R. SID SMITH (DEFENDANT) .....APPELLANT;

AND

THE GOW-GANDA MINES, LIMITED AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*May 16.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint stock company—Allotment of shares—Surrender by allottee—Unpaid calls—Transfer—Waiver.

S. subscribed for shares in a mining company, was notified of allotment of the same and paid the amount due on a first call as agreed. Later he notified the company that he withdrew his subscription and refusing to pay further calls was sued therefor. It turned out that when S. subscribed for the stock all the shares had been allotted by the company and those given to him had been obtained by surrender from one of the original allottees.

Held, that under the Ontario Companies Act, when stock has been allotted by a company, the only case in which the directors can regain control of it, is that of forfeiture for non-payment of calls. As in this case there was no forfeiture, the company did not legally own the stock allotted to S. and could not compel him to pay for it.

Held, also, that the provision in said Act that stock on which calls are unpaid cannot be transferred, is imperative and cannot be waived by the company.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the trial judge in favour of the plaintiffs.

The facts of the case are stated in the above headnote.

PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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Hellmuth K.C. and *Ziba Gallagher* for the appellant.

Smyth K.C. for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—This is an action for calls upon stock of the respondent company for which it is alleged the appellant subscribed. It is admitted that the appellant signed a certain subscription agreement but he denies that the shares for which he agreed to subscribe were ever allotted to him. The action was maintained by the trial judge and his judgment confirmed on appeal. Other defences were set up; but the sole question to be considered in this appeal is: Was the appellant ever a shareholder of the respondent, liable to pay the calls for which this action is brought? The inquiry is, on the evidence did the company ever do that which it was entitled to do, if it was really meant to make the appellant a shareholder? It is important to bear in mind that the action is not for breach of an agreement to take stock, but for moneys due by the appellant for calls made in respect of shares of the respondent company. The claim, therefore, is based on the assumption that the appellant is the holder of certain shares of that company and is in arrears for calls made on those shares. The appellant could become shareholder in one of two ways:

1st. By the allotment of shares from the company through the board of directors.

2ndly. By a transfer of shares to him by a shareholder.

There can be no doubt that at the time of his subscription, as found by the trial judge, all the shares were allotted to other subscribers and that there was

no stock at that time which the directors could allot to the appellant under the subscription agreement. The judgments below, however, proceed on the ground that appellant's subscriptions were taken in lieu of subscriptions of former subscribers to whom allotments were made but who were allowed to withdraw and whose stock was allotted or re-allotted to the appellant.

To maintain those judgments on the facts of this case it would be necessary to hold that a shareholder to whom stock has been allotted may be relieved of his obligations by the consent of the board of directors. Unless forfeited for non-payment of calls the directors have no control over shares that have been allotted. The title to those shares is fixed and the company cannot substitute any one for the allottee, and there is no pretence that there was a forfeiture here. Title of course can be acquired by transfer, if all the calls then due on the stock transferred have been paid; but here there were unpaid calls due by the original allottee and there is in addition no evidence that any transfer was executed to the appellant or that he ever heard of, or was asked to accept, any transfer.

I would allow this appeal with costs.

DAVIES J. concurred with the Chief Justice.

IDINGTON J.—I cannot see how, having due regard to the provisions of the "Ontario Companies Act," it can be held that after a call had been made on allotted stock and whilst such call remained unpaid, the respondent company could allot stock to some one else and hold him liable as if he had duly sub-

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scribed for such stock, no matter how anxious he was to get stock or the man called upon was to get rid of what he had been allotted.

Nor can I see how a bargain forbidden by the statute can be converted into a bargain for something the parties never contracted for with each other.

I think it is impossible to attribute appellant's subscription, for a certain number of shares only offered out of a specified block of stock, to a subscription for some other stock neither party had contemplated as in the market. Even if it could have been, contrary to the intention as evidenced by the documents, there has been no call made in respect of it.

It is a contract between the parties that is sued upon, but it is one that is subject to and can become operative only within certain statutory limitations.

The appeal should, I think, be allowed only with such costs throughout as the appellant might have been allowed to tax had he from the start confined his contention in defence and counterclaim to the neat point involved in this appeal. And I think he should be ordered to pay the respondents the costs throughout of and incidental to all other contentions set up by him in his pleadings and in the trial and in appeal below and here, such costs to be set off *pro tanto* against the amount he is entitled to recover on his counterclaim and (if need be) costs taxed to him.

DUFF J.—I think Mr. Hellmuth's contention is unanswerable. The directors had not the slightest intention of allotting to Smith any of the 300,000 shares of the nominal capital which had not already been allotted. Smith had no intention of applying

for such shares. Smith expected to receive, when he made his application, and the directors intended to give him, when they professed to make him a shareholder, a part of the 700,000 shares which, under the existing arrangement, it was understood should be issued.

In fact the whole of this 700,000 shares had been allotted to other persons; and what the directors intended to do and believed they were doing was to cancel the allotments of some of these shares and re-allot them to Smith. They did not profess and had no intention to forfeit these shares for non-payment of calls. They acted upon the assumption, which, of course, nobody disputes was a mistake on their part, that having allotted a part of their share capital to a person who thereby became a shareholder they could by the consent of that person cancel the allotment and by that process acquire full power to deal with the shares as a part of the unissued capital of the company. This, it is perfectly clear, they could not do. As to the suggestion that Smith may be treated as a transferee holding under transfer from the previous allottees, that suggestion must fall to the ground for two reasons: 1st, there was no transfer in fact and Smith's application was an application to the company for an allotment of shares; and 2ndly, it seems to me to be perfectly clear that there is a statutory prohibition against the transfer of shares upon which calls are unpaid. The argument that the statutory provision is directory merely or can be waived by the directors is, in my opinion, inadmissible for the short reason I put to Mr. Smyth in the argument, viz., the statute declares the shares themselves in such circumstances to be non-transfer-

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able; so long as any such call remains unpaid they are *extra commercium*.

ANGLIN J.—Section 54 of the "Ontario Companies Act, 1907," declares shares upon which a call duly made remains unpaid and which have not been forfeited for non-payment to be non-transferable. This provision, it is, in my opinion, not competent for the company or its directors to waive or to override. This section differs essentially from section 16 of the English "Companies Clauses Act," 8 Vict. ch. 16, which merely disentitles a shareholder to transfer such shares as of right; *Ex parte Littledale*(1), and from the not unusual provision that directors may decline to register a transfer of shares made by a person indebted to the company (R.S.C. 1906, ch. 79, sec. 67). It impresses temporarily upon the shares themselves the character of non-transferability. Declared by section 48 to be

> transferable subject to such conditions and restrictions as by this Act * * * may be prescribed,

shares are, by section 54, expressly made non-transferable,

> until all previous calls have been fully paid in, or until declared forfeited for non-payment of calls.

The company can deal with shares in this position only by taking the forfeiture proceedings prescribed by section 56, or, in the case of mining companies, by selling them under section 144. No step was taken under either of these sections.

(1) 9 Ch. App. 257.

The shares which the defendants undertook to "allot" to the plaintiff were in this position. They had been underwritten and allotted to other subscribers. A call had been made upon them and notice thereof had been given, as provided by the underwriting agreement, through the trustees to whom it was made payable. This call was unpaid. The shares had not been forfeited. The subscription or application of the defendant was for shares included in and subject to the underwriting agreement and not for any other shares. He knew that the entire underwriting of 700,000 shares had been subscribed: he did not know that the entire 700,000 shares had been actually allotted.

Assuming that there was, or should be deemed to have been, a transfer of the 2,500 shares from the persons to whom they had been originally allotted to the plaintiff, sufficient if such shares were then transferable, the character of non-transferability impressed upon them by the statute while any call remained unpaid and they had not been forfeited rendered any attempt to transfer them abortive and ineffectual.

The incapacity of the company to accept a surrender of issued shares and to re-allot them is indisputable. Neither, in view of what was actually done and of the nature of the application or contract signed by the plaintiff, can the company be heard to say that he was allotted shares out of the 300,000 not covered by the underwriting agreement to which his subscription was attached and to the terms of which it was made subject.

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With respect, I would, for these reasons, allow this appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Ziba Gallagher.*

Solicitor for the respondents: *Samuel King.*