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accumulations and accretions thereof, and to ascertain and report the amount of the said ancestral property with the said accumulations and accretions, which is now in the hands of the said first defendant, and to ascertain the amount of the plaintiff's one-third share therein, and also to ascertain the amount of the second defendant's one-third share therein. I order the first defendant to pay all the costs of the suit up till date; order as to subsequent costs reserved.

Attorneys for the plaintiff:—Messrs. *Ardesir, Hormasji*, and *Dinshá*.

Attorneys for the defendants:—Messrs. *Jefferson, Bhálshankar*, and *Dinshá*; and Messrs. *Thákurdás, Dharamsi*, and *Cámá*.

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## ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

*IN RE* THE MACHINE EXCHANGE COMPANY, LIMITED, IN LIQUIDATION.

1887.

*December* 12.

RUSTOMJI FRA'MJI WA'DIA'S CASE.
SHA'PURJI BYRA'MJI KATRUCK'S CASE.

*Company—Memorandum of Association—Effect of signing Memorandum—Withdrawal of signature before registration of memorandum—Indian Companies Act VI of* 1882, *sec.* 45.

A person who signs a memorandum of association for a number of shares becomes absolutely bound to take those shares. The statutory liability, the creation of the agreement commences with the signature of the memorandum and is not held in suspense until the memorandum is registered. There is no *locus pœnitentiæ* up to the date of registration, and no person who has signed the memorandum can, acting independently of the others, cancel his signature.

IN the winding up of the above company which had been registered on the 18th January, 1887, the Official Liquidator (Mr. T. Lidbetter) now brought in the list of contributories for settlement.

Rustomji Frámji Wádiá was entered on the list as the holder of forty shares and Shápurji Byrámji Katruck as the holder of thirty shares. Both the said contributories had subscribed the

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registered memorandum of association for the number of shares mentioned in the list.

Rustomji Frámji Wádiá, however, disputed his liability save as to five shares, on the ground that on the 17th January, 1887, the day before the company was registered, he wrote to the agent of the company, Mr. Drewett, withdrawing his subscription as to thirty-five of the forty shares for which he had subscribed his name. The following is a copy of the letter alleged to have been written :—

"*19, Church Gate Street,*
*Bombay, 17th January 1887.*

To

T. Drewett, Esq.,

Agent, Machine Exchange Company, Limited, Bombay.

Dear Sir,—Referring to the forty shares subscribed by me on the understanding that the amount of five shares will be paid by me and that of thirty-five shares will be paid by yourself on your own account, I have taken legal advice thereon, and I am advised that I shall be held responsible for thirty-five shares also in case you decline to pay the amount thereof. I therefore beg to return the guaranteed letter regarding those thirty-five shares to you, and request that you will enlist my name as subscriber for five shares only and no more. I take this opportunity to write this at once, inasmuch as the Company is not yet registered. If notwithstanding this timely intimation you choose to keep my name as a shareholder for forty shares, you will do so at your own risk and peril."

To that letter he alleged he received the following reply :—

"*27, Apollo Street, Fort,*
*Bombay, 17th January, 1887.*

Rustomji Frámji Wádiá, Esq.,

19, Church Gate Street.

Dear Sir,—I am directed by Mr. Drewett, the agent of the Machine Exchange Company, Limited, to acknowledge the receipt of your letter of the 17th instant, and in reply I am directed by him to inform you that, as desired by you, your name will be entered into the Register book of shareholders as holder of five

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shares only and the rest are cancelled. I am also directed by him to inform you that he was glad that before the company was registered you sent him a timely notice to enable him to enter your name for five shares only, otherwise he would have been obliged to pay to the company the amount for thirty-five shares. "Yours truly,

(Signed) RÁMCHANDRA SUNDARJI,
Accountant."

The agent of the company (Mr. Drewett) denied that he had ever received the above letter of the 17th January, 1887, from Rustomji Frámji Wádiá or had authorized the alleged reply to be written.

The second of the abovementioned contributories (Shápurji Byrámji Katruck) admitted that he had first subscribed for thirty shares, but alleged that on the day before the company was registered (*viz.* on the 17th January, 1887) he had withdrawn his name in respect of twenty of the said shares and allowed it to remain for ten shares only. The following was his letter to the agent of the company:—

T. DREWETT, Esq., "*17th January, 1887.*
Machine Exchange Company.

DEAR SIR,—Unavoidable circumstances compel me to withdraw the number of shares (30) that I have put down on Saturday last in the proposed Machine Exchange Company, Limited.

I have no objection to your keeping ten shares in my name for the present. Yours faithfully,

(Signed) SHÁPURJI BYRÁMJI KATRAK."

The agent of the company swore that he did not receive that letter until the 18th January two hours after the company had been registered.

*Farran* for the Official Liquidator:—As to Rustomji Frámji Wádiá's case, we deny that there was any letter of withdrawal written or received. As to Shápurji's case we say there was no withdrawal before registration. After the memorandum of association is signed there can be no withdrawal; Indian Com-

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panies' Act (VI of 1882), sec. 45; *Buckley on Companies* (Ed. 4th), p. 41; *Drummond's Case*[1]. The contract was complete either with the proposed company or with all the other signatories of the memorandum of association; *The Guzerát Spinning and Weaving Company* v. *Girdharlál Dalpatram*[2]; *Duke's Case*[3].

*Lang* for Shápurji Byramji Katruk:—My client is liable only for ten shares. The signature does not bind until the memorandum of association is registered. There is no company until registration; *Duke's Case*[4]. If there is any contract it is a contract with the other signatories who may possibly be entitled to bring a suit against us. But we contend that before registration the memorandum of association is a mere agreement from which we can withdraw without the consent of the other subscribers, *The Guzerát Spinning and Weaving Company* v. *Girdharlál Dulputram*[5].

*19th December 1887*: SCOTT, J.—These claims are brought by the liquidator of the Machine Exchange Company to place Shápurji Byrámji Katruk and Rustomji Frámji Wádiá on the list of the contributories of that company, and as regards the shares for which they subscribed the memorandum of association. The company was registered on 18th January, 1887, and wound up this year.

This case involves two questions: one of law and one of fact. I propose to deal with the point of law first. The signatories of the memorandum of association are held liable under the Indian Companies' Act (section 45) which is as follows:—"They shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and," the Act goes on to say, "shall be entered as members on the register of members when the company has been registered." This section is taken *verbatim* from the English Act, and a long series of English decisions has decided that when a person signs a memorandum of association for any number of shares, he becomes absolutely bound to take those shares. All these cases, which are collected in *Drummond's Case*,[5] show conclusively that

(1) L. R., 4 Ch. App., 772.
(2) I. L. R., 5 Bom., 425.
(3) L. R., 1 Ch. Div., 620.
(4) I. L. R., 5 Bom., 425.
(5) 4 Ch. App. 772.

it is the act of signing the memorandum which establishes the liability for the shares subscribed for. Buckley, p. 42, says, "The subscriber is liable by virtue of the contract, which, under this section, arises immediately upon his signature."

But it was argued that the liability was inchoate as long as the company was not registered. Let us examine whether that reading is in accordance with the letter and spirit of the section. It must be remembered that these company Acts were framed with a view to protect the public against the dangers of the limited liability system. The spirit of this particular provision is expounded by Lord Romilly in *Drummond's Case*(1). "The persons signing the memorandum are required by the Legislature to do so as an earnest that there are certain persons personally liable to pay money to the company." They are, in short, guarantors of the *bonâ fides* of the company. As Giffard, L.J., says:—"A man who signs the memorandum of association agrees to become a shareholder, and as long as there are shares that can be allotted to him he must fulfil that obligation." Mr. Lang argued there was a *locus penitentiæ* up to registration. He cited in support of his argument the dictum of Sir George Jessel in *Duke's Case*(2). But that dictum, read with its context, tells against the contention, not for it. "Before registration," says the learned judge, "the contract contained in the memorandum may be varied, or rescinded or modified." But he goes on to explain the kind of variation that is permissible. "The Act," he says, "does make the memorandum irrevocable as regards the amount of capital subscribed for, but it does not say that if the memorandum contains any other particulars they may not be varied." There must, of course, be some ascertained person or body of persons with whom a contract is made before it can be binding and complete. The only body of persons in existence who could be parties to this contract before registration are the seven or more subscribers, and the effect of the section is that no one person acting independently of the others can cancel his signature. Whether all by agreement could do so is a question it is not necessary to consider, as such a step would destroy the proposed company altogether, and the question of the protection

(1) 4 Ch. App. 772 at p. 776 *note*. (2) L. R. 1 Ch. Div., 620 at p. 623.

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of the public, which is the object of the Act, would not arise. The literal meaning of the section is clear. The words "shall be deemed to have agreed to become members," read with the succeeding words, "on registration shall be entered on the register of members," bear only, to my mind, one construction. The statutory liability, the creation of an agreement, commences with signature of the memorandum, and is not held in suspense until registration. The context of the Act shows clearly that the subscribers of the memorandum are a body with a status before the registration. Sections 6—8 and 41 all show this. By section 6, which lays down the mode of forming a company, any seven persons may form a company by (*a*) subscribing their names to a memorandum of association, and (*b*) by otherwise complying with the requisitions of the Act. The subscription is the first step. By section 8 it is laid down that each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes. By section 11 it is provided that, when the memorandum of association is registered, it shall bind, not only the subscribers who are specially dealt with by section 45, but also the company and its members, as if each member had subscribed his name thereto. This implies an antecedent liability, so far as concerns the subscribers. Section 41 deals with registration of the memorandum of association; and declares its subscribers, together with the other members of the company, to be, after registration, a body corporate. Finally, section 45 creates two distinct obligations; one which has force from the moment of subscription, the other which comes into force on registration. The subscribers of the memorandum, it says, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, that is the first obligation imposed upon them by the Act. They have *agreed* to become members. The use of the word "agreed" shows that the Legislature implied a promise which means in law a proposal and an acceptance and the creation of a *vinculum juris*. The provision was made for the protection of creditors and shareholders, and the promiser cannot repudiate the liability it creates. An agreement is clearly intended, and it must be presumed, as I said before, that the Legislature, with the

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intention of protecting the public, bound the subscribers one to another, and closed the door of withdrawal upon them after subscription.

Now if this is a fair statement of the law, it seems to me impossible to argue that the section leaves a *locus pœnitentiæ* to the subscribers up to the time of registration. But I need not go so far for the purposes of this case. Even if there were a *locus pœnitentiæ*, and if the case the parties here set up were true, they would be no better off. They asked that their names should be removed, but they did not remove them. They notified their wish to Drewett, who could have no implied authority from the proposed company, and certainly had no actual authority from the other signatories to remove the names or reduce the amounts. The defendants treated him as agent for their withdrawal; he failed to carry out their orders; the names and amounts remained and were registered, and from that time forth the liability of the defendants is beyond a doubt. They had merely a right to sue Drewett for negligence, and their only way of getting rid of their liability was to take the shares and then make a valid transfer. "Upon the authorities, it is clear," says Mr. Justice Kay (*In re Argyle Coal and Cannel Company Limited, Ex-parte Watson*[1]) "that a person who had signed the memorandum could not get rid of his liability as a shareholder except by means of a legal transfer of his particular shares." I may add that as regards Shapurji's liability the case is still stronger against him. He was a director, and as a director he was bound to put himself on the list for the number of shares for which he had subscribed. (*Hall's Case* [2].)

In my view of the case it is hardly necessary to deal with the question of fact, but as Judge of First instance it may be useful to do so. As to Shapurji Byramji Katruck's case. No doubt he signed the memorandum of association for thirty shares. But he says he wrote withdrawing his signature as regards twenty of the shares on the 17th January last, the day before the registration of the company. In point of fact there was no withdrawal of twenty shares before registration. Mr. Drewett, to whom the

(1) Times' Reports, Vol. II, p. 213 and see 54 L. T. N. S. p. 233.
(2) L. R. 5 Ch. 707.

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letter was addressed, the managing director, says he did not receive the letter till after he had registered the company. Mr. Woolley, the head clerk, fully confirms the statement. I may add that Mr. Woolley gave his evidence in both cases well and fairly, and Mr. Drewett, though he hesitated, did not impress me unfavourably. Mr. Shapurji says he saw Mr. Drewett on the evening of the 17th, when the withdrawal of the 20 shares was discussed. Mr. Drewett admits such a conversation, but says it was a few days after, not the day before the registration. Mr. Shapurji says he despatched his letter at ten in the morning,but his peon says it was not delivered till 1 p.m., although the peon further says it was an urgent letter for immediate delivery. I think, on the whole, the balance of evidence is in favour of Mr. Drewett's story that he never received the letter till next day.

As to Rustumji Frámji Wadia's case. Mr. Wadia says he also wrote on the 17th to withdraw his name as regards thirty-five shares, having subscribed for forty, and he swears that the same day he received a letter from a clerk who signed on behalf of Drewett accepting the withdrawal. Mr. Drewett repudiates the letter of withdrawal altogether. It is important to bear in mind, whilst weighing the evidence, that Mr. Wadia never raised this defence until he made his affidavit in reply to the liquidator's demand that he should be placed on the list of contributories for forty shares. On Drewett's side, Woolley denies that he saw any such letter of withdrawal. He says the clerk in question had no authority to sign and send out any letter accepting a withdrawal of shares. As a matter of fact there is no letter signed by the clerk in the letter book between January and April, although there are many before and after and after these dates. Woolley further says, and this is most important, that a notice of call was sent to Mr. Wadia in March. Mr. Wadia denies that he received the notice. But the letter delivery book puts it beyond doubt that such a notice was sent out by a messenger in the ordinary course of business; and it is also clear that a similar notice was not only sent, but received by Mr. Shapurji, who occupied the same floor and did the same business as Wadia. It is also clear that no letter came from Wadia repudiating his liability on the call on forty shares. Rámchandra, the clerk, says

that he spoke to Mr. Drewett about the call notice to Wadia, but he did not say it was actually kept back, and the letter delivery book shows that the call notice was, as a matter of fact, sent out to all seven signatories of the memorandum, including Wadia. It must be remembered that Rámchandra, was formerly in Wadia's service, and is so now. As regards the letter of repudiation of the 17th January, it is supported by the evidence of the solicitor's clerk, who says that, after giving some legal advice, he drafted such a letter for Wadia; and another witness says he made a fair copy of the draft. But the date is not clearly assigned to this drafting and copying, nor is there distinct proof that the letter was sent. On the whole, I do not think the receipt of the letter of repudiation and the sending of the reply have been proved. I may add that this decision does not impugn the truthfulness of the evidence of the solicitor's clerk. All I decide is that the letter of repudiation and letter of acquiescence were not respectively sent and received as alleged.

My judgment may be thus summed up:—(*a*) Shapoorji and Wadia were subscribers of the memorandum of association for twenty-five and forty shares respectively. (*b*) They did not notify their withdrawal from twenty and thirty-five shares respectively before registration. (*c*) If they did notify the withdrawal, it was to an agent who had not authority to cancel the subscription. (*d*) Even if they had cancelled the subscription, they would have been still liable as the Act binds them from the moment of subscription. (*e*) At any rate, it is settled law that they are liable as subscribers of the memorandum whose names appear there at the date of registration. They must therefore both be placed on the list of contributories for the amount they subscribed for.

*Attorneys for the liquidator*:—Messrs. *Chalk, Walker*, and *Smetham*.

*Attorneys for the contributories*:—Messrs. *Little, Smith, Frere*, and *Nicholson*.