[HIGH COURT OF AUSTRALIA.]

THE FARMERS' MERCANTILE UNION AND CHAFF MILLS LIMITED . . } APPELLANT;
PLAINTIFF,

AND

COADE AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 9.

SYDNEY, *Nov.* 18.

Knox C.J., Higgins and Starke JJ.

Company—Shareholders—Contract—Application for share—Deposit paid—Acceptance of application—Delay—No notice of allotment—Applicants' names put on register—Notices of calls forwarded—Voluntary winding up—Liability to company as shareholders—Companies Act 1893 (*W.A.*) (56 *Vict. No.* 8), *secs.* 27, 101.

The respondents signed an application for one £25 share in the appellant company and, forwarding therewith £1 deposit, undertook to pay the balance by instalments with interest. Under the articles of association the sum of £10 ought to have been paid on allotment. No notice of allotment was sent to the respondents, although in fact it had been made and their names had been entered on the register of the company as the holders of one share. Nearly two and a half years after the date of the application, a notice of call in respect of such share was sent by the company to the respondents, as was also, after the lapse of a further two years, a notice of another call. Subsequently, a meeting of shareholders and creditors (of which the respondents were sent notice) having resolved to wind up the company voluntarily, the list of contributories was settled by the liquidator, including the respondents' names as holders of one share. A notice of a further call, made by the liquidator, was sent to the respondents. All the notices above referred to were received, and ignored, by the respondents. In an action by the company to recover the balance of application money, the calls and interest in respect of such share, the Local Court of Western Australia dismissed the claim on the ground that no notice of allotment had been sent, and that the respondents were entitled to assume that their application had lapsed. This decision was

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affirmed by the Full Court of Western Australia, but on a different ground—that the company had no power to enter into such a contract, and had allotted the share on conditions that were not included in the respondents' offer.

Held, by *Knox* C.J. and *Higgins* J. (*Starke* J. dissenting), as the proper inference to be drawn from the undisputed facts, that the respondents had agreed to become, and the company had accepted them as, members of the company; and that they were therefore liable to the company as shareholders.

In re Land Loan Mortgage and General Trust Co. of South Africa—Boyle's Case, (1885) 54 L.J. Ch., 550, followed; *Ramsgate Victoria Hotel Co.* v. *Montefiore*, (1866) L.R. 1 Ex., 109; 35 L.J. Ex., 90, distinguished.

Decision of the Supreme Court of Western Australia reversed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Local Court at Perth by the liquidator of the Farmers' Mercantile Union and Chaff Mills Ltd. against Edward James Coade and Robert Tindale (as members of the company) for the recovery of £31 16s. 7d., the balance of application money, calls and interest on one share in the company. In their application, which was dated 22nd August 1913, the defendants requested the managing director of the company to allot them one ordinary share with a limited liability of £25, subject to the memorandum and articles of association, and forwarded the sum of £1 and undertook to pay further instalments not exceeding £5 a year and also interest on any overdue payments. On 9th October 1913 one share was allotted to the defendants, and at some time not specified their names were entered on the register of the company as the holders of that share. No notice of allotment was given to them. After the lapse of a considerable time, notices of calls, a notice of a meeting of shareholders and creditors to wind up the company and a notice as to the date of settling the list of contributories were sent to the defendants, as was also a notice of a call made by the liquidator and demanding payment of the amount of such call and of the amount owing in respect of the previous calls. All these notices, which the defendants admitted having received, were ignored by them. The Magistrate of the Local Court gave judgment in favour of the defendants, and the Full Court of the Supreme Court dismissed the plaintiff's appeal from that judgment.

The company now, by special leave, appealed to the High Court from the decision of the Supreme Court.

Further material facts and the arguments sufficiently appear in the judgments hereunder.

Keenan K.C. (with him *Unmack*), for the appellant.

Keall (with him *Cooper*), for the respondents.

During the argument reference was made to *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1); *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (2); *Halsbury's Laws of England*, vol. v., p. 176, par. 292; *In re Land Loan Mortgage and General Trust Co. of South Africa—Boyle's Case* (3); *In re Bowron, Baily & Co.*; *Ex parte Baily* (4); *First National Reinsurance Co.* v. *Greenfield* (5); *Palmer's Company Law*, 10th ed., p. 103; *Oakes* v. *Turquand* (6); *Lindley on Companies*, 8th ed., p. 18; *In re Portuguese Consolidated Copper Mines Ltd.* (7); *In re Cachar Co.—Lawrence's Case* (8); *McIlwraith* v. *Dublin Trunk Connecting Railway Co.* (9); *Cababé on Estoppel* (1888), pp. 82-83, 86; *Anson on Contracts*, 15th ed., pp. 37, 49; *In re Imperial Mercantile Credit Association—Chapman and Barker's Case* (10); *Smith's Leading Cases*, 11th ed., vol. II., p. 848; *In re Florence Land and Public Works Co.—Nicol's Case* (11); *In re Universal Banking Corporation*; *Ex parte Gunn* (12).

Cur. adv. vult.

Nov. 18.

The following written judgments were delivered :—

KNOX C.J. On 22nd August 1913 the respondent Coade, as agent for the respondents, signed an application for one share of £25 in the appellant company. The application is in the following words :—"Application for shares in the Farmers' Mercantile Union

(1) (1866) L.R. 1 Ex., 109.
(2) (1865) 35 L.J. Ch., 88.
(3) (1885) 54 L.J. Ch., 550.
(4) (1868) L.R. 3 Ch., 592.
(5) (1921) 2 K.B., 260.
(6) (1867) L.R. 2 H.L., 325.
(7) (1890) 45 Ch. D., 16, at p. 35.
(8) (1867) L.R. 2 Ch., 412.
(9) (1871) L.R. 7 Ch., 134, at pp. 138-140.
(10) (1867) L.R. 3 Eq., 361, at p. 365.
(11) (1885) 29 Ch. D., 421.
(12) (1867) 36 L.J. Ch., 800; 37 L.J. Ch., 40.

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& Chaff Mills Limited.—Registered under the *Companies Act* 1893.—To the Managing Director.—Dear Sir,—I hereby request that you allot me one ordinary share with a limited liability of £25 each in the Union, of which I desire to become a member subject to memorandum and articles of association thereof. I hand you herewith the sum of £1, and I undertake to pay further instalments at call not exceeding £5 per share per year. I further agree to pay interest at the rate of 8 per cent. per annum on any overdue payments. Dated this 22nd day of August 1913. Name in full: Coade & Tindale. Address: 'Lambton Downs,' Wickepen. Usual signature: Coade & Tindale, pp. Edwd. J. Coade." At the date of this application art. 7 of the articles of association of the company provided that all shares applied for after 1st February 1913 should be paid for at such time and upon such terms and conditions as the directors might decide, but so that the amount paid up thereon should be at least equivalent to the amount paid up on the shares applied for before 1st February 1913. The amount then paid up on each share applied for before 1st October 1913 was £10. At a meeting of directors of the company held on 9th October 1913 one share was allotted to the respondents; and at some time not specified the names of the respondents were entered in the share register of the company as the holders of one share, the respondents being credited with the payment of £1 and debited with £5 payable on application and £5 payable on allotment. No notice of allotment was given to the respondents, but on 1st February 1916 notice was given to them of a call of £5. The respondents did nothing on receiving this notice. On 11th February 1918 notice was given to the respondents of a further call of £5, and again they did nothing. On 9th September 1919 notice of a meeting of shareholders and creditors, called by direction of the Chief Justice of Western Australia for the purpose of considering whether the company should be wound up voluntarily or under supervision, was given to the respondents. On 20th September this meeting was held, and it was resolved that the company should be wound up voluntarily. On 13th October 1919 notice was sent to the respondents that 15th December 1919 has been appointed as the date for settling the list of contributories, and that they would be included in such lists as

holders of one share unless sufficient cause should be shown to the contrary. On 24th March 1920 a notice that a call of £5 per share had been made by the liquidator, and demanding payment of that sum and the amount owing in respect of previous calls, was sent to the respondent. All these notices were ignored by the respondents.

In November 1920 the appellants instituted proceedings against the respondents to recover £31 16s. 7d. in respect of balance unpaid of application and allotment money, calls and interest. The claim was dismissed by the Magistrate of the Local Court on the ground that no notice of allotment was given within a reasonable time. The company having appealed to the Full Court of the Supreme Court, the appeal was dismissed—the Court being of opinion that it was not within the power of the company under the articles of association to accept the offer made by the respondents, and that the company did not accept the respondents' offer as made but allotted them a share on conditions not included in the offer, and which could not be held to have been communicated by the notice of call in February 1916. From this decision the company appealed, by special leave, to this Court.

Sec. 27 of the *Companies Act* 1893 (W.A.) provides that every person who has agreed to become a member of a company and whose name is entered on the register of members is to be deemed to be a member of the company; and by sec. 101 of the Act every present member of a company which is wound up is made liable as a contributory. The names of the respondents being on the register, the only question is whether they agreed to become members.

The first question that arises is whether the application indicates an intention on the part of the respondents to become shareholders only if and when a preliminary condition should have been performed, or to become shareholders *in præsenti* with a collateral agreement as to the terms of payment of the amount payable on the share. The answer to this question depends on the construction of the application. Looking at the terms of the application, it appears to me that the condition as to terms of payment is a condition subsequent and not a condition precedent to the allotment of the share. The application expressly states the desire of the

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respondents to become shareholders on the terms of the memorandum and articles, and the condition in question relates in its terms to acts to be done after the respondents had become shareholders. A breach of the collateral agreement might give rise to a cause of action in the respondents, but in my opinion could not operate to prevent them being members of the company.

The next question for decision is whether, under the circumstances set forth above, the respondents should be taken to have agreed to become members of the company. In my opinion the allotment of the share by the directors must be taken as showing the intention of the company to accept the offer made by the respondents on the conditions on which it was made. But intention to accept an offer is of no avail unless the acceptance be communicated, or at all events put in due course of communication, to the person making the offer ; and it is not suggested that there was any communication, actual or attempted, to the respondents of the fact that the company had accepted their offer until the notice of the first call was sent to them. When they received that notice it was competent for them either to have closed the transaction by saying " We accept the share and excuse the delay which has taken place," or to have repudiated the share and demanded repayment of the amount which had been paid, on the ground that there had been unreasonable delay in accepting their offer. They did neither ; in fact, they did nothing. When they received the second notice of call they again did nothing. On neither occasion were any steps taken by the company to enforce payment of the call. What inference ought to be drawn from the inaction of the respondents ? The only decision which is really in point is that in *Boyle's Case* (1) ; and, if that case was rightly decided, it seems to me to follow that the respondents cannot now successfully dispute their liability as shareholders. I know of no other case in which mere inaction on the part of the alleged shareholder has been held sufficient evidence of an agreement to become a member of the company in a case in which he had the right to repudiate when he received notice of allotment. In *Palmer's Company Precedents*, 11th ed., Part I., at p. 54, it is

(1) (1885) 54 L.J. Ch., 550.

said :—" An allottee who receives notice of allotment, after a reasonable time has expired, must exercise his right of repudiation promptly. If he does not he will be bound ; *à fortiori* if creditors' rights have intervened by a winding up." *Crawley's Case* (1) is cited in addition to *Boyle's Case* (2) as authority for the proposition. In my opinion the decision in *Crawley's Case* does not warrant the statement in support of which it is cited. In that case the applicant for shares, after receiving notice of allotment, had executed a transfer of some of the shares which had been allotted to him ; thus affirming his position as shareholder. In *Sewell's Case* (3) there is a dictum of Lord *Cairns* which seems to support Mr. *Palmer's* statement. His Lordship says :—" Whether he could have disclaimed the ownership of these twenty-three shares may be doubtful, but I assume in his favour that he might have had a case of that kind. It appears to me that not having done so, and being aware that he was held out to the public as the holder of twenty-three shares, it is too late for him months or years afterwards to enter into that question." Commenting on the decisions in *Sewell's Case* and *Lawrence's Case* (4), Mr. *Palmer*, in his *Company Law*, 11th ed., at pp. 126-127, says : " The result of this doctrine of holding out is that if a person's name is on the register with his consent, and he claims a right to have it removed on some ground or other, he must exercise the right promptly, otherwise he forfeits it." No assistance in determining this case can be derived from the decision in *Ramsgate Victoria Hotel Co.* v. *Montefiore* (5) ; for in that case the offer to take shares had been withdrawn before any notice of acceptance of the offer was given to the applicants. Nor do the decisions in cases in which the shareholder seeks to be relieved of his liability on the ground that his agreement to take shares was induced by misrepresentation afford any assistance ; for in all such cases the fact that there was a concluded agreement to take shares is admitted. The question which arises in the present case is whether an applicant for shares, to whom notice of acceptance is only given after a reasonable time for the acceptance of his offer has expired, is to be regarded as having

(1) (1869) L.R. 4 Ch., 322.
(2) (1885) L.J. Ch., 550.
(3) (1868) L.R. 3 Ch., 131, at p. 138.
(4) (1867) L.R. 2 Ch., 412.
(5) (1866) L.R. 1 Ex., 109 ; 35 L.J. Ex., 90.

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agreed to take the shares for which he applied if he does nothing in the direction of repudiating his liability to accept the shares before the liquidation of the company. In the present case the respondents must be taken to have known in the month of February 1916 that their application for a share had been accepted and that their names were upon the register of shareholders as the holders of one share. It is clear on the authorities that the agreement to become members need not be evidenced in writing, but may be verbal or may be inferred from the conduct of the parties.

In my opinion the proper inference to be drawn from the facts proved in the present case is that the names of the respondents were placed on the register and remained there with their consent; and this, on the authorities, is sufficient to establish that they agreed to become members of the company.

HIGGINS J. The facts, so far as relevant, may be briefly stated :— 22nd August 1913, Coade and Tindale signed an application for a £25 share at instance of company's agent, and paid £1—not £10 as provided by the articles; 25th August, application and £1 received by company; 9th October, allotment and entry of Coade and Tindale on register of shareholders—no notice of allotment sent; 1st February 1916, call of £5, notified to Coade and Tindale; 11th February 1918, call of £5, notified to Coade and Tindale; 20th September 1919, special resolution to wind up; 15th December 1919, list of contributories settled including the names of Coade and Tindale—after notice to Coade and Tindale; 7th February 1920, call of £5 by liquidator—notified to Coade and Tindale: Coade and Tindale did not pay the balance of £10, or the calls; did not apply for the return of the £1; and did not oppose the settling of their names on the list of contributories.

The Police Magistrate dismissed the claim for the balance of the £25 with interest, on the ground that no notice of allotment was sent to Coade and Tindale, and, as to the notification of call, that the delay from August 1913 to 1st February 1916 was unreasonable, entitling Coade and Tindale to assume that their application had lapsed. On appeal, the order of the Magistrate was affirmed by the Supreme Court on the ground that under art. 7 the company had

no power to enter into such a contract—that £10 had to be paid on all shares issued after 1st February 1913, and that the company had allotted to Coade and Tindale a share "on conditions that were not included in their offer."

The application for the share was on a printed form as supplied by the company's agent. [His Honor then read the document already set out, and continued:—] The application was duly signed for Coade and Tindale by Coade. Art. 7 is as follows: "All shares applied for and issued on or after the first day of February 1913 shall be paid for at such time and upon such terms and conditions as the directors may from time to time decide but so that the amount paid up thereon shall at least be equivalent to the amount paid up on the shares applied for prior to the first day of February 1913." Now, the amount paid up on the shares applied for before 1st February 1913 was £10; and under the article Coade and Tindale were liable to pay the full sum of £10 on allotment, but they paid only £1. But the payment of £10 is not by the articles made a condition precedent to the power to allot. To create a condition precedent there must be very clear words (*Harris' Case* (1)). The application for the share is expressly made "subject to the memorandum and articles"; and if the words of the application stopped there, it is clear that the applicants offered to take the share on the strict lines of the articles. Then the application must be looked at as a whole, and such a construction should be adopted, if the words used permit it, as is consistent with the article. The words "I hand you herewith the sum of £1" and the following words of the application do not in any way purport to qualify the preceding words, but merely add words of undertaking which are to receive such effect as they ought to receive in a Court of law. In substance, the application means: "We know we shall be liable on allotment to £9 more at once; but, as the company may not want the £9 immediately, we undertake to pay interest thereon until actual payment at 8 per cent., the same rate as is payable for any overdue call under art. 13." In my opinion, the words in question are rather a mere notification than a new stipulation; but, even if

(1) (1872) L.R. 7 Ch., 587.

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the undertaking is to be treated as a contract accepted by the company, it is a collateral contract, distinct from the contract to take the share subject to the articles; or, perhaps, a condition subsequent (see *Harris' Case* (1); *Elkington's Case* (2); *Bridger's Case* (3); *Fisher's Case* (4)). In neither case does it affect the offer to take the share *in præsenti*, subject to the obligations of the articles. Nor is there any indication that the company allotted the share to Coade and Tindale on conditions that were not included in the offer. The company did nothing that was inconsistent with any of the terms of the application. I am therefore unable to concur with the view of the Supreme Court.

But, apart from the form of the application, the question remains, are Coade and Tindale members in respect of the share, seeing that no notice of allotment was sent to them, and that the first notice of call sent to them was about 1st February 1916, nearly two and a half years after the application? Under sec. 27 of the Western Australian *Companies Act* 1893 (as under the British Companies Acts) every person who has *agreed* to become a member and whose name is entered on the register of members is to be deemed to be a member; and in liquidation he is a contributory. Coade and Tindale were entered on the register; but there is no agreement unless there be mutual assent to the same thing; and the assent must be communicated from one party to the other. A simple assent to the application by the company by allotment at the board and entry in the book, without an intimation of some kind to the applicants, does not constitute an agreement. The question turns on the ordinary principles applicable to contracts, as well expressed in Lord *Blackburn's* judgment in *Brogden* v. *Metropolitan Railway Co.* (5). Looking at the meagre facts before us, which I have stated, what is the proper inference? It is quite a natural thing for men to regard the filling in of the application brought to them by the company's agent as being in itself an acceptance of an offer made by the company; but under the articles the directors retain their discretion to accept or to reject an applicant. Here there was no formal letter

(1) (1872) L.R. 7 Ch., 587.
(2) (1867) L.R. 2 Ch., 511.
(3) (1870) L.R. 5 Ch., 305.
(4) (1885) 31 Ch. D., 120.
(5) (1877) L.R. 2 App. Cas., 666, at p. 692.

of acceptance sent to Coade and Tindale; but it is enough if the company intimate, by spoken words or by conduct, that it has accepted the application. Writing is not necessary for acceptance; and the question is: Did Coade and Tindale know that the company had accepted the application (*Levita's Case* (1); *Gunn's Case* (2); *Crawley's Case* (3); *Robinson's Case* (4); and see *Re Land Shipping Colliery Co.*; *Ex parte Harwood* (5); *Legal and General Life Assurance Co.* v. *Gill* (6))? In this case (I pass over for the present the long delay between the application and the first call), the applicants knew, from the fact of the notice of the call 1st February 1916, that the company was treating them as members. They had applied for the share "subject to the articles," and they must be treated as knowing the contents of the articles (*Oakes* v. *Turquand* (7)), and as knowing the law that unless they were entered on the register they could not be members or have a call made on them. If this notice of call had been sent to Coade and Tindale in September or October 1913, it would have clearly been a sufficient intimation that the company had accepted the application.

But there is still the point of the long delay in the intimation—August 1913 to February 1916. Apart from the right of one who makes an offer to withdraw it before acceptance, to withdraw it even if a time be fixed for acceptance (*Ritso's Case* (8); *Byrne* v. *Van Tienhoven* (9); *Bristol &c. Bread Co.* v. *Maggs* (10)), there are cases which tend to show that the applicants, on receiving the intimation of acceptance after a long interval, would have been entitled to reject the allotment and to demand the return of the £1; but the rejection has, according to the cases, to be prompt, for creditors and others dealing with the company may be misled. The position is put thus in *Palmer's Company Law*, 11th ed., p. 112:—"An allottee who receives notice of allotment, after a reasonable time has expired, must exercise his right of repudiation promptly. If he does not he will be bound; *à fortiori* if creditors' rights have

(1) (1867) L.R. 3 Ch., 36.
(2) (1867) L.R. 3 Ch., 40, at pp. 44-45.
(3) (1869) L.R. 4 Ch., 322.
(4) (1869) L.R. 4 Ch., 330.
(5) (1869) 20 L.T., 736.
(6) (1878) 4 V.L.R. (L.), 204.
(7) (1867) L.R. 2 H.L., 325.
(8) (1877) 4 Ch. D., 774.
(9) (1880) 49 L.J. C.P., 316.
(10) (1890) 44 Ch. D., 616.

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intervened by a winding up." The cases cited are *Boyle's Case* (1) and *Crawley's Case* (2); and see *Wheatcroft's Case* (3). In *Boyle's Case Kay* J. said (4):—"A man makes an application for shares. He never withdraws that application. After a considerable delay the allotment is made. He has a perfect right to say, 'Your delay has been so long that I will not have the shares.' But if he does not say that, if he says nothing, is there no contract? No case has held that. If he lies by and says nothing, of course that leaves him at liberty to accept the allotment if the company prospers, and to repudiate if it turns out unsuccessful. He cannot do that. He must do the one thing or the other. His non-withdrawal of his application leaves him under the necessity of saying, 'I will not accept the shares.' Otherwise, if he says nothing, his conduct may amount to condonation of the delay which has taken place." In that case the learned Judge examines fully the decision of Lord *Cairns* in *Baily's Case* (5), and points out that the repudiation there was very prompt: that, even assuming notice of allotment to have been sent on 3rd February 1886, the applicant had on 7th February written declining the shares and asking for a return of the deposit. *Kay* J. points out also that Lord *Cairns* had expressly relied on the fact that the company had not gone into liquidation, and that the issue was not as between creditors and the alleged shareholder. The same note of promptitude appears in *Ramsgate Victoria Hotel Co.* v. *Montefiore* (6)—a case which is better reported in the *Law Journal* (7), where it appears clearly that immediately on notification of call the applicant's solicitor wrote declining the shares and requesting the removal from the register. In the present case Coade and Tindale, knowing the claim for the call of 1st February 1916 and for the call of 11th February 1918, did nothing until liquidation began on 20th September 1919—more than three and a half years; and even then they did not oppose the settlement of the list. Such conduct would be treated by *Chelmsford* L.C. as "acquiescence" (see *Oakes* v. *Turquand* (8)); and it certainly tends to the inference

(1) (1885) 54 L.J. Ch., 550.
(2) (1869) L.R. 4 Ch., 322.
(3) (1873) 29 L.T., 324.
(4) (1885) 54 L.J. Ch., at p. 553.
(5) (1868) L.R. 3 Ch., 592.
(6) (1866) L.R. 1 Ex., 109.
(7) (1866) 35 L.J. Ex., 90.
(8) (1867) L.R. 2 H.L., at pp. 351-352.

that Coade & Tindale consented to waive any delay of the company in communicating its assent to the application.

The whole question is, ultimately, What is the proper inference to be drawn from the admitted facts? There is no question as to credibility of witnesses; and this Court, on appeal, is in as good a position to draw the inference as the Court below, and can make such an order as should have been made below. Did Coade & Tindale "agree" with the company to take the share? The answer to this question depends not on the written communication alone (for the agreement need not be in writing), but on the whole conduct of the parties. Provided that we find the essentials of agreement, such as mutual assent to the same terms for a valid consideration, an assent communicated from one party to the other, that is enough. There is a clear law as to what an agreement involves, but there is no law as to how an agreement to take shares is to be manufactured, and I rather think that there is too much tendency to reduce the mode of manufacture to a rigid formalism. But, assuming that an offer to take shares implies a condition, under all circumstances, that the offer must be accepted, and the acceptance communicated, within a reasonable time, it is obvious that very slight evidence would be sufficient to prove waiver of such a condition. Here, the respondents signed an offer without saying how long it was to be open; and when the belated notice of acceptance came, in the form of notice of call, and a notice of a second call two years after, they did nothing. They must be treated as knowing that their names were on the register, and that persons dealing with the company had access to the register. They did not even oppose the settlement of their names on the list of contributories. As a matter of common sense the inference is obvious. Probably, in considering the question was there a contract or not to take the share, there can be no better test than that of the converse case. If the company had been prosperous and if Coade and Tindale insisted on being treated as being shareholders, what defence could the company have, seeing that it had sent two notices of calls before liquidation, that it had not refunded the £1, and that Coade and Tindale had not asked for a refund from 1913 to the present time?

In my opinion, therefore, the appeal should be allowed, and

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the company is entitled to an order for payment of the £24 with interest from the dates at which the instalments and the calls were payable.

STARKE J. The respondents, Coade and Tindale, are entered in the register of members of the Farmers' Mercantile Union and Chaff Mills Ltd. as the joint holders of one £25 share. Proceedings were taken against the respondents by the company (the appellant) in the Local Court at Perth in Western Australia for £31 16s. 7d. for the balance of application money, calls and interest alleged to be due in respect of the share. Judgment was entered for the defendants in the Local Court, and this judgment was affirmed by the Supreme Court of Western Australia. The liability of the respondents depends upon whether they agreed to become members of the company. And as the facts were not in dispute and the decision of the Courts below affected a number of other shareholders in the company (which is now in liquidation) and was said to be a matter of general importance, this Court gave special leave to the company to appeal against the decision of the Supreme Court.

On 22nd August 1913 Coade, on behalf of the respondents, made the following application to the managing director of the company. [His Honor here read the document above set out, and continued :—] The sum of £1 accompanied the application. On 9th October 1913 the directors allotted 314 shares to various applicants, including one share to Coade and Tindale, and apparently at some time between that date and 8th April 1914 the respondents' names were entered on the register of members of the company. The "date of entry as member" is, according to the register, as of 25th August 1913. This date was treated as the date of application ; for the register contains further entries setting forth that a sum of £10 was payable in respect of the share on application, and that the due date for payment of the application money is 25th August 1913. The sum of £10 was, or ought to have been, paid up on shares applied for prior to 1st February 1913, and the entry in relation to the respondents' share was doubtless based upon the provisions of clause 7 of the articles of association, as follows: "All shares applied for and issued on or after the first day of

February 1913 shall be paid for at such time and upon such terms and conditions as the directors may from time to time decide but so that the amount paid up thereon shall at least be equivalent to the amount paid up on the shares applied for prior to the first day of February 1913." The sum of £1 forwarded with the application was credited as paid on the share on 25th August 1913, and also a further sum of fivepence for a dividend on 8th April 1914. No communication other than certain notices of calls hereinafter mentioned was made to the respondents of the allotment of the share to them or of the declaration and crediting of a dividend. And no claim was made for payment of the balance of the money stated in the register to be due upon application. Sometime in February 1916, however, notice of a call of £5 per share was given to the respondents. This notice is not before us; but we may assume, perhaps, that it was in the usual form setting forth that a call of £5 per share had been made in respect of the share held by the respondents in the company. The respondents ignored the notice, and the company took no steps to enforce the call. In February 1918 another call of £5 was made, and notice was again given to the respondents, who ignored it, and the company took no steps to enforce it. At this point it is desirable to consider the position of the respondents.

"There is no difference," as was said by *Chitty* J. in *Nicol's Case* (1), "between a contract to take shares and any other contract." The acceptance of an offer must be communicated. A formal notice of allotment is not essential if the applicant is made aware that this application for shares is accepted. Notice of a call may constitute a sufficient communication of the acceptance of an application to take shares (*cf. New Zealand Farmers' Dairy Union* v. *Birch* (2)). But, in whatever form the acceptance of an offer is communicated, that acceptance must be identical with the terms of the offer. In the present case the applicants applied for one £25 share, paid £1 and undertook to pay further instalments at call "not exceeding £5 per share per year." The application for shares is not made upon any condition precedent that calls should not exceed £5 per share per year. The stipulation is as to a matter arising after the

(1) (1883) 29 Ch. D., at p. 426. (2) (1897) 15 N.Z.L.R., 315.

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allotment of the share. Unless an allotment be made, calls cannot be made (see *Fisher's Case* (1)). But the stipulation is not a collateral or separate contract as in *Elkington's Case* (2). It is a term, condition or stipulation attached to the offer. Was this offer with this term, condition or stipulation attached ever accepted by the company ; and, if so, was that acceptance communicated to the respondents ? It is for the company to establish the agreement.

The only evidence is (1) that shares totalling 314 as per allotment sheets were allotted (the respondents' share is included in these sheets) ; (2) that the company made an entry on the register that £10, less £1 already paid, was due on 25th August 1913 ; (3) that notice of a first and second call each of £5 was given to the respondents (the terms of these notices are not even before the Court); (4) that the company did not attempt to enforce these calls nor the amount payable on application for the share ; (5) that the respondents ignored the notices of call and did not claim a refund of £1 forwarded with the application. To my mind the entry in the register as to the payment of the application money is quite inconsistent with the offer made by the respondents, *i.e.*, to pay £25 in respect of the share but not exceeding £5 per share per year. The entry is quite in accordance, however, with the duty of the directors under clause 7 of the articles to allot shares but so that the amount paid up thereon shall at least be equivalent to the amount paid up on the shares of the company applied for prior to 1st February 1913. The learned Judges of the Supreme Court were of opinion that it was beyond the powers of the company to accept the offer of the respondents. I do not agree to this view. Art. 4 provides that "the directors may allot and issue the shares of the company not already taken up in such manner as they shall deem advisable in the interest of the company and may from time to time decide that no further shares shall be issued until they otherwise decide and may repeat and alter such decision as often as they think fit." Art. 7, however, is a very good reason for concluding that the directors did not depart from the terms of that article unless the contrary intention plainly appears. The entry in the company's register, so far from indicating a contrary intention, supports in no uncertain

(1) (1885) 31 Ch. D., at p. 126. (2) (1867) L.R. 2 Ch., 511.

manner the conclusion that the directors acted in accordance with art. 7 and accepted applications for shares on that basis. Consequently, in my opinion, the company has not proved its acceptance of the respondents' offer to take a share in the company, and without this no agreement on the part of the respondents to take a share can exist.

The question is as to the formation of an agreement, and not what the remedy would be for a breach of the term or stipulation already mentioned if the agreement had been concluded. Apart from the view just expressed, the Magistrate of the Local Court entered judgment for the defendants on the ground that the respondents were entitled to assume that the matter, that is, I apprehend, the offer to take a share, had lapsed. This is a question of fact, and in my opinion the evidence justifies the finding of the Magistrate. The company did not communicate with the defendants for two and a half years after their offer was made. No one has disputed that; the delay was unreasonable, and, if the respondents had been sued for the moneys payable on application or for the calls at any time before the liquidation of the company, there is no doubt, in my opinion, that judgment must have been entered for the respondents. They were entitled to say that their offer should have been accepted within a reasonable time (*Crawley's Case* (1); *Ramsgate Victoria Hotel Co.* v. *Montefiore* (2); *In re Bowron, Baily & Co.*; *Ex parte Baily* (3)), and, failing such acceptance, that the offer was off altogether. It was quite unnecessary to give notice of the withdrawal of the offer for the purpose of relying upon this defence (*cf. Pearl Mill Co.* v. *Ivy Tannery Co.* (4)). The Magistrate was also entitled to consider the fact that the company never made the slightest effort to collect the application money or to sue for the calls. It strongly supports the conclusion, in my opinion, that the parties treated the offer as off or abandoned. The respondents did not ask for the return of their deposit but "let the 20s. go." This is as consistent with the view that the amount was so trifling that it was not worth pursuing as with the view that the respondents' offer to take a share was

(1) (1869) L.R. 4 Ch., 322.
(2) (1866) L.R. 1 Ex., 109.
(3) (1868) L.R. 3 Ch., 592.
(4) (1919) 1 K.B., 78.

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continuing. So it appears to me that at any time before liquidation the respondents would have been entitled to say that their names were not on the register of the company with their consent; in other words, that no agreement to take a share in the company had ever been concluded between them and the company. But the company did go into liquidation. On 4th September 1919 the company preferred a petition for winding up to the Supreme Court, and a provisional liquidator was appointed. The Court directed a meeting of shareholders and creditors to consider the question whether the company should be wound up voluntarily or under supervision or compulsorily. Notice of this meeting was given to the respondents, but they did not attend it. On 22nd September 1919 a resolution for the voluntary winding up of the company was carried and a liquidator appointed, and this was approved by the Court. On 15th December 1919 the liquidator gave notice of intention to settle the list of contributories. The respondents ignored the notice, and they were ultimately settled on the list of contributories in respect of the share standing in their names on the register. The liquidator then claimed from the respondents the amount sued for in the Local Court, which the respondents refused to pay. It is said that the respondents' silence or inaction in all the foregoing circumstances established their assent to the allotment, or that it was necessary in the circumstances for the respondents to repudiate the allotment. But, if I am right in thinking that the company never accepted the respondents' offer, none of these facts can constitute an agreement or afford evidence of an agreement. Creditors in a liquidation could not, in such a case, be in any better position than the company itself (*Black & Co.'s Case* (1)). Apart, however, from this view, the circumstances surrounding the liquidation can only be relied on in support of proof that an agreement to take a share had been concluded. The question whether such an agreement was concluded remains a question of fact. *Boyle's Case* (2) was much relied upon. A rule of law was deduced from this and other decisions which, it was said, is correctly stated in *Palmer's Company Precedents*, Part I., 11th ed., p. 54, as follows:— "It is an implied term in an application for shares that the offer

(1) (1872) L.R. 8 Ch., 254, at p. 259. (2) (1885) 54 L.J. Ch., 550.

must be accepted within a reasonable time, and, if it is not, the applicant is entitled to repudiate the allotment. . . . What is a reasonable time must depend on circumstances; but an allottee who receives notice of allotment, after a reasonable time has expired, must exercise his right of repudiation promptly. If he does not he will be bound; *à fortiori* if creditors' rights have intervened by a winding up." The question in *Boyle's Case* (1) was whether an agreement to take shares had been established. It was, in truth, a question of fact, and was in that case resolved in the affirmative. The facts in this case are very close to *Boyle's Case*, but I cannot say that the Magistrate was bound to arrive at the same conclusion. Indeed, I think a very reasonable and proper conclusion upon the whole matter was that the respondents' offer had lapsed, and that the conduct of both parties had treated it as at an end. The respondents could not, of course, both approbate and reprobate an agreement to take a share at one and the same time. But I cannot see that they did so. The evidence is quite as consistent with the view that the respondents regarded their names as wrongly upon the register and refused to have anything to do with the company—ignored it in all respects—as with the view that their silence and inaction indicated an assent to their names being upon the register and an agreement to take a share. This case, it must be remembered, is not a claim to rescind a concluded contract but a denial that a contract was ever concluded. In the former case rescission must be made promptly and before the rights of third parties intervene. In the latter case the contract must be established by satisfactory evidence or the party charged must be estopped from denying that a contract was concluded. The latter position can be dismissed from consideration in this case, for there is not the slightest evidence that the company or its creditors acted on the faith of the respondents' names being upon the share register to its or their prejudice.

Judgment was, in my opinion, properly entered for the respondents; and this appeal should be dismissed.

Appeal allowed. Judgments of Local Court and Supreme Court set aside. Judgment for appellant for £31 16*s.* 7*d.*, *with taxed*

(1) (1885) 54 L.J. Ch., 550.

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costs in Local Court and in Supreme Court. Respondents to repay to appellant the amount of any costs actually paid by appellant to respondents under the orders of Local Court and Supreme Court; appellant to pay to respondents their costs of the appeal to High Court pursuant to its undertaking. Set-off of costs ordered to be repaid.

Solicitors for the appellant, *Unmack & Unmack.*
Solicitors for the respondents, *Villeneuve Smith & Keall.*

[HIGH COURT OF AUSTRALIA.]

CAREY . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

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MELBOURNE, *Nov.* 29, 30; *Dec.* 5.

Higgins J.

Public Service (Commonwealth)—Officer—Appointment—Determination—Contract between Commonwealth and officer.

Subject to any statute to the contrary, the King has the right to terminate the appointment of his servant at pleasure and without cause, even though the appointment is for a term of years.

Dunn v. *The Queen*, (1896) 1 Q.B., 116, followed.

Gould v. *Stuart*, (1896) A.C., 575, distinguished.

The relation between the Crown and its servant involves a contract.

HEARING of action.

An action was brought in the High Court by Henry Ernest Carey against the Commonwealth to recover damages for the wrongful