[HIGH COURT OF AUSTRALIA.]

CENTRAL PIGGERY CO. LTD. . . . APPELLANT;
RESPONDENT,

AND

McNICOLL . . . . . RESPONDENT.
APPLICANT.

CENTRAL PIGGERY CO. LTD. . . . APPELLANT;
RESPONDENT,

AND

HURST . . . . . RESPONDENT.
APPLICANT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June*, 22, 23.

Latham C.J., Rich and Dixon JJ.

Company—Shares—Issue of shares to employee—Application made before employment—Resolution of company—Allotment of shares—Letter of acceptance after contract of service—Statutory prohibition—"Proceed to the issue" of shares—Rectification of register—The Companies Acts 1931 *to* 1942 (22 *Geo. V. No.* 53—6 *Geo. VI. No.* 23), *s.* 112—*The Industrial Conciliation and Arbitration Acts* 1932 *to* 1947 (23 *Geo. V. No.* 36—11 *Geo. VI. No.* 27) *s.* 4.

Section 4 of *The Industrial Conciliation and Arbitration Acts* 1932 *to* 1947 provides that no company "shall proceed to the issue to any of its employees any share in the company . . ." until the consent of the Industrial Court shall first be had and obtained.

Where applications for shares in a company were made by persons who subsequently became employees and certificates of the shares allotted were posted after they became employees—

Held that, as the shares were issued on communication to them of the acceptance of their applications, the company had proceeded to the issue of shares to its employees within the meaning of s. 4 of *The Industrial Conciliation and Arbitration Acts*.

Decision of the Supreme Court of Queensland (*Philp* J.): *McNicoll* v. *Central Piggery Co. Ltd.*, (1949) Q.S.R. 240, affirmed.

APPEAL from Supreme Court of Queensland.

These were applications by James Balgarnie McNicoll and James Robert Hurst, made under s. 112 of *The Companies Acts* 1931 *to* 1942, for orders that the register of members of the Central Piggery Co. Ltd. be rectified by removing therefrom their names as shareholders and that moneys paid by them to the company in respect of certain shares with interest thereon be repaid, on the ground that the provisions of s. 4 of *The Industrial Conciliation and Arbitration Acts* 1932 *to* 1947 relating to the issue of shares to employees of a company were not complied with prior to the issue of such shares. On the register McNicoll was shown as the holder of 300 fully paid cumulative preference shares of £1 each and 50 similar shares paid to 10s., and Hurst was shown as holder of 500 fully paid cumulative preference shares of £1 each. Each applicant applied to the directors in writing for the shares mentioned. All moneys were paid with the application and by his application each applicant authorized the directors " to register me as a holder of the said shares."

The applications were heard before *Philp* J. who found the facts as follows :—In McNicoll's case the facts were that prior to 25th September 1946 on which date the company was registered, one Wilcox, the promoter of the company, had made an arrangement with McNicoll that the company, when formed, would employ McNicoll as a labourer upon the terms that McNicoll took certain shares in the company. On 25th September 1946 (or 26th September 1946) McNicoll applied to the company for 300 fully paid cumulative preference shares of £1 each and 50 similar shares paid to ten shillings and paid £325 in respect of the applications. The applications were in the usual form and by them McNicoll authorized the directors " to register me as a holder of the said shares." On 8th October 1946 a service agreement between the company and McNicoll was executed by the company—it having been previously executed by McNicoll. Under that agreement McNicoll commenced actually to work for the company on 14th October 1946 and continued in the employ of the company at all relevant times. On 21st September 1946 the directors of the company resolved to allot McNicoll the shares applied for by him and he was registered as a shareholder in respect thereof on 5th October 1946. No notification of such allotment or registration was given by the company to McNicoll prior to 16th October 1946.

In Hurst's case the facts were similar. He applied for shares on 26th September 1946 and became an employee of the company on

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7th October 1946. No notification of either allotment or registration was given to him by the company until 19th October 1946.

Philp J. held that the shares were issued contrary to s. 4 of *The Industrial Conciliation and Arbitration Acts* and ordered that the register be rectified by removing therefrom the names of the applicants as shareholders and that the moneys be repaid without interest: *McNicoll* v. *Central Piggery Co. Ltd.* (1).

From this decision the Central Piggery Co. Ltd. appealed to the High Court.

Bennett K.C. (with him *Boden*) for the appellant. The shares were issued at the time the company brought them into being by sealing and entering them in the books. They were brought into being by resolution. At that time the respondents were not employees of the company. There was no concluded agreement until notification of issue reaches the other party. Application is the offer and notification of acceptance of the offer must be given. *The Industrial Conciliation and Arbitration Acts*, s. 4 is not concerned with acceptance but with issue. This company had proceeded to issue before the applicants became shareholders. The intention is to prevent the company's foisting shares on its employees. Allotment is the usual expression which signifies an acceptance. The legislature has deliberately not used the word allotment in *Re Fresh Food and Preserving Co. Ltd.* (*Smith's Case*) (2). The making of the contract is not the criterion. The word "issue" is different from allotment. Allotment is not complete until acceptance. Allotment contemplates "Allottees" and also a title. Here the company had proceeded to the issue of shares before the respondents became employees.

Townley for the respondents—Section 4 must be read with the second paragraph. The use of the word "call" shows that consequent on issue the applicants are shareholders. "Issue" used with relation to shares does not mean resolution but means issue to some person or appropriation to a particular person who is an employee, or issue in such manner that an employee becomes a shareholder. The mischief struck at by the Act is an employee becoming a shareholder: *In re National Savings Bank Association* (*Hebb's Case*) (3). As to the meaning of "issue" see *Mowatt* v. *Castle Steel and Iron Works Co.* (4). [He also referred to *In re Imperial Rubber Co.* (*Bush's Case*) (5); *Baring* v. *Commissioner of*

(1) (1946) Q.S.R. 240.
(2) (1903) Q.S.R. 162.
(3) (1867) L.R. 4 Eq. 9.
(4) (1886) 34 Ch. D. 58.
(5) (1874) 9 Ch. 554.

Inland Revenue (1).] Issue connotes shares leaving the company and arriving at a destination. Proceeding means the whole process of issuing.

Bennett K.C., in reply.

The following judgments were delivered :—

LATHAM C.J. The question which arises in this case depends upon the construction of s. 4 of *The Industrial Conciliation and Arbitration Acts* 1932 *to* 1947, which makes provision in the following terms : " No company . . . shall proceed to the issue to any of its employees any shares in the company . . . until the consent of the court shall first be had and obtained." The court is the industrial court which is the court established under that Act. The matter arose on applications for rectification of the share register in two cases, those of James Balgarnie McNicoll and James Robert Hurst. The company concerned was the Central Piggery Co. Ltd. The facts in each case were that the persons who sought rectification of the register were promised employment in the company if they took shares. The company was subsequently formed and became their employer under a contract of service. They made application for shares before they were employees and a resolution was passed by the directors of the company which provided for the allotment of shares to them. Notification of the allotment did not reach the applicants until they had become employees of the company.

The question is whether on the day they became employees of the company, the company had proceeded to the issue of shares to them. It has been established for many years that an application for shares is an offer which may be accepted by allotment notified to the applicant. In the absence of a communication in the general sense of the law of contract (even though it may fail to reach the applicant) there is no acceptance of the offer and therefore no contract. In the present case the applicants did not become shareholders until notification of the allotment was received by them or perhaps placed in the post. The notification was posted after they had become employees. The question is whether the company had proceeded to the issue of any shares. Mr. Bennett argued that the phrase applied only to the first step of the process, which culminated in the issue of shares, and that if the first step was taken, as in the present case, before the relationship of employer and employee was established then there was no breach of the statute. There is a distinction between proceeding to issue shares and proceeding

(1) (1878) 1 Q.B. 78, at p. 90.

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towards the issue of shares. The section deals with the whole process from the initial step to the actual issue. The words used are " issue to any of its employees ". The issue of the shares is the act which ends the transaction and ends in the issue of the shares to a specific person, an employee. The act of issuing involves a set of proceedings which result in the employee becoming a shareholder. That is what the statute is designed to meet. I agree in substance with the reasons of *Philp* J.

RICH J. I agree. " The word ' issue ' is one which has not any very definite legal import with reference to shares," (*Spitzel* v. *The Chinese Corporation Ltd.* (1)). In the instant case the phrase to be construed is " proceed to the issue," a phrase which predicates a course of action ending in the issue. Shares are turned from nominal into effective capital upon being issued. And it may be resolved to issue shares which are perfected, signed, sealed and stamped. Yet if some of them are, for example, deposited by the company in escrow they do not become binding on the company until delivered and accepted. It is not the first step which counts but the final step. In my opinion no offence was committed by the company because the shares in question did not become binding on the company and the applicants before they entered into the company's service. They did not become members of the company until after they had become employees of the company, and then the prohibition of s. 4 of the Act operated on the transaction. I agree with the conclusion arrived at by *Philp* J.

DIXON J. I agree. Section 4 of *The Industrial Conciliation and Arbitration Acts* is a definition section but strangely enough includes a prohibition. The prohibition is the source of difficulty in this case. The use of the words " proceed to the issue " by the legislature make it clear that before the company takes any steps which result in the issue of shares it must apply to the industrial court and obtain the consent of that court. We are concerned in this case with the fact that after the process by which the allotment and issue of shares commenced, they became employees. About the beginning of September 1946, before the incorporation of the company, the promoter approached two persons, who wished to become shareholders. The company was registered on 25th September. On the 25th or 26th September McNicoll applied for shares in the company, and I gather, so did Hurst on 26th September. A meeting of directors was held on 28th September and a resolution passed that the shares applied for by McNicoll and Hurst be allotted. The shares so

(1) (1899) 80 L.T. 347.

allotted were entered in the share register of the company and share certificates signed on 5th October, 1946. An agreement for service was made by the company with McNicoll on 8th October and with Hurst on 7th October and both entered into the service of the company before the share certificates were forwarded to them by prepaid post. McNicoll commenced work on 14th October and his share certificate was posted to him on 16th October. Hurst commenced work about 7th October and his share certificate was not posted to him until 19th October.

The question is whether in these circumstances the provisions of s. 4 of *The Industrial Conciliation and Arbitration Acts* were transgressed. It was said on behalf of the company that it had proceeded to issue the shares before McNicoll and Hurst became employees of the company and that therefore the provisions of the section had not been transgressed. It thus becomes necessary to decide what the word " issue " means. It is a word which in other departments of the law has a definite meaning, but not in this. In *Levy* v. *Abercorris Slate and Slab Company* (1), *Chitty* J., in considering the nature of a debenture, said: " It must be 'issued,' but 'issued' is not a technical term, it is a mercantile term well understood; 'issue' here means the delivery over by the company to the person who has the charge." In *Koffyfontein Mines Ltd.* v. *Mosely* (2) the House of Lords affirmed the decision of the Court of Appeal *sub. nom. Mosely* v. *Koffyfontein Mines Ltd.* (3). *Fletcher Moulton* L.J. (4) deals with the creation of shares as distinct from the issue of shares. *Farwell* L.J. (5) points out that " the words 'creation,' 'issue' and 'allotment' are used with three different meanings familiar to business people as well as to lawyers." His Lordship says :—" There are three steps with regard to new capital; first it is created; till it is created the capital does not exist at all. When it is created it may remain unissued for years . . . When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of *Stirling* J. in *Spitzel* v. *Chinese Corporation* (6) he says: 'What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person.' "

Speaking generally the word " issue " used in relation to shares means, where an allotment has taken place, that the shareholder is put in control of the shares allotted. A step amounts to issuing shares if it involves the investing of the shareholder with complete

(1) (1887) 37 Ch. D. 260, at p. 264.
(2) (1911) A.C. 409.
(3) (1911) 1 Ch. 73.
(4) (1911) 1 Ch., at pp. 82-83.
(5) (1911) 1 Ch., at p. 84.
(6) (1899) 80 L.T. 347, at p. 351.

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control over the shares. *In re Ambrose Lake Tin and Copper Co. (Clarke's Case)* (1) makes that quite clear. *Cockburn* L.C.J. said:—(2) "inasmuch as the term 'issue' is used, it must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete." *Cotton* L.J. (3) speaks of the steps by which the allottee becomes complete master of the shares. *Thesiger* L.J. (4) says that:—"there is no magic to be attributed either to an allotment or to the issue of certificates, but in each case the Court must look at all the circumstances of the case, and see whether practically and substantially there has been an issue of shares at a time when there was not a contract registered."

In the present case it is clear that neither McNicoll nor Hurst had become parties to a binding contract before 5th October. There had been no communication to either of them accepting their offers, and there could be no contract until there was an acceptance. They were not masters of their shares and were in the position that they could repudiate. When they became the servants of the company they were not shareholders. The transaction was inchoate and did not become effective until there was a communication of the acceptance. On communication there was a culmination of the process and the shares were issued. They were in fact not issued until 16th October in the case of McNicoll and 19th October in the case of Hurst.

It is necessary to return to the word "proceed." It was argued that there was no violation of s. 4 of the statute as the company did not proceed to the issue of shares, but the section is not directed only at the initial step, but at the whole process. The company may not begin or bring the transaction to a conclusion without the consent of the court. If during the course of the proceedings the intending shareholder becomes an employee of the company, then the section is violated. I agree with *Philp* J. and think that the appeal should be dismissed.

Appeals dismissed with costs.

Solicitors for the appellant: *R. G. Smith & Smith.*
Solicitors for the respondents: *Cannan & Peterson.*

B. J. J.

(1) (1878) 8 Ch. D. 635.
(2) (1878) 8 Ch. D., at p. 638.
(3) (1878) 8 Ch. D., at p. 641.
(4) (1878) 8 Ch. D., at p. 642.