

1872.

Dec. 2.

## [ORIGINAL JURISDICTION.]

*Crown Side.**In re* THE ALBERT MILLS COMPANY, LIMITED.

NASARVA'NJI ASPA'NDIA'RJI, MA'NIKJI

HORMASJI and GOKALDA'S MADANJI ...*Applicants.*SHIVJI MA'NIKBHA'I and four others.....*Respondents.**Mandamus—Company—Jurisdiction—Enforcement of Director's right by Mandamus—Casual Vacancy.*

The High Court has jurisdiction to enforce by *Mandamus* the right of persons duly elected Directors of a Joint-Stock Company to exercise the functions of Directors of such Company, if such rights are interfered with by the Company acting through its other Directors.

*Semble* that the Court will not refuse to interfere by *Mandamus* in such a case, merely because the office of a Director is not a permanent office, or because a Director can be removed from his office by a special resolution of the shareholders, but, in a proper case, will restore him to his legal position.

Meaning of the words "casual vacancy" considered.

ON the 12th of September, *Marriott*, in the above case, obtained from GREEN, J., a rule, calling upon The Albert Mills Company, Limited, and Shivjibháí Mánikbhái and four other directors of the Company to show cause why a writ of *mandamus* should not issue requiring them to permit each of the abovenamed applicants to exercise the office and functions of a Director of the said Company.

The Albert Mills Company, Limited, was a company registered under Act XIX. of 1857.

The facts of the case, so far as it is necessary to notice them for the purpose of this report, were these:—By the Articles of Association of the Albert Mills Company, the number of its Directors was limited to ten. Two of the directors retired annually by rotation, and their places were filled up by election at the general annual meetings of the shareholders of the Company that were usually held in the month of October or November in each year. The Board of Directors had power to fill up any "casual" vacancy that occurred upon the Board.

On the 3rd of October 1870, a meeting of shareholders was held, at which, by the election of four additional directors, the number of directors was raised from five to nine. Of these nine, two had vacated their seats at the Board before the next general meeting which was held on the 16th of November 1871, and their places had not then been filled up by the Board. At the last mentioned general meeting, two of the remaining seven directors retired by rotation and were re-elected, but nothing was said or done at that meeting, with reference to the two "casual" vacancies that then existed. On the 16th of December 1871, another casual vacancy occurred upon the Board, which was, however, on or about the same day, filled up by the Board appointing a new Director in place of the Director who had then retired. On the 1st of February 1872, Jehángir Hormasji, one of the seven directors then on the Board, died, but no steps were at that time taken to fill up the "casual" vacancy caused by his death.

1872.

*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIMIT-  
 ED, NASAR-  
 VANJI  
 ASPA'NDIA'R-  
 JI, MA'NIKJI  
 HORMASJI  
 & GOKALDA'S  
 MADANJI  
 v.  
 SHIVJI  
 MA'NIKBHAI.

On the 25th of July 1872, several shareholders of the Company sent in a requisition to the directors, requiring them to call an extraordinary general meeting of the shareholders of the Company for the following purposes:—I.—To increase the number of directors of the Company to ten or to such less number as the meeting might determine. II.—To fill up the offices so created by the election of qualified persons. This requisition was laid before the Board of Directors on the 12th of August, and in pursuance of it, a meeting of the shareholders was, by the order of the directors, advertised for the 4th of September following.

On the 2nd of September 1872, a majority of the directors passed a resolution, appointing Bhaváni Vishvanáth Devdat Dánu, and Bhagván Bhaván to act as directors, thus raising the number of directors to nine.

At the extraordinary general meeting held on the 4th of September, a majority of the shareholders elected the three applicants directors of the Company, treating the appointment made by the Board of Directors upon the 2nd of September 1872 as null and void. The present application

1872.  
*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIM-  
 ITED, NASAR-  
 VA'ANJI  
 ASPA'NDIA'R-  
 JI, MA'NIKJI  
 HORMASJI  
 & GOKALDA'S  
 MADANJI  
 v.  
 SHIVJI  
 MA'NIKBHA'I.

was in effect made for the purpose of establishing the validity of the election of the applicants, and the invalidity of the appointment made by the Board of Directors on the 2nd of September 1872. It was alleged that the majority of the Board of Directors was acting in direct opposition to the wishes of a large majority of the shareholders.

The rule came on for argument before GREEN, J., on the 18th of November 1872.

*Anstey* and *Latham* showed cause:—I.—The present is not a proper subject for a *mandamus*, as the Albert Mills Company is not a public Company, and the object for which the writ is sought by this application, is not to compel the performance of a public duty; in which case only will a *mandamus* issue against a private Company: *R. v. London Assurance Company* (a), *R. v. The Bank of England* (b), *Com. Dig. Tit. Mandamus B. Vin. Abr. Tit. Mandamus*, where *R. v. Cutlers Company* and *R. v. Gunmakers Company* (c) are cited. See also *Vaughan v. Gunmakers Company* (d), *R. v. Turkey Company* (e), *R. and Middleton v. Corporation of New River* (f). The cases of *Thames Haven Dock Co. v. Rose* (g); *Anonymous case* (h) and *Da Costa v. Russia Co.* (i), are relied upon by text writers as decisions to the contrary, but in the former, there is a mere *dictum*, and the cases in *Strange* are not of authority.

II.—Even if the court has jurisdiction to issue a *mandamus* in a case like the present, it will not, in its discretion, interfere in the management of the affairs of a private Company: *Mogley v. Alston* (j), *Reg. v. Alderson* (k), *Foss v. Harbottle* (l), *Atwood v. Merryweather* (m), *East Pant du United Lead Mining Company (Limited) v. Merryweather* (n), *Reg. v. Victoria Park. Co.* (o).

(a) 5 B. & Ald. 899. (b) 2 B. & Ald. 620.

(c) W. Kely 280. (d) 6 Mod. 82. † (e) 2 Burr. 943,999.

(f) *Siderfin*. 169; S. C. 1 *Levinz* 123.

(g) 4 M & G. 552. (h) 2 *Strange* 696.

(i) *Ibid* 783; S. C. *Fitzg.* 4.

(j) 1 *Phillipps* 790. (k) 1 Q. B. 878. (l) 2 *Hare* 461.

(m) 37 L. J. Ch. 35. (n) 2 H. & M. 254. (o) 1 Q. B. 288.

III. As the office is full, a writ of *quo warranto* is the proper remedy. At any rate the writ of *mandamus* ought to be directed to the persons *de facto* in possession: Com. Dig. Tit. Mandamus B.; *R. v. Mayor of Colchester (p), Ex parte Nash (q)*.

IV. The office of a director is a temporary one, from which he can be removed at the will of the shareholders; a *mandamus*, therefore, will not lie to compel him to be admitted to his office: Tapping on Mandamus p. 175; *Le Roy. v. Champion (r), Hill v. The Queen (s), Evans v. Heart of Oak Benefit Society (t)*; Com. Dig. Tit. Mandamus.

V. The Board of Directors had power to fill up the vacancies that existed on the Board on the 2nd of September 1872, as they were "casual" vacancies, and nothing occurred at the general meeting of the 16th of November 1871 to alter their character.

They also contended that the application was not a *bonâ fide* one.

*Marriott*, in support of the rule:—On the first point, there is no other remedy open to us, and in such a case a *mandamus* invariably issues: Tapping on Mandamus p. 18, *R. v. The Commissioners for inclosing lands in the Parish of Dean (u), R. v. Severn Railway Co. (v), R. v. Wilt's Canal Co. (w)*. The cases cited by Lindley on Partnership p. 889 and from *Strange*, are conclusive. See *R. v. Eastern Counties Railway Co. (x)*.

The cases cited on the second point have no application. We do not ask the court to interfere in the private concerns of the Company, but to have our legal rights preserved to us.

On the third point, he cited *R. v. Rector of Birmingham (y), R. v. Mayor of Cambridge (z), R. v. Borough of Bossiny (a)*, case of *Aberystwith (b)*. As to the *de facto* directors

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| (p) 2 Term Rep. 259.  | (q) 15 Q. B. 92.                                  |
| (r) Siderfin 14.      | (s) 8 Moore, P. C. C. 138. (t) 12 Jur. N. S. 163. |
| (u) 2 M. & S. 80.     | (v) 2 B. & Ald. 646.                              |
| (w) 3 Ad. & E. 477.   | (x) 10 Ad. & E. 565.                              |
| (y) 7 Ad. and E. 254. | (z) 4 Burr. 2008.                                 |
| (a) 2 Strange 1003.   | (b) Ibid 1157.                                    |

1872.

*In re*  
THE ALBERT  
MILLS COM-  
PANY, LIM-  
ITED, NASAR-  
VA'NJI  
ASPA'NDIA'R-  
JI, MA'NIKJI  
HORMASJI &  
GOKALDA'S  
MADANJI  
v.  
SHIVJI  
MA'NIKBHAI.

1872.

*In re*  
THE ALBERT  
MILLS COM-  
PANY, LIM-  
ITED, NASAR-  
VÁNJI  
ASPA'NDIA'R-  
JI, MÁ'NIKJI  
HORMASJI &  
GOKA'LDÁ'S  
MADANJI  
v.  
SHIVJI  
MA'NAKBHÁ'I.

not being served, he said he only asked for a rule for a *mandamus* and that they could come in on the return of the writ.

As to the fourth point. It is not sufficient that a person is removable at pleasure to prevent the court from interfering, the option must have been exercised: Tapping on *Mandamus* p. 175; *R. v. Slatford (c)*, *R. v. Mayor of Oxford (d)*. Directors are only removeable by special resolution.

As to the fifth point, he contended that the directors had only power to fill "casual vacancies," and that two of these filled up on the 2nd of September had ceased to be casual, by the intervention of a general meeting, and that consequently there were three vacancies which the shareholders filled by electing the applicants on the 4th of September.

The Honourable *C. J. Mayhew*, Acting Advocate General, appeared for the Directors.

*Cur. adv. vult.*

GREEN, J. :—In the above matter on the 12th day of September 1872 on motion made on behalf of Nasarvánji Aspandiárji, Mánikji Hormasji, and Gokaldás Madanji, a rule was granted calling upon the Albert Mills Company and on Shivji Mánikbhái, Allárákhá Shivji, Nasarvánji Ardesar Wadia, Trikamji Velji and Vallabhás Vandrávandás (whom I shall hereafter refer to as the respondent directors) to show cause why a writ of *mandamus* should not issue requiring them to permit each of the applicants, namely, Nasarvánji Aspandiárji, Mánikji Hormasji, and Gokaldás Madanji (whom I shall hereafter refer to as the applicants) to exercise the office and functions of a director of the said Company. Cause was shown against the rule being made absolute on the 18th, 19th, and 21st days of November last by Mr. Anstey and Mr. Latham on behalf of the Company, by Mr. Mayhew, Advocate General, on behalf of the respondent directors, and Mr. Marriott was heard in reply and in support of the rule. Mr. Farran stated

that he was instructed to watch the case on behalf of Jehángir Hormasji, another of the directors. A considerable mass of affidavits has been filed in the matter by the parties, a great part of the matter contained in which is, in my opinion, not very relevant to the questions which have to be determined by the court. As to much of that matter, however, I must admit, after a second perusal of the affidavits, that it is less irrelevant than at first sight it appeared to me to be.

The first objection raised on behalf of the Company and respondent directors, was, that the present case is not one in which courts in England would (apart from the provisions of the Common Law Procedure Act 1854) grant this remedy, and that the writ is granted only to enforce the right to exercise an office in some public corporation, or if directed to a private corporation, it is granted only where the purpose, for which the writ is sought, has a public character. There is no doubt that in earlier times there was an indisposition to grant this remedy in the case of corporations established for trading or private purposes, even though such corporations were public in the sense that they had been established by Royal Charter or special Act of Parliament. But there are many instances in recent times [some of which are cited in *Norris v. The Irish Land Co. (e)*] in which the courts have interfered by *mandamus* to enforce rights in corporations established for private trading purposes. I am unable to draw any distinction in this respect between trading corporations established by Royal Charter or special Act of Parliament and those established under the general powers of the statutes for the registration and incorporation of joint stock companies. Both classes of corporations are alike private as regards their nature and the purpose for which they are established, and alike public having regard to their derivation of a corporate character from Royal prerogative or legislative power. The cases collected in Mr. Lindleys' work on Partnership, 2nd edition, pp. 890-891, afford a number of instances

1872.

*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIM-  
 ITED NASAR-  
 VAN'JI,  
 ASPANDIA'R-  
 JI, MANIKJI  
 HORMASJI, &  
 GOKALDA'S  
 MADANJI  
 v.  
 SHIVJI  
 MA'NIKBHAI.

1872.

*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIM-  
 ITED, NASAR-  
 VA'NJI  
 ASPANDIA'R-  
 JI, MANIKJI  
 HORMASJI, &  
 GOKALDA'S  
 MADANJI  
 v.  
 SHIVJI  
 MA'NIKBHAI.

where the courts in England in recent times have interfered in the case of corporations established for trading purposes when the case is otherwise a proper one for their interference and when no other remedy is available; and I have been unable to trace any distinction drawn between trading corporations established by Royal Charter or special Act and those established under the general statutes relating to joint stock companies. In one case, that of *Steward v. Greaves (f)*, Parke, B., expresses an opinion that the Company in question in that case (which was a banking copartnership established under the general powers of 7 Geo. IV., c. 46, and not a corporation at all) would be compellable by law (I presume by *mandamus*, as I do not know what other means of legal compulsion there would be) to appoint a public officer, if none existed, in whose name the copartnership might be sued. So in *The Thames Haven Dock Co. v. Rose (g)* both Tindal, C.J., and Maule, J., expressed an opinion that when the number of directors of a Company incorporated by a private act has fallen below the number fixed by the Act for carrying on the business and concerns of the Company, a *mandamus* would be granted to compel the filling up of the vacant places. I am of opinion on this point that according to the present state of the law in England, and apart from the provisions of the Common Law Procedure Act 1854, the right of persons duly elected directors of a company incorporated under the Joint Stock Companies Acts to exercise the office and functions of directors would, if interfered with on the part of the company acting through the other directors or officers of the company, be enforceable by *mandamus*. I am at a loss to see by what other remedy the right of such persons could be enforced, unless a writ of *mandamus* were grantable; and the absence of any other remedy has been always regarded as a strong ground for the court to award such writ.

It was then contended that even assuming that the applicants had been duly elected directors of the Company, the

court ought not to compel effect to be given to such election by reason of the precarious nature of the office of director in a company constituted as the present Company is, and having regard in particular to the 76th article of association. On this point, the cases of *Evans. v. The Heart of Oak Benefit Society (h)*, and *Hill v. The Queen (i)*, were relied upon. In both cases, however, the applicant had been actually removed from the office in which he sought, by *mandamus*, to be re-instated, and the court being of opinion that the persons by whom such removal had been resolved upon had a discretionary power to effect such removal, the exercise of such discretion was not to be interfered with by *mandamus*. I doubt whether the law can be taken to be, that where the remedy by *mandamus* to enforce the right of a person to exercise an office is otherwise properly applicable, that the court ought to abstain from applying that remedy merely because a discretionary power of dismissal or removal resides somewhere and may possibly be exercised, unless the power has in fact been exercised, and the question is whether that exercise should be interfered with. On another branch of the case, however, this power conferred on a meeting of shareholders by article 76 to remove directors at pleasure has a material bearing in this respect, namely, that the majority of the shareholders have a sufficient and adequate remedy in their own hands against the alleged opposition of the respondent directors to admit the applicants to exercise the powers and functions of directors, and the fact that another remedy is provided, though it may not take away the jurisdiction to grant the writ, is a strong circumstance to influence the court to abstain from interfering in that way. I have, however, treated of these objections to the granting of the writ in this case less fully than would otherwise have been necessary, by reason of the conclusion I have arrived at on the vital question of the right of the applicants to claim the character of validly elected directors. If they have no such right their right to the writ falls to the ground at once, and I proceed to investigate this question without

1872.

*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIM-  
 ITED, NASAR-  
 VA'NJI  
 ASPANDIA'R-  
 JI, MANAKJI  
 HORMASJI, &  
 GOKALD'AS  
 MADANJI  
 v.  
 SHIVJI  
 MA'NIKBHA I.

1872.

*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIM-  
 ITED, NASAR-  
 VANJI  
 ASPANDIA'R-  
 JI, MANIKJI  
 HORMASJI, &  
 GOKALDA'S  
 MADANJI  
 v.  
 SHIVJI  
 MANIKBHAI.

saying more on the several points, interesting and otherwise important as they may be, which have been raised in argument.

[His Lordship then proceeded to state the facts of the case which, in his opinion, showed that it would be undesirable to grant a *mandamus* in the present instance and continued : ]  
 The whole matter, however, seems to me to resolve itself into this. Were there, on the 2nd September 1872, three casual vacancies in the board and were the directors on that day legally (*i.e.*, within the powers of their articles of association) justified in appointing Bhaváni Vishvanáth, Bhagván Bhaván, and Devdat Dháni to fill such vacancies ? If they were, then the general meeting of the 4th September 1872 had no power to appoint the three applicants as directors, there being already 9 duly appointed directors of the Company. As to the propriety of this resolution of the directors of the 2nd September 1872 in the face of a requisition for a general meeting of shareholders to appoint three new directors, and which meeting had been summoned for two days afterwards, it is for a general meeting of shareholders to pronounce; the only question now is was the resolution legally valid ? What then is a casual vacancy under article 72 ? The word "casual" in itself means something fortuitous, something not anticipated or predetermined. As used in article 72, it denotes a vacancy occurring otherwise than by reason of retirement on account of seniority of appointment (which is a vacancy anticipated and occurring necessarily in ordinary course) and includes vacancies occurring by reason of death or the occurrence of the casual events specified in Article 67. If this be so, then there is no doubt that at the time of the general meeting of November 1871 there were two casual vacancies in the board and two vacancies not casual, *i.e.*, occurring by reason of the retirement of the two directors, Allárahíá Shivji and Vallabhdás Vandrāvandás by rotation. The two non-casual vacancies were filled up by the reappointment of the two retiring directors. It seems not to be contested that before that meeting the board might have filled up the two casual vacancies arising by Surupchand Damarsi

and Tribhuvandás Jagjivandás having become disqualified. I cannot understand how the occurrence of that meeting can have taken from these two vacancies their casual character. It is argued that as the two casual vacancies existed and the shareholders were silent as to the filling of them, an intention not to fill them may be presumed. As to any expressed intention on their part not to fill them, it is not suggested that there is a vestige of evidence of it. Then subsequently to the general meeting of November 1871 there occurred an undoubted casual vacancy by the death in February 1872 of Hormasji Pestanji. I cannot see that any such inference as is suggested is necessarily to be drawn from the omission of the shareholders at the meeting of November 1871 to fill up the places of Surupchand Damarsi and Tribhuvandás Jagjivandás, which had become vacant during the preceding year; and I consider that it is quite as reasonable to infer from that silence that the shareholders did not desire to interfere with the power of the directors to fill up these vacancies (a power which it cannot be denied existed down to the time of the meeting) as to make the other inference which is contended for. For these reasons, I am of opinion that the appointment by the directors present on the 2nd September of Bhaváni Vishvanáth, Bhagván Bhaván and Devdat Dháni, to be directors was a valid one and that the appointment by the general meeting of shareholders on the 4th September of the applicants as directors was not a valid one. If this be so, the whole right and title of the applicants to have the writ granted falls to the ground, and I must, therefore, discharge the rule and with costs.

Attorneys for the applicants :—*Manisty and Fletcher.*

Attorneys for the respondents :—*Hearn, Cleveland and Peile.*

1872.

*In re*  
 THE ALBERT  
 MILLS COM-  
 PANY, LIM-  
 ITED NASAR-  
 VA'NJI  
 ASPANDIA'R-  
 JI, MANIKJI  
 HORMASJI  
 & GOKALDA'S  
 MADANJI  
 v.  
 SHIVJI  
 MA'NIKBHA'T.