*Privy Council Appeal No. 20 of 1924.*

**Tom Boevey Barrett** - - - - - - - *Appellant*

*v.*

**African Products, Limited** - - - - - - - *Respondents*

**Same** - - - - - - - - - *Appellant*

*v.*

**Same** - - - - - - - - - *Respondents*

**In the matter of African Products, Limited (in liquidation)**

*(Consolidated Appeals)*

FROM

**THE SUPREME COURT OF THE GOLD COAST COLONY.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY, 1928.

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*Present at the Hearing:*

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD BUCKMASTER.]

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Five judgments are challenged by these consolidated appeals.

1. A judgment of the Divisional Court of the Eastern Province of the Gold Coast Colony, dated the 1st April, 1922, ordering the appellant to pay £10,062 10*s.* to a company known as the African Products, Limited, who are respondents to the main appeal.

2. A judgment of the Full Court dated the 3rd November, 1923, dismissing the appellant's appeal from (1);

3. A judgment of the Divisional Court of the 27th January, 1925, refusing to set aside the dissolution of the said Company which had been ordered on the 2nd June, 1922.

4. A judgment of the 30th January, 1925, refusing leave to appeal against the order of the 27th January, 1925;

5. A decision of the Full Court refusing leave to appeal from (4).

As leave to appeal has been given against all these judgments, it follows that the judgments of the 1st April, 1922, and the 27th January, 1925, are the only ones material, for the others are consequential upon these. The foundation of the whole dispute lies in the facts underlying the judgment of 1st April, 1922, and they need careful examination.

In July, 1918, the appellant, who was at that time in the Gold Coast, promoted and caused to be incorporated the company known as African Products, Limited, with a capital of £100,000 divided into 100,000 £1 shares; the date of incorporation was the 17th July, 1918, and its business was that of general merchants. The laws applicable to this company are certain ordinances of the Gold Coast Colony, which in the material respects reproduce the English Companies Act of 1862. It appears that limited companies were not commonly known in the Colony—this one was only the 23rd that had been registered—and it may well be that subsequent events were affected by this ignorance. The seven signatories of the memorandum were the appellant and six of his nominees, who each signed for one share.

The company began business in August, 1918, and immediately entered into successful contracts for the purchase and resale of cocoa, which produced a profit after paying all expenses for the period ending 31st December, 1918, when the accounts were made up, of a sum alleged to be £20,998. None of the share capital had by this date been paid up and no shares had been issued or allotted, but the accounts represented a sum of £1,007 as having been received under the following head "Shares a/c £1,007" and there is a corresponding entry on the other side under this head, "We to debit Bank w. cheq. per T. B. Barrett, 1007" No such sum had been paid, but on 4th January, 1919, the appellant did in fact pay this sum to the company and the private cash book of the company contains the two following relevant entries:

"1918, Cash received for shares, £1,007."

and on the other side:

"1919, Cash to general account, £1,007."

On the 14th February, 1919, a general meeting of the company was held and it was resolved that a dividend of 15 per cent. be paid for the period ending 31st December, 1918, and a bonus at the rate of £10 per share. Pursuant to this resolution £10,000 was paid to the appellant as a bonus on his 1,000 shares and £62 11s. 3d. as a dividend for the five months. A large number of further shares were subsequently issued with which it is unnecessary to deal and the company having fallen from prosperity into difficulties a winding-up order was made by the Court on the 13th November, 1920.

The appellant was subsequently prosecuted for having obtained the £10,010 by fraudulently and falsely representing himself as a shareholder for 1,000 shares and was sentenced to three years' hard labour. (The £10,010 was a mistake for £10,000. There was no doubt that he was entitled to the £10 as holder of

one share.) Into the merits of that conviction their Lordships cannot enquire, for the purposes of this appeal the fact is not material and it would not have been alluded to by them but for circumstances hereinafter stated.

On the 29th April, 1921, proceedings were taken by the company against the appellant to recover the said sum of £10,062 10s. on the ground that such money was received for the use of the company, it having been paid on the false statement that the appellant held 1,000 shares and judgment was given for the amount claimed on 1st April, 1922, less an admitted counter-claim.

The main grounds of objection to this judgment are two. (1) That the evidence given could not support the claim, and (2) that if it were sufficient the appellant's evidence in answer was not heard and that disabilities due to his confinement and his ill-health prevented him from presenting his case.

As to (1): Their Lordships think the evidence given was complete. Mr. Glencross, the Official Liquidator, who had access to all the books and documents, and was one of the original shareholders, stated that all the shares held up to June, 1919, by the appellant was only one; as no shares were issued or allotted until long after February, 1919, and no record was to be found in the books or papers, other than those mentioned, relating to any application for shares, this statement threw upon the appellant the onus of disproving it. It follows that, in the absence of such proof, the payment made to the appellant in respect of his 1,000 shares was on the interpretation of the facts most favourable to himself, a payment made under a mistake of fact common to himself and the company, viz.:— that he was a shareholder for 1,000 shares, when in truth he was not, and money so paid can be recovered as money had and received to the use of the company and this was the form of the action. It is urged, however, that the case was improperly supported by evidence of the appellant's conviction and indeed on the application for leave to appeal to this Board it appears to have been thought that the evidence in the criminal charge itself was used. This is a profound mistake. In the evidence in chief of Mr. Glencross, the only reference to this conviction was a statement in the following terms: "When I was in Accra, I remember certain proceedings were taken against Barrett in respect of the company and it resulted in Barrett's conviction." Such a statement was both unsubstantial and irrelevant, but it certainly cannot be used for suggesting an unfair attempt to use the conviction as evidence since even the subject of the conviction is not mentioned.

Finally, however, on further examination by the Court, the following question and answer were made:

"*Q.*—Regarding this claim of the African Products, Ltd.: how did Captain Barrett obtain the amount? *A.*—He obtained it by stating he held *a* 1,000 *shares in* 1918. That statement was not correct. He obtained the money by false statement. He has been prosecuted on that charge and convicted."

Their Lordships regard as unfortunate the fact that this statement should have been made ; it was not evidence and was not due to any question put by the Court, but it is unreasonable to think that it influenced a judgment which was completely supported by the evidence to which attention has been called. It may be noted that it seems to have been disregarded even by counsel for the appellant since he made no protest about it, for protest was useless if the statement had no value or force. The first ground on which this judgment is attacked cannot therefore be maintained.

The second is a matter requiring anxious consideration ; no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence, but it is not clear to the Board that this is what has occurred. Leave to defend had been granted on an affidavit of the defendant sworn 29th July, 1921. An application to take his evidence on commission heard on 21st June, 1921, was adjourned and was renewed on the hearing and then refused upon the ground that he had in fact put in no defence. The explanation of this omission is not satisfactory ; it is said that he was ill, but there is no evidence whatever, original or supplementary, that he was so continuously and seriously ill for nine months as to render this an excuse, while again, the allegation that he had no access to the books of the company could not have prevented him from stating what his defence was. Further, all the books and papers of the company have now been seen and their contents are of no assistance to the appellant. Finally, their Lordships have heard all that can be said by way of defence and there is nothing to support the appellant's case. On the hearing before the Divisional Court, his counsel did not cross-examine on the statement that he was not a shareholder except by suggesting that the 1,000 shares were bonus shares given to him. Of this no evidence at all was offered. Even allowing for any carelessness and irregularity in the proceedings of the company, assuming that transactions took place which were not recorded and that the appellant was in sole control, he could not have given himself bonus shares and no one of the other members of the company was ever called or their evidence requested to show such an arrangement was made. The same comments apply to the wholly different case put forward on this appeal. Before this Board the appellant's counsel argued that there had been an application for shares made and accepted in 1918 and payment made in January, 1919, but, owing to the carelessness with which business was done, this was not formally recorded. Assuming there was carelessness and disregarding the inaccurate entry suggesting payment in 1918, there still remains the question of with whom and when and how was this agreement to take shares made, why is there no one who can say a word about it, and why the appellant in his affidavit for leave to defend says no more than that he held and still holds the shares, a statement certainly untrue for, on his present argument, he

did not hold the shares in February, 1919, but had merely agreed to take them.

For these reasons their Lordships are of opinion that the judgment of 1st April, 1922, cannot be successfully impeached. In these circumstances the appellant is a debtor to the company for £4,665 13s. 5d., and it is only as a shareholder that he can claim to set aside the order for dissolution; on any view it is impossible he can have any pecuniary interest in this result. He asserts that the order for dissolution being *ex parte* there is no fixed limit of time for an appeal against it, whereas the Chief Justice held the appeal was out of time under O. 52 r. 2. It is quite unnecessary to consider this branch of the controversy, for the decision of the Chief Justice on 27th January, 1925, was a decision on the merits and he held, and rightly as their Lordships think, that on its merits the application could not be maintained since in its support it would be necessary both to allege and prove fraud, and neither had been done. Their Lordships think it unnecessary to add to the judgment of the Chief Justice on this point; in their view he rightly apprehended and determined the questions of law relevant to the application and little more need be said. The application was clearly based on alleged irregularities, but it was necessary to prove more than irregularities. By whatever procedure it is sought to overthrow a judgment on the ground of fraud, the fraud must be definitely alleged and its particulars unequivocally stated. This was not done.

As a last extremity counsel for the appellant asked that fraud might be alleged here for the first time and that although the respondents did not appear. Although no such application could be granted, their Lordships think it right to add that having examined the materials on which such a charge was put forward, they are of opinion that they afford no warrant in its support.

For these reasons their Lordships think these appeals (including the petition for leave to adduce further evidence), should be dismissed and they will humbly advise His Majesty accordingly.

**In the Privy Council.**

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TOM BOEVEY BARRETT

*v.*

AFRICAN PRODUCTS, LIMITED.

SAME

*v.*

SAME.

IN THE MATTER OF AFRICAN PRODUCTS, LIMITED (IN LIQUIDATION).

(*Consolidated Appeals.*)

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DELIVERED BY LORD BUCKMASTER.

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