders and the directors, was that of principal and agent, by saying that the analogy does not apply in these circumstances and stated that 'if the mandate of the directors is to be altered, it can only be under the machinery of the Memorandum and Articles themselves'. He regarded *Tahourdin's* case as having no direct bearing because it rested upon a statute 'differing in the most essential point, namely, in the limitation of the directors' authority'. Cozens-Hardy L.J. did not base his decision in any way upon the reference to an extraordinary resolution. He pointed out that in the case even of a partnership, a managing partner may be in a position where he is managing for himself as well as for others and is therefore not subject to the direction of the other partners. A mere majority cannot put an end to the express stipulations contained in the contract which the partners, or the members of the company, have made. ' . . . if you once get clear of the view that the directors are mere agents of the company, I cannot see anything in principle to justify the contention that the directors are bound to comply with the votes or the resolutions of a simple majority at an ordinary meeting of the shareholders.[14] He regarded the *dictum* in *Tahourdin's* case as depending entirely upon the provisions of section 90 of the Companies Clauses Consolidation Act which he treated as containing words governing the matter, which words were not to be found in the Companies Act 1862, nor in the Memorandum or Articles of the company in question.

The second case in this series was the decision of the Court of Appeal in *Gramophone and Typewriter Ltd. v. Stanley*.[15] The question which arose related to the application of the income tax legislation, but principles were enunciated in general terms, although the company in question was incorporated under German law. The appellant, an English company carrying on business in the United Kingdom, held all the shares in a German company registered with limited

[14] *Per* Cozens-Hardy L.J. *ibid* p. 45.
[15] [1908] 2 K.B. 89.

liability under German law. Under German law, the company was obliged to set aside out of its profits an amount representing in effect depreciation on patents, held by it, before it was entitled to divide its profits amongst its shareholders. The revenue sought to tax the English company upon the whole of the profits of the German company. The question arose only in respect of the amount required by German law to be set aside. Each member of the Court of Appeal dealt with the general relationship between the members of an incorporated company and its board of directors. Cozens-Hardy M.R. said[16]: 'The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his, as distinct from the corporation's'. Fletcher Moulton L.J. said[17]:

> The directors and employees of the corporation are not his [*i.e.* the individual corporator's] agents, and he has no power of giving directions to them which they must obey. It has been decided by this Court in the case of *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame*[18] that in an English company, by whose articles of association certain powers are placed in the hands of the directors, shareholders cannot interfere with the exercise of those powers by directors, even by a majority at a general meeting. Their course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself.

Buckley L.J. said[19]:

> Further it is urged that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This Court decided not long since, in *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame*[20], that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions,

16 *Ibid.* 95-96.
17 *Ibid.* 98.
18 [1906] 2 Ch. 34.
19 [1908] 2 K.B. 89, 105-106.
20 [1906] 2 Ch. 34, 45.

> which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas.

This case may be said to have been the first clear formulation of these principles, and it is important to note that it does not depend in any way upon the relevant Article requiring the 'regulations' to be made by extraordinary resolution. Indeed the propositions quoted above are inconsistent with the notion that an extraordinary resolution, as distinct from a special resolution altering the Articles, could enable the shareholders to give effective directions to the board of directors.

The matter, however, still did not appear to be finally accepted, because in the following year Neville J., notwithstanding the decision of the Court of Appeal, took a different view in *Marshall's Valve Gear Co. Ltd. v. Manning, Wardle & Co. Ltd.*[21] a case which, however, cannot be reconciled with the earlier authorities nor with the subsequent decision of the Court of Appeal and the House of Lords in *Salmon v. Quin & Axtens Ltd.*[22]. The judgment of Neville J. proceeds upon the unsatisfactory and indeed untenable distinction between matters which are the subject of express reference on the one hand and matters which are embraced in a general description such as that which gives to the board of directors the management of the affairs of the company. It has been suggested that the actual decision might perhaps be supported upon the ground that it was a case of fraud[23].

The matter was again considered by the Court of Appeal in *Salmon v. Quin & Axtens Ltd.*[24] where the Court of Appeal took the same view as it had previously done. In this case, the Articles of the company contained the standard clause relating to the powers of the directors, but also contained a provision that no resolution of the directors relating to the acquisition or letting of any premises should be valid unless twenty-four hours notice of the meeting should have been given to each of the managing directors, A and B, and that neither of them should have dissented in writing before or at the meeting. A and B also held the bulk of the ordinary shares of the company. Resolutions were passed by the directors for the acquisition of certain premises and for the letting of other premises, but B dissented from each of these resolutions. At an extraordinary general meeting of the company, resolutions to the same effect were passed by a simple majority of the shareholders. It was held, applying the

21 [1909] 1 Ch. 267.
22 [1909] 1 Ch. 311; [1909] A.C. 442.
23 *Buckley on The Companies Act* (12th ed.) p. 860. See also Hornsey, 13 *Modern Law Review* pp. 475-6 where a somewhat different basis for supporting the actual decision is suggested.
24 [1909] 1 Ch. 311.

principle of *Cuninghame's Case*[25], that the resolutions were inconsistent with the Articles and the company ought to be restrained from acting upon them. Farwell L.J. held that the resolutions of the general meeting were without effect. He held that they were absolutely inconsistent with the special Article dealing with the powers of the managing directors. He observed that he regarded the case as covered by the reasoning, if not by the decision, of *Cuninghame's Case* and *Gramophone and Typewriter Ltd. v. Stanley* and he quoted with approval the observation of Buckley L.J. in the *Gramophone and Typewriter Case*.[26] He said that 'Any other construction might, I think, be disastrous, because it might lead to an interference by a bare majority very inimical to the interests of the minority who had come into a company upon the footing that the business should be managed by the board of directors'.[27] He then goes on to comment on the passage appearing in *Buckley on the Companies Act*[28] which he says was based upon the decision in *Tahourdin's Case* and observes: 'I think it is overlooked in that passage that that was a decision on the Companies Clauses Act, and, as pointed out by the present Master of the Rolls in the *Automatic Case*, the section in the Companies Clauses Act provides that "the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose"'.[29] He concludes by saying that the express provision in that Act takes away any force or applicability of the decision in *Tahourdin's* case. Cozens-Hardy M.R. agreed without adding any separate reasons. It is also to be observed that Counsel for the plaintiff in this case criticized the observations of Neville J. in *Marshall's Valve Gear Co. Ltd. v. Manning, Wardle & Co.*[30] as being inconsistent with the principles adopted in *Cuninghame's Case* and in the *Gramophone and Typewriter Case*, even if the decision itself was to be distinguished on the ground that the directors in that case were acting for their own personal ends. That decision is not referred to in the judgments, but the Court of Appeal's decision itself must be regarded as involving acceptance of those criticisms.

In the House of Lords[31] the matter was disposed of very shortly without calling upon the respondent, but it may be noted that the argument for the appellant included the submission that *Marshall's Valve Gear Co. Ltd. v. Manning, Wardle & Co.* was precisely in point. Lord Loreburn delivered the only speech on the matter and observed that 'In regard to the second point I think it really too clear

25 [1906] 2 Ch. 34.
26 [1908] 2 K.B. 89.
27 [1909] 1 Ch. 311, 319-20.
28 (8th ed. 1906) p. 558.
29 [1909] 1 Ch. 311, 320.
30 [1909] 1 Ch. 267.
31 [1909] A.C. 442.

for argument that the business in question was business within the seventy-fifth Article'.[32] He then went on to say: 'The only question of substance to my mind is the third contention of Mr. Upjohn, when he said that the word "regulations" as employed in the seventy-fifth Article includes at all events, if it is not equivalent to, directions, whether general or particular, as to the transaction of the business of the company. Now it may be a question for argument, but for my own part I should require a great deal of argument to satisfy me that the word "regulations" in this Article does not mean the same thing as Articles, having regard to the language of the first of these Articles of Association.'[33] Article 1 read 'The regulations contained in Table "A" of the First Schedule to the Companies Act 1862 shall not apply to this company but the following shall be the regulations of the company'. He then goes on to say: 'But whether that is so or not, it seems to me that the regulations or resolutions which have been passed are of themselves inconsistent with the provisions of these Articles, and therefore this appeal fails . . .'[34]. *Marshall's Valve Gear Co. Ltd.'s Case* is not referred to but the submission based upon it was expressly rejected.

These two decisions of the Court of Appeal, approved by the House of Lords, may properly be regarded as settling the matter and this has been the course of English authority since 1909.[35] It is true that there are verbal difficulties about this view and that the final words do not add much, or anything, to what would be the case in the absence of these words. However, it is impossible to regard a resolution of a general meeting which takes away from the directors their powers of management, either in general or in some particular matter, or interferes with the manner in which those powers are to be exercised, as being other than inconsistent with the opening words of the Article and thereby outside the scope of a general meeting except by an alteration of the Article itself.

Before examining the subsequent English authorities it is necessary to refer to the New South Wales decision in *Dowse v. Marks*[36] in which Harvey J. distinguished the decisions of the Court of Appeal and the House of Lords. Although not strictly necessary for the purpose of the decision, Harvey J. dealt with the significance of the

[32] Article 75 was substantially identical with Article 55 of Table 'A' in the 1862 Act and not distinguishable from Article 73 of Table 'A' in the Uniform Companies Act.

[33] [1909] A.C. 442, 444.

[34] *Loc. cit.*

[35] *Thos. Logan Ltd. v. Davis* (1911) 104 L.T. 914 is in line with these decisions but the judgment of Warrington J. (whose judgments at first instance had been affirmed in *Cuninghame's* case and reversed in *Salmon v. Quin & Axtens Ltd. supra n.* 22) contains *obiter dicta* not reconcilable with the decision of the Court of Appeal or that of the House of Lords. His observations echo the rejected reasoning of Neville J. in *Marshall's Valve Gear Co.'s* case [1909] 1 Ch. 267.

[36] (1913) 13 S.R. (N.S.W.) 332. There appear to be no other Australian authorities directly in point, though Isaacs J. appears to have shared the view expressed by Buckley L.J. in *Gramophone and Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89; see *Melbourne Trust Corp. v. Commissioner* (1912-13) 15 C.L.R. 274, 305.

words in the relevant Article, namely 'subject to any regulations from time to time made by the company in general meeting' and held that all the powers 'delegated' to the directors by that Article were in fact subject to the directions of the company in general meeting as to the manner in which they should be exercised. He dealt with the matter upon the footing that an Article in the standard form constituted a 'delegation' from the company and indeed as a 'delegation' from the general meeting, to the directors of powers which were inherently those of the company itself. He distinguished the decisions of the House of Lords and the Court of Appeal upon the ground that the Articles of Association with which they had been dealing were described as 'regulations' in the opening words of the Articles, as they still are in Table 'A'. With great respect to the Judge this distinction is both artificial and unsatisfactory. It ignores the fact that the Companies Act itself is the source of the expression 'regulations'. It is section 29 of the Companies Act which requires that there shall be 'Articles signed by the subscribers to the Memorandum prescribing regulations for the company'. The fact that a set of Articles is headed 'Articles of Association' and does not use the word 'regulations' is a quite insufficient foundation for distinguishing such Articles from those given an established meaning by the earlier decisions. Moreover, the reasoning involves the fundamental misconception that the directors' powers are 'delegated' to them.

This is a convenient point to comment on the use of the word 'delegated' in this context. It has been, and is still, much used to describe the powers of the directors. In truth, however, it is not an accurate description of the situation and as an analogy it is unsafe and misleading. The powers of the directors are not delegated to or bestowed upon them by the company or its members in general meeting. The Articles do not 'delegate' *anything* to the directors. At the very moment a company comes into existence the power to control its activities, its structure, and its business, is divided between the company in general meeting and the directors in whatever manner the Companies Act and its Articles of Association may prescribe and if it has none of its own, Table 'A' will apply. In such a situation the concept of delegation has no place, notwithstanding that, subject to the Act, an appropriate majority of members in general meeting may change the structure and alter the division of power. To use the term 'delegation' in this context is to fall into the error of regarding the directors as mere agents; a basic error long since exposed. It should also be noted that the Companies Act requires that a company shall have directors and the 1961 Act now prescribes their duties in general terms.[37] The generality of those terms, however, does not disguise the fact that their duties are owed (as the courts have always held) to

37 Companies Act 1961 s. 124. See Wallace & Young, *Australian Company Law & Practice* p. 393.

the members in general, or to the "company as a whole", and not merely to the majority.

The matter arose in England again in 1935 in the case of *Shaw & Sons (Salford) Ltd. v. Shaw*.[38] The facts of this case are somewhat complicated, but for present purposes, it is enough to say that the directors, in fact the only directors entitled to vote in respect of this particular matter, resolved that instructions be given for the purpose of issuing writs against two of the other directors for the recovery of debts owing by them to the company. Subsequently, a resolution was passed by the shareholders at an ordinary general meeting directing the chairman of directors to discontinue the proceedings. A writ was nonetheless issued and by way of defence the defendants pleaded *inter alia* that the action had been brought without proper authority. This defence was rejected by the trial judge as was also a defence on the merits of the matter, *i.e.* as to whether there had been an account stated. In the Court of Appeal, the appeal was upheld upon the ground that there had not been an account stated, and the judgment was therefore set aside. On the first point, however, two members of the Court took the view that the relevant directors were given by the Articles the authority to handle this aspect of the company's business including the issue of proceedings and that their powers could not be interfered with by a resolution of a general meeting. Greer L.J. said:[39]

> A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by the directors, certain other powers may be reserved to its shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which a general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles or, if opportunity arises under the articles, by refusing to re-elect directors of whose actions they disapprove. They cannot themselves usurp the power which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders. The law on this subject is, I think, accurately stated in *Buckley on The Companies Acts* as the effect of the decisions there mentioned: See 11th Ed. p. 723. . . . As to the third ground of want of authority, that the shareholders instructed the directors to discontinue the action on April 30 1934: If the permanent directors had power under the articles to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles which they have not proposed to do. This would seem to be the effect of the decision of the House of Lords in *Quin & Axtens Ltd. v. Salmon*, though the decision of Neville J. in *Marshall's Valve Gear Co.'s* case is difficult to reconcile with that case. However, I do not think it necessary in the present circumstances to decide the point finally, but I incline to the view that article 95 in

38 [1935] 2 K.B. 113.

39 [1935] 2 K.B. 113, 134.

matters within the powers of the permanent directors would require alteration of the regulations by special resolution to prevent this action continuing; that is to say, that Lord Loreburn's dictum in *Quin & Axtens'* case is correct, that the words 'regulations' and 'articles' in the articles in that case, which were substantially similar to the present article 95, mean the same thing: See *Logan v. Davis*.

The remaining English decision dealing directly with this matter is *Scott v. Scott*[40] where Lord Clauson, sitting as a judge in the Chancery Division, held two resolutions of a general meeting ineffective to control the activities of the directors. The first was treated as being either an attempt to declare an interim dividend; a matter expressly given to the directors, or as an instruction to the directors to make loans; a matter within the general powers of the directors to manage the business of the company under the standard Article. The other resolution appointed accountants to 'investigate the affairs of the company'. This also he held to be contrary to the standard form Article, as interfering with the directors' management of the affairs of the company.

Another series of cases dealing with a somewhat different matter throw some light on this problem. It is established that ordinarily such expressions as 'control' and 'controlling interest', as used in taxing Acts, in relation to companies mean the holding of shares which carry a majority of votes at a general meeting of the company, at all events in cases where the Articles are of an 'orthodox' character. It is sufficient to refer to such cases as *I.R.C. v. Bibby*[41], *British American Tobacco Co. Ltd. v. I.R.C.*[42], *Barclays Bank Ltd. v. I.R.C.*[43] It is important to note that the reason given in the House of Lords for this view is not that the majority of shareholders can as such deal with the day to day business of he company or require the directors to carry on such business in a particular way by the making of 'regulations' or the like. In the *British American Tobacco Co. v. I.R.C.* Lord Simon said:[44] 'The owners of the majority of the voting power in the company are the persons who are in effective control of its affairs and fortunes. It is true that for some purposes a seventy-five *per cent* majority may be required, as, for instance (under some company regulations) for the removal of directors who oppose the wishes of the majority, but the bare majority can always refuse to re-elect, and so in the long run get rid of a recalcitrant board.' In that case decisions such as *Gramophone and Typewriter Ltd. v. Stanley* and *Quin & Axtens v. Salmon* were relied upon by the appellants as indicating that a bare majority does not have 'control' and that it would be necessary in order to have such control to be in a position to pass a special resolution. This argument was rejected and the reasoning of the House of Lords makes it clear that they did not reject the

[40] [1943] 1 All E.R. 582. [41] [1945] 1 All E.R. 667.
[42] [1943] A.C. 335. [43] [1961] A.C. 509. [44] [1943] A.C. 335, 340.

propositions established by those cases, but treated 'control' in the tax context as being that which would give ultimate control of the composition of the board of directors. These cases accordingly confirm the reasoning of the cases discussed above and the view that in a company of the kind now under discussion the members in general meeting cannot exercise control of the manner in which the directors exercise their powers or generally conduct the business. Such control can only be achieved by altering the composition of the board, which the general meeting is empowered to do. Under the present Companies Act a bare majority does have this kind of 'control' of the board of directors in the case of public companies by reason of section 120 (1) which provides that a public company may by ordinary resolution remove any director before the expiration of his period of office. That section strengthens the position of a general meeting *vis-a-vis* the board of directors.

There remains for consideration the relationship between the cases just reviewed and the doctrine underlying the rule in *Foss v. Harbottle*[45] as it is customarily expressed. Most formulations of that rule assume that a resolution of a general meeting may authorize the institution of legal proceedings in the name of the company against either directors or third parties. Thus Gower[46] says: 'However, it is well established that if the directors cannot or will not start proceedings in the company's name (and if they themselves are the defendants they obviously will not) the power to do so reverts to the general meeting.'

As is not uncommon in the development of English law, the two lines of authority have substantially developed independently of each other and with little cross reference. Gower[47] observes that the proposition just quoted is impossible to reconcile with cases such as *Gramophone and Typewriter Ltd. v. Stanley* and *Shaw & Sons (Salford) Ltd. v. Shaw* and Wedderburn[48] says of the observations in those cases, 'If they are correct one assumption, at least, underlying the *Foss v. Harbottle* cases had been smashed.'

This is not the place to attempt a re-examination or a delimitation of the rule in *Foss v. Harbottle*. It is too late to say that it has feet of clay and may be destroyed by a vigorous push at the appropriate moment. Its proper limits are, however, another matter. Both Wedderburn and Gower have recently subjected it to critical examination.

45 (1842) 2 Hare 461.

46 Gower, *Modern Company Law* (2nd ed.) p. 528.

47 *Ibid.* p. 127. As to this proposition, Gower comments that it is difficult to reconcile with the cases and suggests that 'though the general meeting cannot interfere with the directors deciding to take proceedings, it can, apparently, reverse a decision for directors not to take proceedings', but adds 'but *quaere* whether this latter rule is not limited to intra corporate disputes'.

48 Wedderburn, 'Shareholders Rights and The Rule in Foss v. Harbottle' (1957) *Cambridge Law Journal* 194; (1958) *Cambridge Law Journal* 93. The discussion referred to is in (1957) *Cambridge Law Journal* pp. 201-2.

However, it is certainly not possible to regard *Foss v. Harbottle* as an authority for the positive proposition that a majority of members may issue instructions to the directors as to the manner in which they are to conduct the business of the company. The rule in *Foss v. Harbottle* has never been so expressed. At most it is based on an assumption that in certain types of cases the majority of members may sue in the name of the company. Even the *dicta* do not suggest that they may require the directors to sue.

Wedderburn and Gower differ in their views as to the effect of the cases, here discussed, on the rule in *Foss v. Harbottle*. It is true that there are recent *dicta* reiterating the old notion that the majority at a company meeting is always in ultimate control of the use of the company's name in litigation, but the actual decisions in the cases are impossible to reconcile with such a view where the Articles are in the usual form. Wedderburn[49] suggests a possible reconciliation, *viz* that, although the majority of shareholders cannot stop the directors from launching an action in the company's name, on the other hand the directors could not stop that majority from bringing a corporate action, 'a conclusion which might be enough to save the rule in *Foss v. Harbottle* from utter destruction by this side wind.' Few would, I venture to think, grieve at the utter destruction of the rule itself. It is the possibility of the utter destruction of the 'exceptions' which would be a matter for concern.

The result of the cases discussed above is that, where the articles are in common form, the general meeting is excluded from participation in the ordinary business or trading affairs of the company and cannot issue instructions as to the manner in which its affairs are to be carried on, *e.g.* in the making of contracts, in the embarking on new business ventures, in the engagement of employees and the like.

The next branch of the subject set for this article which calls for some comment is the division of control 'as it is in fact'. Within the same terms of reference as indicated in the opening paragraph the only useful comment that can be made is that save in the most exceptional circumstances the directors, and not the general meeting, are in control of a company's business, though it may be observed that the larger the business the more responsibility and control must rest with management, and the greater the dependance of the directors upon the executive staff. It is fair to say also that on those matters which the Act or the Articles do reserve to the general meeting the recommendations of the directors are generally accepted.

Finally this topic calls for some observations on the division of power between directors and general meetings 'as a matter of policy'. It would, as a matter of practice, be impossible to conduct a company's business if questions as to the manner in which a company's business

49 (1957) *Cambridge Law Journal* p. 202.

was to be conducted had to be referred to a general meeting, and equally impossible to conduct the business if a general meeting could interfere by requiring the directors to perform particular executive acts, to engage in particular kinds of business or to enter into particular contracts. No reason of policy suggests itself for taking a different view as to the division of power. The allocation of power to the general meeting to appoint directors and to remove them irrespective of whether their term of office has expired or not, provides a practical and sensible division of power and it does not cease to be so by reason of fears that the directors themselves exercise a substantial influence upon what a general meeting may do, or may be in a position to exercise such an influence by reason of their being thought to have a 'practical control' of the proxy machinery. A related matter in which change does seem desirable is the obligation to furnish information to the shareholders either in general meeting or by periodic report. It is difficult to suggest in general terms a provision which would ensure that additional information would be supplied to shareholders, without imposing a burden on companies which would not necessarily serve any useful purpose but would merely add to the costs of administration. However, some procedure by which shareholders, either as individuals or at general meeting, could require the board of directors to provide information as to the company's business is worthy of consideration.

It is both necessary and desirable that the directors, and the directors alone, should have the power to make decisions with regard to the actual conduct of the company's business, but it is neither desirable nor proper that the directors should conceal from the shareholders the manner in which they exercise these powers.

I do not suggest that it is either usual or common for this to occur, but it is not unknown. It is not easy to define in abstract terms what are permissible or legitimate questions from shareholders about the detailed conduct of the company's business, but if some improvement in the law in this field is thought desirable, then this is a point at which it would be convenient to start. It is not of assistance in this context to say that if the general meeting disapproves of a refusal to provide information then it may always remove the directors. It ought not to be the position that only a majority of the shareholders may hope to get an answer to a question genuinely relating to the affairs of the company. That is something which an individual shareholder ought to be able to do by himself. On the other hand, some limits are no doubt essential, but it is not enough to have questions met by a statement that is not in the interests of the company that the answers should be revealed. There may perhaps be some matters of which that could properly and legitimately be said, but there does seem to be room for some improvement in this field.