

Tuesday, November 15.

FIRST DIVISION.

MILN v. NORTH BRITISH FRESH FISH SUPPLY COMPANY (LIMITED).

*Company—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 23—Application for Shares, whether Conditional—Powers of Directors—Ultra vires.*

A person applied for 1000 shares in a joint-stock company, and remitted £25, "being deposit of 2s. 6d. per share, less 2s. per share commission." The application was made upon this condition—"I do not wish to invest my own money in shares of your company up to that extent, but see my way clear to place 1000 shares amongst my friends and clients." The shares were allotted to him, and his name was entered on the register of members. He failed to place the shares, and thereafter presented a petition to have his name removed from the register. *Held* (1) that the placing of the shares was not a condition precedent to the petitioner being put upon the register; and (2) that it would have been *ultra vires* of the directors to have made an agreement with the petitioner by which he was to be put upon the register without incurring liability as a member. Petition *refused*.

This petition was presented under the 35th section of the Companies Act 1862 by William Simpson Miln, residing at 3 Bellevue Villas, Woodgreen, London, for rectification of the register of members of the North British Fresh Fish Supply Company (Limited), in the following circumstances as set forth in the petition:—

The North British Fresh Fish Supply Company (Limited) was incorporated under the Companies Acts, with its registered office in Scotland, and having a nominal capital of £50,000 in 50,000 shares of £1 each. Its first issue of capital (3000 shares) was offered in December 1886.

On 22d December 1886 the petitioner addressed to the secretary of the company an application for 1000 shares of the said issue, on the conditions specified in a letter to the secretary in the following terms—"Enclosed I beg to hand you application for 1000 shares, together with £25, being deposit of 2/6 per share, less 2/ per share, commission. Please to put this application before your directors at their allotment meeting, on the following conditions:—I do not wish to invest my own money in the shares of your company up to that extent, but see my way clear to place 1000 shares amongst my friends and clients. Although I have been very busy lately, still a good many shares have been applied for through me, and certainly after allotment I feel sure that I can place at least that number, more especially as the London Founders' Association (Ld.) have agreed to give me their full commission of 10 per cent. I authorise you to forfeit the deposit sent you herewith in case I fail to place the shares I apply for within two months from this date. I intend to remit you as and when I sell the shares, which I will sell by transfer out of my name, giving you notice of any transfer I sign."

In compliance with the said application and rela-

tive letter (which was engrossed in the minutes of the board), the secretary of the company on 23d December 1886 sent to the petitioner—(1) an allotment letter of that date for the 1000 shares, showing 2/6 per share, or £125, as paid on application, and 7/6 per share, or £375, as payable on allotment; and (2) a receipt for "the sum of £25, being the deposit of 2/6 per share required on the application for an allotment of 1000 shares of £1 each in the above company (less 2/ per share commission)."

The petitioner was never called upon to pay the amount payable on the other shares of the company on allotment. The petitioner in fulfilment of his undertaking endeavoured to place the shares, but owing to differences with the directors and secretary of the company failed to do so, and on 22d February 1887 wrote to the directors of the company referring to his previous letter of 22d December 1886, and his "conditional application for shares," and informed them that he had not placed the shares "for many good reasons" which he explained. He also expressed his belief that the company would succeed if properly controlled, and asked the directors to extend the time for his placing the shares for three months. On 4th March 1887 the secretary intimated to the petitioner that the directors had agreed "to grant your request for an extension of time for three months, from 22d February 1887 to enable you to get the shares allotted to you placed amongst your friends."

The petitioner did not get any of the shares placed, and on 4th July 1887 intimated this to the secretary of the company, and requested that in the circumstances the deposit of £25 should be refunded, the petitioner returning the receipt therefor, and abandoning the commission. It was intimated to the petitioner in reply, on 27th July 1887, that the directors had not the power to do anything in the matter. The petitioner thereupon intimated to the company that he had resolved to abandon the £25 deposited on application, and he returned the allotment letter and receipt, and requested that his name should be removed from the register of members. On 26th September 1887 the secretary of the company intimated that the directors were advised that they had no power to do so without an order of the Court.

The petitioner averred that "throughout the whole transaction the petitioner acted as paid agent of the company, and the shares were allotted in his name provisionally, and for convenience in the execution of the agency. The petitioner's name accordingly should now be removed from the register of members, the agency to facilitate which the shares were so provisionally registered having proved abortive and come to an end."

The company lodged answers, in which they averred—"The petitioner duly applied for the shares in question, and, as he was well aware at the time, these shares were allotted to him, and he was entered on the register as a shareholder in respect thereof, and agreed to become a shareholder in respect thereof. The shares were all along dealt with by the petitioner and the company as having been finally and unconditionally allotted to and accepted by the petitioner." They submitted that the petitioner's averments were

irrelevant and unfounded in fact.

The Companies Act 1862 (25 and 26 Vict. c. 89), sec. 23, provides—"The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

Argued for the petitioner—The question here was whether he agreed to become a member of the company within the meaning of section 23 of the Companies Act 1862. It was clear he did not. He had no doubt signed documents which in ordinary circumstances would put him on the list of shareholders, but the real arrangement was that he should place 1000 shares. The application and allotment were merely incidental to the primary contract to place shares. There was a wide distinction between an agreement to take shares and an agreement to place shares—*Gorrißen*, L.R., 8 Chan. App. 507. Such a contract was within the powers of the directors—*Liquidator of Consolidated Copper Company v. Peddie*, December 22, 1877, 5 R. 393; *Simpson's case*, L.R., 4 Chan. App. 184; Buckley on the Companies Acts, sec. 23.

Argued for the respondents—The terms of the application showed that the petitioner was to be the *dominus* and true owner of the shares. It was not open to him to say that unless a preliminary condition was complied with he was not to be put on the register. The directors had no power to make such an allotment—*Muir v. City of Glasgow Bank and Liquidators*, December 20, 1878, 6 R. 392 (*per Lord President*, 403)—*aff.* (H.L.) 21. In the cases cited the question was whether there was a condition precedent to being put on the register. But here it was not said that the petitioner's name was improperly put on the register—*Fisher's case*, L.R., Chan. Div. 120; *Elkington's case*, L.R., 2 Chan. Div. 511; *Bridger's case*, L.R., 9 Eq. 74, and 5 Chan. 305. There was no preliminary condition to be fulfilled before the petitioner's name was to be placed on the register. It was there by agreement, and that was conclusive. There was no authority for the proposition that the petitioner might agree to be put on the register, and afterwards repudiate being a shareholder; nor was there any to the effect that the directors had power to register his name with qualified liability. The case of *Gorrißen* (*supra cit.*) was not in point, for Gorrißen had never substantially agreed to be put on the register.

At advising—

LORD PRESIDENT—I think this is a clear case. The petitioner applied for shares by his letter of the 22d of December 1886, and he expressed his assent to an allotment of shares, and authorised the secretary to place his name on the register in the usual formal manner, and this was done.

The question comes to be, whether there was an agreement apart from the request to be registered, which suspended the petitioner's liability, and

imported an agreement that he was not to be put on the register till a condition precedent should be fulfilled? I am of opinion that there was no such agreement. The letter written on the same date as the application for shares plainly contemplated that he was to be put on the register, and that his name was not to be removed therefrom except in one way, viz., by the execution of a transfer of the shares in favour of other persons. I am therefore unable to hold that any such agreement as is contended for has been made out here, where on the face of the application for the shares there is a request to be registered and thus become a partner of the company. Now nobody can become a partner without incurring all the liabilities of the other partners, and being placed on the same footing with them. In other words, no one can be registered except as a partner with full liability. Therefore, even supposing an agreement, such as Mr Lorimer contended for, had been made out, I am of opinion that it would have been beyond the powers of the directors to have made it. But I do not think that the letter of 22d December above referred to bears any such meaning. I think all the petitioner meant to say was, that he did not wish to continue to be a shareholder, but only became one with a view to transferring his shares in common form at an early period. I therefore think the petition should be refused.

LORD MURE concurred.

LORD SHAND—The question raised is under section 23 of the Companies Act. Did this petitioner agree to become a member of the company? Now, I am of opinion that any man who applies for shares, and requests that his name be put on the register, agrees to become a member. There is a class of cases where registration is to take place, but only after a condition precedent has been fulfilled; and if there is registration notwithstanding this qualification of the request, the Court will give redress because the registration is unauthorised. There is no such condition here. Therefore the case is one where the petitioner agreed to become a member.

I also concur in what your Lordship has said as to the want of power on the part of the directors to register a man with qualified liability.

LORD ADAM—I am of the same opinion.

The Court refused the petition with expenses.

Counsel for the Petitioner—Lorimer. Agent—Peter Morrison, S.S.C.

Counsel for the Respondents—Dickson. Agent—Thomas Dalgleish, S.S.C.