1950
*May 2, 3
*Jun. 23

IN THE MATTER OF THE HOME ASSURANCE COMPANY OF CANADA (IN LIQUIDATION)

ALL PERSONS ON THE LIST OF CONTRIBUTORIES, REPRESENTED BY H. S. PATTERSON Sr. (DEFENDANTS) ..... } APPELLANTS;

AND

ALFRED GORDON BURTON, AS LIQUIDATOR OF HOME ASSURANCE COMPANY OF CANADA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Wound up under Dominion Winding Up Act—Contribution of shareholders—Whether liable to calls when shares issued in violation of Alberta Sale of Shares Act—Subsequent conduct as shareholders—The Alberta Sale of Shares Act, R.S.A. 1922, c. 169—The Winding Up Act, R.S.C. 1927, c. 213.

The Home Assurance Company of Canada having been wound up under the Dominion Winding Up Act on the ground of insolvency, the liquidator applied to have the appellants listed as contributories as being liable to call for the amount remaining unpaid on their shares. The appellants pleaded that they were not liable since the shares had been issued in violation of the provisions of the *Alberta Sale of Shares Act*. The call was allowed by the trial judge and was confirmed by the Appellate Division of the Supreme Court of Alberta.

Held: Following the principle laid down in *McAskill* v. *North Western Trust Co.* ([1926] S.C.R. 412), the appellants, even though the original contracts of sale of the shares were void due to the non-compliance with the *Alberta Sale of Shares Act*, must be held to be contributories as their subsequent conduct as shareholders has resulted in "independent binding agreements".

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), confirming the decision of Macdonald J. fixing the list of the contributories in the winding up of the Home Assurance Company of Canada.

H. S. Patterson K.C. and *Malcolm Millard K.C.* for the appellants.

W. A. McGillivray for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

(1) 30 C.B.R. 142.

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The judgment of the Chief Justice and of Kerwin and Taschereau JJ. was delivered by

TASCHEREAU J.—The Home Assurance Company was incorporated by private Act of the Legislature of the Province of Alberta in 1918, with an authorized capital of $500,000, divided into 5,000 shares, having a par value of $100 each. By the terms of its Charter, the company was empowered to make contracts for fire, storm, hail, accident, automobile, plateglass, burglary, theft, etc.

On the 2nd day of November, 1948, after nearly thirty years of operations, the company was ordered to be wound up under the *Dominion Winding Up Act*, by order of the Honourable Mr. Justice Hugh J. MacDonald, on the ground of insolvency, and the plaintiff-respondent Alfred Gordon Burton was appointed permanent liquidator. On the 8th of March, 1949, the latter filed a statement of claim praying that the shareholders of the company, who had paid originally only a small instalment plus the premium, on the purchase price of their shares, be listed as contributories, as being liable to call to the extent of $85 for each share held by such contributory. The claim was allowed by Mr. Justice MacDonald, and his judgment was unanimously confirmed by the Appellate Division of the Supreme Court of Alberta (1).

The relevant facts which give rise to the present litigation may be summarized as follows:

In 1922, four years after its incorporation, the company, pursuant to the provisions of *The Sale of Shares Act* (R.S.A. 1922, c. 169), applied to the Board of Public Utilities of the province, for leave to sell shares to the public, and on January 19, 1923, was authorized to sell 500 shares. Further permissions were also granted on June 29, 1923, and on February 14, 1924, for 1,000 shares each time, making a grand total of 2,500 shares. The Board also fixed the premium on these shares at $10, and prescribed a form of contract covering their sale.

The defendants-appellants' submissions are manifold in view of the fact that although all the alleged shareholders are represented by Mr. H. S. Patterson, they have separate grounds of defence. Some claim that they cannot be compelled to pay the balance of 85 owing on each share,

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because the shares in question were issued contrary to the provisions of *The Sale of Shares Act,* in that shares to the number of 5,000 were issued by the company when the number authorized by the Board was only 2,500. It is also contended by others that sales were made by non-registered agents, that in other cases licensed agents failed to produce to the purchasers their licences or did not deliver copies of contracts, that numerous sales were made at premiums other than those allowed by the Board, and, at times when the company did not have any certificate from the Board, and finally, that fraudulent representations were made to several prospective investors.

It was found quite impossible to deal with each case individually, and therefore, counsel for both parties have signed the following agreement:

1. That so far as the existence of Certificates of the Board, the existence of Agents' Licenses and the forms of the Applications for Shares are concerned, and as to whether sales were made in excess of the Certificates issued or by unlicensed salesmen or at premiums other than those permitted by the said Certificates, we are satisfied that all the evidence available is before the Court and the matter should be disposed of on that basis. We may say that should either side discover additional evidence not available at the time of the trial of the issues, the other will not oppose an application to present it in the interests of having before the Court the true facts.

2. That so far as the defences that copies of contracts were not delivered and that agents did not exhibit their licences to the prospective purchasers at the time of sale, and the question of fraud, the individual contributories may bring additional evidence applicable to particular cases if these defences are found to be valid.

In their statement of defence, the defendants allege that the contracts of sale of these shares are *void,* and created no liability on their part. The defence of absolute nullity however does not cover the cases where false representations may be proven.

In support of this proposition, the defendants rely on the case of *McAskill* v. *North Western Trust Co.* (1), where it was held that if a company to which *The Manitoba Sale of Shares Act* applies, sells its shares without having complied with the provisions of the *Act,* the sale and all steps taken to carry it out, such as an allotment of shares, are *void* and not merely *voidable.*

In the case at bar, it is not contested that serious breaches of the Alberta *Sale of Shares Act* occurred, as for

(1) [1926] S.C.R. 412.

instance the sale of a larger number of shares than the number authorized, sales at a premium higher than $10, and it is not disputed that many agents were not registered, that some others did not produce their licences to purchasers and did not deliver them copies of the contracts as required by the *Act*.

I have no hesitation in deciding that all these violations of the law bring these sales within the sweep of the *McAskill* case, and make them not merely *voidable but void*. Where the transaction is a nullity, as it is here, the alleged shareholder need not ask for the recision of the contract, as the case would be between him and the company, if fraud or misrepresentation were established. Here, as Sir Lyman Duff said in the McAskill case: "The agreement though concluded in fact, is in point of law, a nullity." The case therefore cannot be governed by such decisions as *Oakes* v. *Turquand* (1), where the contract was merely voidable. In such a case, when there has been misrepresentation, a distinction must be drawn between the rights of the shareholders towards the company and his rights towards the liquidator. As Sir Lyman Duff said in the *McAskill* case, at page 419:—

> The case would, of course, be very different if the appellant were the holder of shares allotted to him pursuant to a contract capable of being rescinded on some proper legal ground, such as fraud, but valid and binding until so rescinded. Such a right may be lost by reason of some change in the circumstances making it unjust to permit the exercise of that right, and accordingly it has been held, and has long been settled law, that a registered shareholder, having a right to rescind his contract to take shares on the ground of misrepresentations contained in the company's prospectus, will lose that right if he fails to exercise it before the commencement of winding-up proceedings. The basis of this is that the winding-up order creates an entirely new situation, by altering the relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*.

But the authority of the *McAskill* case has also been relied upon by the liquidator. All these contributories whom the liquidator seeks to put on the list, have accepted and kept their certificates, paid the first instalment on each share and a further call in 1945, and from 1932 to 1947 inclusive, have received and cashed 16 dividends amounting to approximately $14 per share. There can be little doubt that they have acted as shareholders, and it is also fair to assume that the vast majority of them have sent

(1) (1867) L.R. 2 H.L. 325.

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proxies or have attended personally annual and special meetings of the company. It is contended that in view of these circumstances they have by their conduct, acquired the status of shareholders with all the liabilities imposed upon them by the law.

Although it was held in the *McAskill* case that all sales made in violation of *The Sale of Shares Act* were *void,* there are in the reasons given some qualifications that mitigate the rigour of the main principle that was laid down. The Court held that the sale was void and that the alleged shareholder could not be listed as a contributory, but it clearly envisaged the possibility that under different circumstances, even in a case of absolute nullity, an entirely different result might obtain.

Speaking for himself and for Mr. Justice Newcombe, Sir Lyman Duff said at page 420:—

> There are no facts in the stated case to support a conclusion that there was a *valid contract by conduct* between the Company and the appellant not falling within the prohibiton of "The Sale of Shares Act."

And further at page 422, discussing the judgment of Lord MacNaghten in *Welton* v. *Saffery* (1), he added:—

> I am quite unable to entertain a doubt, however, that the shares had been dealt with, or that the shareholders had acted with respect to the shares in such a way as to create an *agreement by conduct* to accept them, an agreement not affected by the condition that the shares should be treated as fully paid up.

Mr. Justice Mignault, with whom Chief Justice Anglin concurred, is not less emphatic. He says at page 431:—

> The application for shares by the appellant and the allotment of these shares to him are consequently void, and there is no contract between him and the Company. No dealings of the appellant with the stock are alleged, and there is nothing from which an *independent agreement to keep* the stock and pay for it can be implied.

In *Re Railway Time Tables Publishing Company; Ex Parte Sandys* (2), an independent contract to keep the shares and pay for them was implied, although it was held that the original contract to purchase shares at a discount was void. But the purchaser had dealt with the stock, had sold or attempted to sell a part of it, and had signed proxies as a shareholder for voting purposes, and it was therefore held that this implied *independent contract* was binding.

(1) [1897] A.C. 200. (2) 42 Ch. D. 96.

In *Acme Products Limited* (1), the Court of Appeal for Manitoba decided:—

An applicant for shares in a company who accepted the shares allotted him, paid for them in part, allowed his name to appear on the list of shareholders, attended both in person and by proxy shareholders' meetings and accepted a dividend held to be precluded from contending for the first time after a winding-up order had been made that the directors who made the allotment were only *de facto* not *de jure* directors, and from disputing his status as a shareholder.

At page 587, in the same case, Mr. Justice Dennistoun speaking for the Court said:—

In my opinion his conduct has the effect of precluding him from disputing his status as a shareholder, and he cannot at this stage overcome the onus which is upon him by simply stating, "I did not know until after the winding-up order was made that the directors in 1928 were not properly qualified."

I have reached the conclusion that although the original contracts were void in view of the *McAskill* case which is a binding authority, the shareholders, appellants in the present case, must be held to be contributories. By their acts, posterior to the impugned agreements, they have agreed to become shareholders, and from their conduct *independent binding agreements* have resulted. They have agreed to keep the stock, they now must pay for it. It would indeed be strange that persons, who during over fifteen years have claimed all the benefits of these shares, could now be allowed to repudiate one of the liabilities imposed by law upon the shareholders, which is to pay the purchase price.

I agree with the conclusions reached by the courts below, and I would therefore dismiss the appeal, with costs of the appellants and respondent to be paid by the liquidator, out of the assets of the company, reserving however to each party the right to bring additional evidence applicable to particular cases, in accordance with their agreement.

RAND J.:—In this appeal, the question of the effect of the issue of shares in violation of the provisions of the *Sale of Shares Act*, c. 169, R.S.A., 1922 on the liability of contributories is raised.

Over five thousand shares in all were issued, of which more than half were sold to persons in Alberta, over two thousand to persons in British Columbia and a small

(1) [1932] 2 W.W.R. 586.

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number in Manitoba and in Saskatchewan; and the sales were all made between 1922 and 1928. It may be taken that those sold outside of Alberta were not authorized by certificates issued under the *Act*. Between 1932 and 1947 the company paid 16 dividends totalling $14 a share, and in 1945 made a call for $2.50 a share. All but 100 or so of the shares had, in the course of the years, been transferred. On November 2, 1948 an order was made to wind the company up under the *Winding-Up Act*. The company was heavily involved, and the liquidator applied for leave to call up the amount remaining unpaid of $85 on each share issued. The courts below have held against the defences raised, and I think they were right.

Mr. Patterson puts his case on the principle laid down by this Court in *McAskill* v. *The Northwestern Trust Company* (1), that the prohibition of sale by such a statute renders the *de facto* transaction void in law. In that case, the shareholder had remained on the registry for something less than 1½ years, but had taken no step of any kind as a shareholder. The purported sale being a nullity, and nothing having occurred to change that state of things, an order removing his name was directed.

The difficulty arises from the fact that legislation of this sort looks only to the relation between the prospective shareholder and the company, and if they were the only parties at any time concerned, it would be easily resolved. But as it is well exemplified here, other interests arise; the legislation has condemned only the transaction carried out in the specified circumstances and the question is whether a new and unprohibited transaction or situation has arisen, to be evaluated in the light of those considerations in the setting of which the statute has, in fact, been enacted.

Although the immediate transaction is voided, the beneficiaries of that protection have in fact enabled the company in this case to commence business and to involve itself in heavy obligations to members of the public; what, then, is the true ground upon which they can be said to have precluded themselves from insisting on the original nullity?

Disregarding the question whether a certificate authorizing the sale of shares in Alberta applies to sale to residents

(1) [1926] S.C.R. 412.

of British Columbia by allotment in Alberta, and whether the failure to furnish a copy of the contract, the effect of which is that the contract "shall not be binding upon" the purchaser, is to be taken to be voidable rather than void, it is clear that by accepting dividends, by paying a call and by transferring shares, the holder at such time acknowledged himself to be a shareholder. It may be that he was acting in ignorance of the matters giving rise to the nullity; but although such statutes are enacted for his protection, they assume that he will be reasonably vigilant in his own concern; and if he either fails to do that or by an act irrevocably affirms his membership in the company, then the protection disappears. There is nothing to prevent the individual by an overt act from agreeing, in effect, absolutely, at any time, that his name is properly on the register and thereafter he will be bound to the consequences flowing from that fact. By purporting to transfer shares in a lawful manner, he makes such an irrevocable election; by accepting dividends and paying calls after the expiration of any reasonable time for enquiry into the circumstances of the company or of the sale to him of the shares, he makes the same election; and other situations are possible in which the lapse of time and the rise of new interests will supersede the purpose of the statute.

For these reasons, I would dismiss the appeal with costs.

ESTEY J.:—The shareholders of the Home Insurance Company of Canada in liquidation contend that their names ought not to be included in the list of contributories on the basis that the shares were originally sold by the company in contravention of the *Sale of Shares Act* (1922 R.S.A., c. 16 enacted 1916 St. Alta. c. 8). The company was incorporated by private Act of the Legislature of Alberta in 1918 (St. of Alta., 1918, c. 58). The shares were sold in the years 1922 to 1928, inclusive.

The shareholders do not deny either the purchase of their respective shares, the allotment and their acceptance thereof, the presence of their names on the share register or that they received sixteen dividends between the years 1932 and 1947 and paid a call in 1945.

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They assert that the contract is void because of non-compliance with the *Sale of Shares Act*, in that the certificates issued by the Public Utility Commissioners did not cover all of the shares sold; all of the shares were not sold by licenced agents; the agents did not produce their licences at the time of the sale; the contracts of the purchase did not specify the unpaid balance and no copy of the contract was delivered to the shareholders at the time of the purchase.

The evidence upon which the shareholders ask that it be found that the *Sale of Shares Act* was not complied with in respect of the granting of the certificates and agents' licences may be summarized as follows: A search of the company's records discloses that the share records, original minutes, financial statements, cancelled share certificates and stubs of certificates are all the records now available. The company has no record of any correspondence with the Board of Public Utility Commissioners, of the certificates or agents' licences issued by that Board.

The file produced from the office of the Board of Public Utility Commissioners discloses that on December 11, 1922, the company filed a statement showing that the directors had purchased 500 shares of the capital stock and asking permission to offer for sale to the public a further 500 shares. This permission was granted January 19, 1923. In June, 1923, the company was permitted to offer a further 1,000 shares and in February, 1924, a similar permission in respect of a further 1,000 shares. The records, therefore, disclose that the company was permitted to sell to the public 2,500 shares and that its own directors had purchased 500 shares, a total of 3,000 of the 5,039 shares sold. The file also discloses that in 1923 and 1924 seven agents were authorized to sell the shares of this company by the Public Utility Commissioners.

It is significant that this company began selling shares to the public in 1922 and that the foregoing file covers the latter part of 1922 and the years 1923 and 1924. The last certificate issued for the sale of shares in February, 1924, would not expire until February, 1925. Shares continued to be sold in the years 1925 and 1926, but only 35 in 1927 and 1928. It will, therefore, appear that well over

one-half of the total of 5,039 shares purchased were sold either to the directors or the public after the required certificates were obtained from the Public Utility Commissioners granting permission to this company to sell its shares. It is not at all suggested that the file produced from the records of the Public Utility Commissioners contains all of the correspondence between that body and the company nor certificates and agents' licences issued. It was produced by the assistant auditor of the Board who had no personal knowledge of this matter, as he had been with the Board only since June 1, 1946. No person purported to say that the file contained a complete record of all that had passed between the Board and the company. This file, admitted in evidence without objection, warrants the conclusion that the company in 1922, 1923 and 1924, at least so far as the obtaining of certificates and agents' licences was concerned, were complying with the provisions of the *Sale of Shares Act*. As regards the years 1925, 1926, 1927 and 1928, this evidence goes no further than saying that the records are not now available. In view of the foregoing, it cannot be doubted that there were records at one time in the possession of the company, but it is not in any way suggested that there has been any improper conduct associated with the fact that they are not now available. In the result, there is no evidence that the *Sale of Shares Act* was not complied with in the obtaining of the necessary certificates granting permission to sell shares to the public or agents' licences. The appellants have not, therefore, upon these bases established that the contracts under which the shares were purchased were void transactions.

As stated by Baron Parke in *Shaw* v. *Beck* (1), ". . . every transaction in the first instance is assumed to be valid and the proof of fraud lies upon the person by whom it is imputed." This case is distinguishable from those where a contract upon its face disclosed that the purchaser had not become a shareholder as in *Standard Fire Insurance Co.* (2).

Then, as to the other defences, the position is somewhat different. While the shareholders may well maintain that they did not know until after the winding-up proceedings

(1) (1853) 8 Exch. R. 392 at 399 (2) (1885) 12 O.A.R. 486.

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what the company did as regards obtaining of certificates and agents' licences, they did know from the outset that at the time of the sale the agents did not produce their licences; that they did not receive a copy of the contract under which they purchased the shares, and, as far as they were concerned, it did not specify the unpaid balance, all of which was required by the *Sale of Shares Act.*

These shareholders, with knowledge of the foregoing facts, as well as the fact that the shares had been allotted, the share certificates received by them and their names on the share register, conducted themselves as shareholders and were accepted as such by the company. Some of them transferred their shares. They or their successors accepted some sixteen dividends over a period of fifteen years from 1932 to 1947, and paid a call in 1945. At least some of these shareholders, it must be assumed, attended and took part in the shareholders' meetings. It is on the basis of this conduct that the liquidator, at the hearing of this appeal, submitted that, notwithstanding that the original contract was void, the shareholders in the company had so conducted themselves that a new contract, independent of any illegality, should be implied covering the purchase of the shares.

The non-disclosure by agent of their licences and failure to give to the purchaser of shares a copy of his contract constitute breaches of the *Sale of Shares Act* that would make these contracts void and in law a nullity. *McAskill* v. *The Northwestern Trust Co.* (1). Moreover, conduct pursuant to such a transaction cannot accomplish anything in law and is likewise a nullity. This was the position in *re London and Northern Ins. Corp.* (2), where it was stated:—

> . . . all those acts were, however, done in conformity with, and in pursuance of, this void transaction; and there was no evidence of any separate agreement on the part of Colonel Stace and Mr. Worth.

In *Bank of Hindustan* v. *Alison* (3), the company failed in its action to enforce a call. Kelly C.B., with whom all of the learned judges concurred, stated, at p. 225:

> But, when we come to look at what the transaction really was between the parties as to the granting and acceptance of these shares, it is clear beyond a doubt that all that was done was done in pursuance

(1) [1926] S.C.R. 412.
(2) (1869) L.R. 4 Ch. 682.
(3) (1871) L.R. 6 C.P. 222.

and upon the faith of the agreement of amalgamation, and, therefore, when it turned out that that agreement was void, it follows that all that was done under it became void also, and conferred no right or obligation on either party. If the defendant had received certificates for shares, or even if he had received dividends, he would have been bound to return them.

Though not a proceeding to enforce a call in liquidation proceedings, the foregoing is relevant as when the transaction is void it can neither be enforced by the company nor liquidator. Buckley on The Companies Act, 12th Ed. p. 281.

These cases, however, contemplate the possibility of a valid contract subsequent to a void transaction, when the parties in possession of the facts conduct themselves as and are accepted by the company as shareholders. *Welton* v. *Saffrey* (1), is an illustration of such a contract. There, notwithstanding the original contract for the purchase of the shares was void, the Court found a valid contract independent of the illegality existed. The shareholder with knowledge of his position and in spite of opportunities to alter his position for one and a half years prior to the winding up, the company continued to accept him and he to conduct himself as if he was a shareholder. The precise conduct is not disclosed in any of the reports of this case. Duff J. (later Chief Justice) after commenting upon this fact, continued as follows:

> I am quite unable to entertain a doubt, however, that the shares had been dealt with, or that the shareholders had acted with respect to the shares in such a way as to create an agreement by conduct to accept them, an agreement not affected by the condition that the shares should be treated as fully paid up." *McAskill* v. *The Northwestern Trust Company supra,* at p. 422.

In *re Railway Time Tables Publishing Company* (2), there were no winding-up proceedings, but a shareholder asked the register be rectified by the removal of her name therefrom. There the original purchase was void, but her subsequent conduction with knowledge of her position justified the conclusion that a new contract existed between the company and herself. See also *In Re Barangah Oil Refining Company* (3); *Re Atlas Loan Co. -ex parte Contributories* (4); *Re Pakenham Pork Packing Co.* (5).

(1) [1897] A.C. 299; L.J. 66 Ch. 362.
(2) (1888) 42 Ch. D. 98.
(3) (1887) 36 Ch. D. 702.
(4) (1910) 30 C.L.T. 368.
(5) (1906) 12 O.L.R. 100.

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The appellant shareholders, because of the enumerated breaches of the *Sale of Shares Act*, upon which their other defences were supported, might have succeeded if only the original contract should be considered. These shareholders, however, with knowledge of the facts upon which they now contend their contracts were void, have conducted themselves as shareholders. Either the original shareholders, or their successors, have assumed the obligations and accepted the benefits. They do not suggest they did not know of the *Sale of Shares Act* or its provisions. Even if they had, their lack of knowledge of this statute, enacted for their benefit prior to and in force in the province of Alberta throughout the twenty-six years this company existed, would not be of assistance in their present contention. In this regard their positions are quite distinguishable from the position of the shareholders in the above mentioned case where both parties proceeded for a time under a misapprehension, as disclosed by a subsequent determination, of what might well be included under the heading of doubtful points of law.

The circumstances are such that a new contract, independent of the original void transaction, exists, based upon the conduct of these shareholders and the company. It follows that the shareholders have been properly included in the list of contributories.

The appeal should be dismissed with costs of the parties hereto payable out of the assets of the company.

Appeal dismissed with costs.

Solicitors for the appellants: *Patterson, Hobbs* and *Patterson.*

Solicitors for the respondent: *Fenerty, Fenerty, McGillivray* and *Robertson.*