Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smith (Official Liquidator of the Bonang Gold Mining Company, Limited) v. Brown, from the Supreme Court of New South Wales; delivered 28th July 1896.

Present:

THE LORD CHANCELLOR.
LORD HERSCHELL.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The appeal in this case raises a question of a class which frequently arises in the winding-up of Joint Stock Companies; viz. the question whether a registered shareholder is entitled to escape contribution on the ground that the calls on his shares are to be taken as having been paid up wholly or partially.

At the date of the winding-up the Respondent was the registered holder of 2,032 1*l*. shares. He contended that they were fully paid up; three shillings by actual payments, and the balance of seventeen shillings by contract. As to 1666 shares his claim has been rejected, and so far there is no further contest. As to the remaining 366 shares his claim has been sustained, and the Official Liquidator appeals from that decision. A number of other share-

88934. 100.—8/96. [36] A

holders are in the same position, and their interests are affected by this appeal; but unfortunately no one appears to oppose it.

The Company was formed under the Companies Act 1874, the 57th section of which is to the same purport with section 25 of the English Act of 1867. Every share is to be taken as subject to the payment of its whole amount in cash, unless otherwise determined by contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of the shares. It is the common case that the Respondent has paid only three shillings on the shares which are of the nominal value of one pound; and that the balance of seventeen shillings was the subject of negotiations before the Company was formed. The question between the Respondent and the Company is whether the seventeen shillings are to be taken as paid up by virtue of (*a*) a contract in writing (*b*) filed with the Registrar (*c*) before the issue of the shares.

On the 8th March 1888, Messrs. Fletcher offered the property afterwards worked by the Company to a syndicate of 20 persons, each contributing 500*l*. Upon this offer a syndicate was formed of more than 20 persons, some of whom took a 40th share instead of a 20th. They in effect purchased the property of Messrs. Fletcher for 10,000*l*., and it has been duly paid for.

The next document is a deed by which four gentlemen, named Walford, Laidley, Dibbs, and Taylor, declared themselves trustees of the property in question for the syndicate, whose members were named in a schedule with the share of each opposite his name. The deed appears to have been executed by the four trustees in April 1888, but it is not dated, and is not executed by any other members of the syndicate. Walford, Taylor, and Dibbs were

themselves along with 20 others named in the schedule as members of the syndicate, and the shares ascribed to the 23 are $\frac{39}{40}$ths of the whole.

On the 12th July 1888 the syndicate met and resolved that a company should be formed with a capital divided into 100,000 shares, and the shares allotted *pro rata* among the syndicate and issued as paid-up to seventeen shillings per share. After this it seems that the syndicate acted as if a company had been formed; and among other acts they allotted shares, though no certificates were issued till the month of October.

On the 30th July a deed was executed by Dibbs, Taylor, Walford, and Laidley (who are called the vendors) as trustees for the syndicate comprised of the persons named in the schedule thereto of the one part, and McKellar (who is called the trustee) of the other part. Thereby the vendors purport to agree with the trustee that a limited liability company shall be formed for working the mining property in question, which the vendors purport to sell and the trustee for the projected Company purports to buy. The deed contained the following clauses :—

"3. That the capital of the said company shall be one hundred "thousand pounds in one hundred thousand shares of one "pound each, which shall be deemed to be and issued as paid "up to seventeen shillings per share, and subject to a liability "of three shillings per share and no more.

"5. That the consideration for the before-mentioned sale and "for the transfer of the said property to the said company "after formation shall be the issue of one hundred thousand "shares paid up to the extent of seventeen shillings, and with "a liability of three shillings per share, duly allotted to the "persons named and in the numbers set out in the said "schedule.

"6. The said trustee for and on behalf of the said proposed "company agrees that the one hundred thousand shares in "such company shall be issued to the subscribers therefor on "the following terms; namely that the sum of seventeen "shillings per share, which represents the sum at which the

"proprietors value the property to be transferred by the "company, shall be deemed to have been paid on each share "by such transfer, and that such shares shall have a liability "thereon of three shillings per share and no more; and such "three shillings may be called up by direction of the company "from time to time as the money is required for developing "the property.

"7. That within thirty days after the registration of the "company this agreement shall be adopted by the board of "directors of the said company by a resolution which shall be "duly entered on the minutes of the proceedings of the said "company.

"8. That the said trustee shall incur no personal liability "whatever in respect of this agreement."

In the schedule, which contains the names of the Syndicate and their shares in the concern, the Respondent appears as the holder of 1,666 shares. The Syndicate now consisted of 26 persons, Laidley and two others having been added since the deed of April. The whole 100,000 shares were distributed among them.

The Memorandum of Association is dated 8th August. By the 5th and 6th clauses the terms conditions and objects of the agreement of 30th July are adopted. The Memorandum is signed by nine shareholders, among whom is the Respondent, signing for 1,666 shares. On the 6th September the Memorandum and also the Articles of Association were filed with the Registrar, and the Company was then completely formed. On the next day the deed of 30th July was filed. On the 14th September the directors passed a resolution adopting that agreement. This resolution has never been filed.

The Master in Equity held that the Respondent ought to be excluded from the list of contributories. The Official Liquidator appealed, and the case was heard by Mr. Justice Manning. That learned Judge held that the 1,666 shares for which the Respondent signed the Memorandum of Association were issued to him on the 6th September when the Memorandum was filed Therefore they could not be protected by the

agreement of 30th July which was not filed till the 7th September.

The remaining shares, held by the Respondent were issued later. As regards them Mr. Justice Manning states that his own opinion, apart from decided cases, would be that, in order to give protection under section 57, there ought to be filed a formal document under the seal of the Company, acknowledging itself bound by the agreement relied on. But then he thinks that the decision in *Hartley's Case* (10 Ch. App. 157) compels him to hold that the agreement of 30th July, which was registered before the issue of the 366 shares, is such an agreement as satisfies the 57th section. For this reason he made an order dated 25th August 1893, by which he varied the Master's certificate to the extent of making the Respondent a contributory for 1,666 shares, with a liability to the extent of fourteen shillings a share and to no further extent.

The Respondent did not appeal from this order. The Official Liquidator appealed for the purpose of making the Respondent a contributory for the other 366 shares. The Full Court, without going into the other arguments, expressed their concurrence in Mr. Justice Manning's view of the effect of *Hartley's Case*, and they dismissed the appeal.

Their Lordships have been furnished with a copy of the agreement in *Hartley's Case*. It was made between a Mr. Boden of the one part and a Mr. Field of the other part. Field is described as the agent of a Company then being formed, and of the promoters thereof. Boden agrees to sell and Field to purchase certain property at the price of 6,000*l*., to be paid as to 4,800*l*. by an equivalent amount of fully paid-up shares in the intended Company, and as to 1,200*l*. in cash after the registration of the Company. If the Company should fail within 30 days of

registration to adopt the agreement the vendor was to be at liberty to annul the sale. After the formation of the Company, but before the registration of the agreement under the Act of 1867, 200 of the vendor's paid-up shares were issued to his assignee or nominee Hartley. After the issue, registration of the agreement, which had been previously overlooked, was effected. Then the 200 issued shares were cancelled and 240 new ones allotted to Hartley. Those proceedings gave rise to two questions. First, the Official Liquidator put Hartley on the list in respect of the 200 cancelled shares; and the question was whether the cancellation was valid. The Court held that it was; pointing out that 200 paid-up shares were part of the purchase-money, and that if they were not granted the vendor would to that extent be still unpaid. Owing to inadvertence, the 200 shares first issued were liable to calls, and in rectifying that mistake the Company were only doing without suit what the Court would have ordered them to do.

Their Lordships notice these facts because in the authorized Law Reports (18 Eq. 542, & 10 Chan. App. 157) the statement of the case is confined to the cancelled shares, and except for one passage in Lord Cairns's judgment, there is nothing to show that the sufficiency of the agreement was in controversy. But from other reports (W. R. vol. 23, p. 203; L. J. vol. 44, p. 240; L. T. vol. 32, p. 106) it is clear that the Official Liquidator put Hartley on the list in respect of the 240 new shares as well as the 200 cancelled ones, and that the sufficiency of the agreement came into question with respect to those shares, and was upheld in both Courts, and that Lord Justice Mellish expressed his concurrence with Lord Cairns.

In delivering his opinion Mr. Justice

Manning went into a careful and learned examination of the question whether other cases to which he referred can be reconciled with *Hartley's Case*. The Full Court also addressed themselves to the same point. They said that the cases suggested as being in conflict with *Hartley's Case* are not really so, because in them there was either no contract, or a document executed as an escrow, or one purporting to be executed by a non-existent body. Whereas here, the Court says, there is an actual valid contract made by a person who was a trustee holding property for the proposed Company.

The only document purporting to be an agreement which has been registered in the present case, and the only document therefore which it is necessary to consider, is that of the 30th of July 1888. The Courts below regard it as a contract sufficient to comply with the exigencies of Section 57 of the Act of 1874.

In the opinion of their Lordships that document is not a contract in any proper sense of the word. It is nothing more than a resolution by certain persons interested in a mining property setting forth the manner in which they proposed to put the property before the public. It does not create nor was it intended to create any legal rights duties or obligations as between the persons expressed to be parties to it. It was a contract in form only. The persons interested in the property and the shareholders in the Company to be registered were just the same persons over again in a different guise; they had, as stated above, already distributed the whole of the share capital among themselves. In *Hartley's Case* there was a genuine sale, and a genuine purchase, and a genuine bargain to pay the price by paid-up shares issued to the vendor, who could enforce the bargain under peril of annulling the sale.

The result is that the Respondent has not brought himself within the protection given by section 57; that the Order of the Full Court dismissing the appeal to them should be discharged; and that Mr. Justice Manning's Order of the 25th August 1893 should be varied so as to include the Respondent in the list of contributories for the whole number of shares for which he was placed there by the Official Liquidator. In other respects that Order should be affirmed. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

The Official Liquidator does not ask for costs against the Respondent, which their Lordships think to be a very reasonable course under the circumstances of the case. The Appellant's costs will be answered by the estate that is being wound up along with the other costs of liquidation.