1918
*Oct. 16, 17.
1919
*Feb. 4.

ALBERTA ROLLING MILLS COMPANY (DEFENDANT) ..... } APPELLANT;

AND

WILLIAM J. CHRISTIE (PLAINTIFF) . RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

*Company — Contract — Rescission — Shareholder — Subscription — Condition precedent or subsequent—Collateral agreement—Surrender of shares—Ultra vires of company.*

C.'s action is for the rescission of an agreement to take shares of the capital stock of the appellant company and for the return of the purchase price on the ground of non-fulfilment of a term of his subscription. The sale of the shares was authorized by the directors, but no formal allotment was made to C.; no notice of allotment was given to him, but notices of meetings were sent. His name was not entered in the register of shareholders but appeared in a ledger account. Four months after full payment of shares, certificates were issued and sent to C. during his absence, which were retained by him for two years. C. never attended any meeting of the company, but filled and sent proxies to the president and promoter of the company who had obtained his subscription.

*Held*, Idington J. dissenting, that, under these circumstances, C. must be regarded as having become a *de facto* shareholder.

*Held* also, that, even if the term alleged by C. had been precedent to his subscription, he would have waived it by becoming, and exercising rights of, a shareholder; but, upon the evidence, it was a condition subsequent or a collateral agreement and its fulfilment was *ultra vires* of the appellant company as involving an unlawful reduction of its capital.

Judgment of the Appellate Division, 12 Alta. L.R. 445, 38 D.L.R. 488, reversed, Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Simmons J. (2), and maintaining the plaintiff's action.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 12 Alta. L.R. 445; 38 D.L.R. 488; [1918] 1 W.W.R. 98.

(2) [1917] 1 W.W.R. 1431.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

*R. McKay K.C.* for the appellant.
*A. H. Clarke K.C.* for the respondent.

THE CHIEF JUSTICE.—This is what is generally known as and called a very hard case and I regret greatly feeling myself compelled to reverse the judgment of the appellate court and to refuse to the respondent Christie the relief he has sought in the action.

I have given the case much consideration. The reasons for judgment of my brother Anglin and the authorities cited by him seem to me conclusive, and as I cannot usefully add anything to what he has said I will concur with him and allow the appeal with costs and restore the judgment of the trial judge.

IDINGTON J. (dissenting).—The respondent declined to sign the ordinary application for shares in appellant company. He never was in due form allotted such shares. Nor was he ever placed upon the register as a shareholder which, by so many provisions in the Companies Ordinance, ch. 20 of 1901, is made the test of what constitutes membership in any company incorporated thereunder as appellant was; for example, by secs. 25, 27, 34, 37, 40 and 42.

It is incorrectly stated, as I read the exhibits referred to, in support of the statement, that respondent's name appears on the register.

The ledger account, kept apparently with numbers, does not appear to me to constitute part of the register. It contains what one might expect to find in relation to a conditional subscription of the character respond-

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ent's contention might require. It was not exactly an ideal ledger for that purpose, but where we meet so many irregularities as prominently appear on the part of the appellant, a trifling matter of that kind is not very surprising.

Let us assume for a moment that upon such a register and record of the transactions here in question, there had arisen a contest as to the respondent's right to vote, could his doing so have been properly entertained for a moment?

And let us go further and assume that upon its having been challenged, respondent had applied, under sec. 40 of the ordinance, to the court or judge designated therein to have his name entered on the register, with nothing more in support thereof than all the material placed before us herein, and such application stoutly opposed, could such court or judge properly order rectification and, against the will of the shareholders, properly on the register, direct respondent's name to be entered thereon? I think not.

Much has been made of the issue by the president and secretary of certificates of shares to respondent, and of his signing, when asked, proxies to Pollock, the president, to vote.

Nothing is shewn of what (if any) use was made of such proxies beyond requesting and reporting them. I wholly disapprove of respondent's conduct in that regard and hope it can be attributed to nothing more than carelessness.

But testing the weight of such a series of acts, by the test I have suggested, as to the strength thereof, in supporting the supposed application on his part to be put upon the register, could he gain any support therefrom on such an application by the mere existence of such proxies and such report as made thereof?

I cannot think so unless much more were shewn to have been done.

It is, I repeat, the question of membership which I am keeping in view.

Moreover, the conditional nature of his subscription clearly pointed to its being, when accepted, in the informal way it was, a contract that could neither constitute him a member, nor be entered into in such a sense as to have that effect unless and until the condition had been fulfilled.

It was quite competent for the parties to have so contracted as respondent swears he thought the contract was, for him to pay ten thousand dollars to be used until the steel-making branch, among the objects for which the appellant was incorporated, had become practicable, and then be applied in payment of shares.

In this view it is unnecessary for me to follow the many well presented arguments on either side.

I may add, however, that I by no means assume that respondent could be so treated in the case of a winding-up of the company and by reason of insolvency the creditors' claims had to be met, and respondent had been placed on the list of contributories.

Nor if the case had been one of misrepresentation of which respondent had complained and he had acted in the same way, after the full disclosure to him thereof, do I think he could claim relief.

It is the contractual nature of that which was done, with presumably an honest purpose on either side which, so long as membership not created and the provisions thereof were competent to be entered into that induces me to hold that the purpose thereof ought not to be lightly set aside or defeated.

The lapse of time might, under other conditions than those springing from a war which forbade building

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unless demanded by dire necessity, have led to other inferences tending to defeat respondent.

I think the appeal should be dismissed with costs.

DUFF J.—I am of the opinion that this appeal should be allowed with costs.

ANGLIN J.—The plaintiff sues for the rescission of an agreement to take 100 shares of the capital stock of the defendant company, and for a return of the purchase price thereof, $10,000, paid by him in instalments, and, in the alternative, for damages. He bases his action on the non-fulfilment of a term of his subscription—that the company would proceed to erect a steel plant at the city of Medicine Hat. The learned trial judge dismissed the action on the ground that by becoming, and exercising rights of, a shareholder, the plaintiff had waived this condition of his subscription (1). This judgment was reversed in the Appellate Division (2), that court holding that the non-fulfilment of what was in its opinion a condition subsequent, which had not been waived, entitled him to the relief of rescission and a return of his money. The facts so far as not hereinafter stated may be found in the reports cited.

If the terms relied on by the plaintiff should be regarded as a condition precedent, I would be disposed to concur in the dismissal of the action upon the ground taken by the learned trial judge. But, while the language of the plaintiff's letter of subscription and of the defendants' letter of acceptance might be open to that construction, the conduct of the parties makes it perfectly clear that this was never intended to be its character, or, if it was, that by mutual consent it was

(1) [1917] 1 W.W.R. 1431. (2) 12 Alta. L.R. 445; 38 D.L.R. 488.

converted into a condition subsequent or a collateral agreement. Taking all the circumstances in evidence into account, my view of the legal effect of the arrangement made is that the term relied upon partook of the nature of a condition to the extent that if the erection of a steel plant should become impossible or if the company should definitely evince its purpose not to proceed with it while the contract was still *in fieri*—before the plaintiff had become a shareholder—he would be entitled to withdraw his subscription and demand a return of his purchase money, but that if such a state of facts should arise only after the plaintiff had acquired the status of a shareholder the term invoked would be enforceable, if at all, only as a collateral agreement by the company thereupon to accept a surrender of his shares and to return whatever money he had paid on account of their purchase.

At the close of the argument I was satisfied that the subscription of the respondent for shares in the appellant company was given subject to the term that the company would erect a steel plant, that it was so accepted and that there was never any abandonment by him of whatever rights the non-fulfilment of that term gave him. Its non-fulfilment is indisputable. The only defence which, in my opinion, calls for consideration is the contention that such repayment would involve an illegal depletion or reduction of the company's capital and therefore cannot be demanded—that because the term attached by the plaintiff to his subscription contemplated such a withdrawal of capital it is void as *ultra vires* of the company, and since he attained and acquiesced in his holding the position of a shareholder he must be treated as if his subscription had been absolute and unqualified. This defence involves two important questions of law: Did the

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respondent ever actually become a shareholder? If he did, is the condition attached to his subscription, which must in that event operate, if at all, as a collateral agreement, valid and enforceable?

The material facts bearing on the first question appear to be that although the sale of the shares in question, as part of a large quantity of stock, was authorised by the directors, there is no direct evidence of a formal allotment of shares to the respondent, nor of any notice of allotment having been sent to him. The sending of notices of meetings, however, probably supplied the latter omission. *Traders Trust Co.* v. *Goodman* (1). Moreover, the respondent's name was not entered in the list or register of shareholders kept and produced by the company. It appears, however, in a ledger account in the book which contains elsewhere what purports to be the list or register of shareholders. He is debited in this account with $10,000, the price of 100 shares, and is given credit for the several payments which he made, amounting in all to $10,000. While the share register was not kept in the form required by section 27 of the Companies Ordinance (1901, ch. 20; Con. Ord. N.W.T., 1915, ch. 61), its deficiencies would probably not be fatal to its evidentiary value. *East Gloucestershire Railway Co.* v. *Bartholomew* (2). Other authorities are collected in Lindley on Companies (6th ed.), p. 76.

By section 25 of the Companies Ordinance:—

> Every person who has agreed to become a member of the company under this ordinance and whose name is entered on the register of members shall be deemed to be a member of the company.

The statute does not proceed, however, as did the English Act, 19 & 20 Vict., ch. 47, sec. 19, to declare that no other person should be deemed to be a share-

(1) 37 D.L.R. 31, 43-47. (2) L.R. 3 Ex. 15.

holder. Under such an Act as this latter, or under an Act making the register conclusive evidence of membership or non-membership, registration would, of course, be essential. But by section 40 of the ordinance now under consideration the Supreme Court is empowered to correct the register even in winding up (*Winstone's Case* (1)), and by section 42 it is only made *primâ facie* evidence of any matters directed to be inserted therein. A person whose name appears on it may shew that it ought not to have been there (*Waterford, Wexford, Wicklow & Dublin Railway Co.* v. *Pidcock* (2)), and it may likewise be shewn that a person whose name does not appear on it was in fact a member. *Portal* v. *Emmens* (3); *Reese River Silver Mining Co.* v. *Smith* (4), *per* Lord Westbury. The inconsistent dictum of Fry L.J. in *Nicol's Case* (5), cited by Mr. Clarke, cannot be successfully invoked against such eminent authority.

*Nicol's Case* (5) was decided on the great lapse of time—

> fourteen years after the holders of all the shares (25,000) had been shewn on the register,

in which the names of the persons sought to be held as contributories did not appear. There had been a new allotment of shares from which they were excluded. *In re Macdonald, Sons & Co.* (6), also cited by Mr. Clarke, is likewise distinguishable. The persons whom it was there sought to hold as contributories were not only not registered but they had never

> done anything as shareholders, and the transaction was therefore never a completed transaction. It was in my opinion competent for the applicants,

says Lord Davey, at p. 107,

> to revoke the authority to place their names on the register.

(1) 12 Ch.D. 239 at p. 249.
(2) 8 Ex. 279.
(3) 1 C.P.D. 201, at page 212-3.
(4) L.R. 4 H.L. 64, at page 77.
(5) 29 Ch.D. 421, at page 447.
(6) [1894] 1 Ch. 89.

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An admission of a shareholder that he is such is in itself sufficient proof of his membership.

On the other hand, on the 26th of September, 1914, some four months after the respondent had made his final payment, three certificates—one for 25 shares, dated the 31st October, 1913, another for 25 shares dated the 31st December, 1913, and the third for 50 shares dated the 1st of February, 1914—were sent to him. They reached his office in his absence. While there is no evidence to shew how these certificates came to be issued or that the respondent actually received them, in view of the retention of them for two years and his other acts as a shareholder, the only reasonable inference seems to be that he knew of their existence and presence amongst his papers. Under section 36 of the statute a certificate is *primâ facie* evidence of the title of a *member* to the stock it represents. I do not overlook the fact that this section proceeds on the assumption that the holder named in the certificate is a member of the company. Although he never personally attended a meeting of the company, the respondent admits having received notices of such meetings accompanied by proxies which he filled in and sent to Mr. Pollock, the president and promoter of the company, who had obtained his subscription. He candidly states in his evidence that he regarded himself as a shareholder during 1914 and 1915 and up to August, 1916. He adds that he would have expected to be paid dividends had they been declared, but that he nevertheless thought that if the company decided to abandon the steel project it would cancel his shares or he could withdraw. Under these circumstances I have no doubt that he would have been made a contributory on winding up (*Levita's Case* (1); *Spackman* v. *Evans*

(1) 3 Ch. App. 36.

(1); *Fisher's Case* (2); *Challis's Case* (3)), and, notwithstanding the more favourable position which a person whom it is sought to hold as a shareholder occupies before there is a winding up, I think the plaintiff must be regarded as having become a shareholder. His retention of the share certificates and his giving of proxies to vote upon his shares are consistent only with his being a *de facto* shareholder. The condition annexed to his subscrip ion being not precedent but subsequent, it was his intention to become a shareholder *in presenti*. That he may have thought himself entitled to withdraw afterwards does not prevent his having acquired that status. *In re Railway Time Tables Publishing Co.* (4); *Re Jas. Pilkin & Co. Ltd.* (5). The case falls within the principle of *Bridger's Case* (6); *Elkington's Case* (7), and *Thomson's Case* (8), rather than within that of *Pellatt's Case*(9), or *Rogers' Case*(10). *Pellatt's Case* (9), appears to be the strongest authority in the respondent's favour on this branch of the case.

The register is only evidence of an application for shares and its acceptance, or of an allotment in the nature of an offer and its acceptance, constituting in either case membership: Lindley on Companies, 6th ed., p. 77. It is the contract that creates the membership not the registration. Allotment is no doubt essential in the ordinary case. But the entry of it in the directors' minutes is merely evidentiary. The absence of such an entry and of a formal notice of allotment are not conclusive against membership. The

(1) L.R. 3 H.L. 171, at page 208.
(2) 31 Ch.D. 120, at page 128.
(3) 6 Ch. App. 266, at page 271.
(4) 42 Ch.D. 98, at pages 112, 114, 117.
(5) 85 L.J. Ch. 318.
(6) 5 Ch. App. 305.
(7) 2 Ch. App. 511.
(8) 4 DeG. J. & S. 749.
(9) 2 Ch. App. 527.
(10) 3 Ch. App. 633.

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evidence they would afford may be supplied, as I think it was in this case, by the issue and delivery of share certificates and the sending of notices of meetings followed by the giving of proxies. *Fisher's Case* (1) was decided in 1885, two years before the House of Lords reversed the decision of the Court of Appeal in *Trevor* v. *Whitworth* (2), and the suggestion of Fry L.J., at p. 128, relied on by the respondent, can scarcely be regarded as now entitled to weight. The same observation applies to a remark of Giffard L.J. in *Crawley's Case* (3), decided in 1869.

My conclusion on this branch of the case is that under all the circumstances in evidence the plaintiff *de facto* became a shareholder of the defendant company. We must, therefore, proceed to consider the validity and effect of the term which he attached to his subscription and subject to which, as far as the directors could bind it to do so, the company accepted him as a shareholder.

As already stated, this term was not a condition precedent. The conduct of the plaintiff as well as of the company's officers makes this perfectly clear. If it were a condition precedent it would have been abandoned by the plaintiff's acceptance of membership. As a condition it ceased to be operative when the plaintiff became a shareholder. Thereafter it could operate, if at all, only as a collateral agreement entitling him to surrender his shares and demand the return of the money paid for them.

Is such an agreement *intra vires* of the defendant company? I think not.

In *Guinness* v. *Land Corporation of Ireland* (4), Lord Justice Cotton, after referring to section 38 of

(1) 31 Ch. D. 120.
(2) 12 App. Cas. 409.
(3) 4 Ch. App. 322, at page 330.
(4) 22 Ch.D. 349, at page 375.

the English "Companies Act" of 1862, corresponding to section 47 of the Consolidated Ordinance of 1915, said:—

> From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid.

This passage is quoted with approval in *Trevor* v. *Whitworth* (1), by Lord Herschell, at p. 419, and by Lord Macnaghten, at p. 433. The defendant company in accepting a surrender of the plaintiff's shares could have only one of two purposes, either to extinguish them—an unlawful reduction of capital, or to re-issue them—an unlawful trafficking in its shares, an illegal use of its capital.

The law on these points as laid down in *Trevor* v. *Whitworth* (1), has been consistently followed ever since. The Companies Ordinance contains very strict provisions as to the conditions on which and the methods by which the capital of a company subject to it may be reduced—sections 78 *et seq.* There is, of course, no pretence of compliance with these provisions. As put by Lord Macnaghten in a passage of his speech in *Trevor* v. *Whitworth* (1), at p. 437, quoted by Lord Herschell in *British and American Trustee and Finance Corporation* v. *Couper* (2):—

> When parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.

In *Bellerby* v. *Rowland & Marwood's Steamship Co.* (3), it was held that:—

(1) 12 App. Cas. 409. (2) [1894] A.C. 399, at page 403.
(3) [1902] 2 Ch. 14.

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A surrender of shares in a limited company, the company releasing the shareholders from further liability in respect of the shares, is equivalent to a purchase of shares by the company and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth* (1).

The court was there dealing with shares partly unpaid. The surrender of fully paid-up shares with a return of the money paid therefor is, of course, equally obnoxious. Both alike involve reduction of capital. While a surrender of shares which involves no reduction of capital may be supported (*Rowell* v. *Jno. Rowell & Sons, Ltd.* (2)), a surrender involving such a reduction, not made under circumstances which would have justified a forfeiture, clearly cannot be unless effected under sections 78 *et seq.* of the Consolidated Ordinance. How strictly the right of forfeiture, and of surrender to take its place, is viewed is illustrated in the recent case of *Hopkinson* v. *Mortimer, Harley & Co. Ltd* (3).

If then a return of the capital subscribed by the plaintiff is *ultra vires* what is the result? I fear it must be the dismissal of this action. That the plaintiff made a mistake as to the legal effect of what he did cannot entitle him to relief. *Ex parte Sandys* (4); *Re James Pilkin & Co. Ltd* (5). Having paid his money as the purchase price of shares in the company and become a shareholder he cannot now require that the money so paid should be treated as a loan made to the company to be applied in the purchase of shares if and when it should erect a steel plant, or should it fail to do so, to be returned to him. That in effect is the position he seeks to take. But that was not his contract.

While it was the obvious purpose of the parties that

(1) 12 App. Cas. 409.
(2) [1912] 2 Ch. 609.
(3) [1917] 1 Ch. 646, at page 653.
(4) 42 Ch.D. 98, at page 115.
(5) (5) 85 L.J. Ch. 318, at page 320.

the stipulation invoked by the plaintiff should operate as a condition subsequent or collateral agreement, non-fulfilment of which would give rise to a right of withdrawal on his part, it was not their intention that the company should bind itself to erect a steel plant or to pay damages for its failure to do so. The plaintiff's evidence of his understanding that if the company should decide to abandon the steel project it could cancel his shares or he could rescind and withdraw puts that beyond doubt. Moreover, whether any damage actually resulted to him from that abandonment would seem to be a question so problematical as to be almost, if not quite, a matter of pure speculation. But it is not necessary to enter on that field. Breach of a contract to erect a steel plant entitling the plaintiff to damages has not been established. Breach of a collateral agreement that upon its failure to erect such a plant the company would accept a surrender of his shares and repay the money which it received from him undoubtedly has. But that agreement is unenforceable because *ultra vires*.

I would allow the appeal with costs in this court and in the Appellate Division and would restore the judgment of the learned trial judge.

BRODEUR J.—I would allow this appeal for the reasons given by my brother Anglin.

*Appeal allowed with costs.*

Solicitors for the appellant: *Laidlaw, Blanchard & Rand.*

Solicitors for the respondent: *Short & Fraser.*