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*Mar. 3.
*June 20.

THE MAGOG TEXTILE AND PRINT COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

EVANS J. PRICE (DEFENDANT)..... RESPONDENT.

THE MAGOG TEXTILE AND PRINT CO. (PLAINTIFF)..... } APPELLANT;

AND

RICHARD R. DOBELL (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Joint stock company—31 Vic. ch. 25 (P.Q.)—Action for calls—Subscriber before incorporation—Allotment—Non-liability.

P. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 Vic. ch. 25 (P.Q.), but his name did not appear in the notice applying for letters patent, nor as one of the original corporators in the letters patent incorporating the company. The directors never allotted shares to P. and he never subsequently acknowledged any liability to the company. In an action brought by the company against P., for $10,000 alleged to be due by him on 100 shares in the capital stock of the company it was

Held,—Affirming the judgment of the court below, that P. was not liable for calls on stock.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the decision of the Superior Court.

The following facts and judgments deal only with the case of Price, the appeals being argued together and one decision given for both.

The incorporation of the plaintiff was under and by virtue of the Joint Stock Companies Incorporation Act (P.Q.) ch. 25 of 31 Vic., as amended by 44-45 Vic. ch. 11.

By the Joint Stock Companies General Clauses Act

*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 12 Q. L. R. 200.

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of the Province of Quebec, 31 Vic. ch. 24, it is enacted:

16. If the special act makes no other definite provision, the stock of the company shall be allotted, when and as the directors, by by-law or otherwise, may ordain.

23. Sub-sec. 2. The names, alphabetically arranged of all persons who are or have been shareholders (shall be recorded by the proper officer).

And by the Joint Stock Companies Incorporation Act of the Province of Quebec, 31 Vic. ch. 25:—

The Lieutenant Governor in council may, by letters patent under the great seal, grant a charter to any number of persons not less than five, who shall petition therefor, constituting such persons and others who may become shareholders in the company thereby created, a body corporate and politic, for any of the following purposes:—

3. The applicants for such letters patent must give at least one month's previous notice in the *Quebec Official Gazette*, of their intention to apply for the same, stating therein;

6. The names in full and the address and calling of each of the applicants, with special mention of the names of not less than three nor more than nine of their number, who are to be the first directors of the company, and the major part of whom must be resident in Canada and subjects of Her Majesty by birth or naturalization.

Section 4. At any time not more than one month after the last publication of such notice, the applicants may petition the Lieutenant Governor through the Secretary of the Province for the issue of such letters patent;

2. Such petition must recite the facts set forth in the notice and must further state the amount of stock taken by each applicant, (and by all other persons therein named, by 41 Vic. cap. 22) and also the amount paid in upon the stock of each applicant, and the manner in which the same has been paid in, and is held for the company.

7. Notice of the granting of the letters patent, shall be forthwith given by the Secretary of the province, in the *Quebec Official Gazette*, in the form of the schedule A appended to this act; and thereupon, from the date of the letters patent, the persons therein named and their successors, shall be a body corporate and politic by the name mentioned therein.

25. If the letters patent make no other definite provision, the stock of the company, so far as the same is not allotted thereby, shall be allotted when and as the directors, by by-law or otherwise may ordain.

32. Sub-sec. 2. The names, alphabetically arranged, of all persons who are, or have been shareholders.

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SCHEDULE A.

Public notice is hereby given, that under the Joint Stock Companies Incorporation Act, letters patent have been issued under the great seal of the Province of Quebec, bearing date of the day of incorporating (here state names, address and calling, of each corporator named in the letters patent,) for the purpose of (here state undertaking of the company, as set forth in the letters patent,) by the name of (here state name of the company, as in the letters patent,) with a total capital stock of dollars divided into shares of

Dated at the office of the Secretary of the Province of Quebec, this day of

A. B.
Secretary.

The suit was brought to recover from the defendant a sum of ten thousand dollars, the amount due for one hundred shares of $100 each in the capital stock of the company.

The defence raised several objections.

1. That the defendant had subscribed the shares only upon the fraudulent representations which had been made to him by the promoters of the company;

2. That the defendant had never subscribed to the capital stock of the company (plaintiff), but had merely undertaken to subscribe for shares to the amount of $10,000.00 in a company to be incorporated at a future period and that the company, which was the plaintiff in the suit, was not the company to which he had so undertaken to subscribe;

3. That the name of the defendant did not appear amongst those of the persons who asked for the incorporation, and that no share was ever allotted by the plaintiff to the defendant.

At the trial the following facts were proved:—

In September, 1882, the respondent, at the solicitation of one William Hobbs, signed a subscription list, headed as follows:—

The undersigned hereby respectively agree to take the number of shares of one hundred dollars each in the capital stock of a company to be formed under the name of the Magog Textile and

Print Company, hereinbelow set after our names respectively, and to pay the amount of all calls thereon, at the office of the company in Montreal, at such times as the provisional directors or the directors of the company when incorporated may direct.

In January following, Mr. Hobbs and eight others, of whom the respondent is not one, gave notice in the Quebec Official Gazette that they were about to apply for letters patent, under the seal of the province, constituting them and such other persons as might become associated with them, a corporation under the name of the Magog Textile and Print Company. And on the 13th April, 1883, letters patent issued under the Quebec Act 31 Vic. ch. 25, as amended by 44-45 Vic. ch. 11, "constituting the applicants and such other persons as "may become shareholders, a body corporate" under the proposed name.

No allotment of stock was ever made, but subsequently, calls were made for the full amount due on the company's stock.

The judgment of the Superior Court, while refusing to admit the allegation of fraud which was not proved, maintained the plea on the other points.

The judgment is in the following words :—

Considering that the plaintiffs have not proved the material allegations of their declaration, and more particularly that the defendant is a shareholder in the Magog Textile and Print Company, liable to pay calls ;

Considering that the defendant did not petition for letters patent of incorporation for said Company, such as issued for the same under the provisions of the Act 31 Vic. chap. 25, and hence is not constituted thereby a shareholder, and that he has not, since said incorporation, subscribed for any stock in the said company ;

Considering that the defendant hath proved that, although he offered to take one hundred shares in the stock of said company before the same was incorporated or had applied for incorporation, and that after incorporation the plaintiffs wholly failed to make any allotment of shares to him, the defendant as provided by said act, and that, in the absence of such allotment, the defendant was not and is not a shareholder in said company as frequently held by the courts of this country ;

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Considering that the said patent of incorporation of the said plaintiffs constitutes the petitioners for said patent by name and all persons that may become shareholders thereafter, a body corporate and politic under the said name of the "Magog Textile and Print Company," and that the defendant is neither a petitioner nor a subscriber to the stock of the same since the issue of said patent.

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On the appeal which was taken from this judgment to the Queen's Bench, appeal side, it was confirmed for the reasons given by the Superior Court.

Bossé Q.C. for the appellants. The contract entered into by the subscription for stock was absolutely complete and binding upon the defendants from the moment it was made, but supposing that not to be the case, but that the subscription was only to take shares at a future time from a company to be incorporated, that was also a complete contract.

The shares were allotted and several calls were made. The statute requires 10 per cent. to be paid before incorporation; if the 10 per cent. was improperly called the defendants are still liable for the 90 per cent. called afterwards.

The plea of the defendants alleging fraud has been set aside by both courts below.

Beïque follows. Under the Joint Stock Company's Act no company can be formed without the petition of, at least, five persons, nor until a certain amount of stock has been subscribed. 31 Vic. ch. 25; 41 Vic. ch. 22.

Thring on Joint Stock Companies (1); Buckley (2); Abbott's National Dig. (3), title "Subscription." These acts and authorities show that the contract contained in the memorandum of shares is binding on the signer when the company is formed. See also Angell & Ames on Corporations (4).

I distinguish the cases of *Union Navigation Co.* v.

(1) P. 27.
(2) Pp. 41 2.
(3) Vol. 1 p. 801.
(4) 11 ed. p. 555 par. 523.

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Couillard (1) and *Rascony* v. *Union Navigation Co.* (2).

The defendants are estopped from claiming want of notice of calls. Bigelow on Estoppel (3).

Irvine Q.C. for the respondents.

Under the Quebec act relating to incorporation of companies, it cannot be said that these defendants are incorporators of this company. The company was to consist of the petitioners and others who should afterwards become shareholders, and the policy of the statute clearly was, that all who wanted to become shareholders were to sign the petition.

Then there is the act 44–45 Vic. ch. 11.

The proposition of Price was never accepted so as to make it binding.

In no way was the offer of the defendants accepted, except by asking them to pay.

No notice of allotment was given.

With regard to the question of fraud. We can still urge that question before this court, and we claim that there has been legal fraud which will relieve subscribers. The promoters purchased the stock of the old company, The Magog Manufacturing Co., and got Shanly to make a valuation of the property which was subsequently bought in. The prospectus was never seen by the respondents, nor was it issued until the subscriptions were made. The owner of the property received from the company his price and made 100 per cent. by it. Respondents were never notified of this position.

Another ground of fraud is that Hobbs subscribed for 100 shares on the understanding that he was not to be liable therefor, but was to be indemified by the other shareholders. This was in order to realize the necessary amount of stock to obtain letters patent.

(1) 7 R. L. 215; 21 L. C. J. 71. (2) 24 L. C. J. 133.
(3) P. 468.

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Stuart follows citing *Couillard* v. *Union Navigation Co.* (1); Lewin on Trusts (2); *Pellott's* Case (3).

Sir W. J. RITCHIE C.J.—The plaintiffs in their declaration allege "that said hundred shares were duly allotted, assigned and made over to the defendant and entered as such on the books of the company, and the defendant then and there became and was and still is a shareholder in the said company of said hundred shares of the denomination of one hundred dollars $100 each, amounting in all to the sum of $10,000," when in fact no allotment of stock was ever made, defendant's name was never even entered in any book of the company until November or December, 1883, in fact until that time no stock had ever existed, though three calls had been made, and as to this entry in the books it does not appear to have been the act of the company. The account Money gives of it is this:—

I am a clerk in the office of Grant, the witness just examined in this cause.

I opened under his instructions the stock ledger book exhibited by him a moment ago, to wit, the stock ledger of the company plaintiff. It was opened about the end of eighteen hundred and eighty-three (1883).

Q. Before the expiration of the year eighteen hundred and eighty-three (1883)? A. Yes.

Q. In what month? A. I could not say the month exactly, it was either in November or December.

Q. When were these entries made that have reference to the defendant? A. The entries in reference to the defendant in the said stock ledger were made at the same time as the other entries were made, to wit, sometime about November or December eighteen hundred and eighty-three (1883).

It does not appear that after the organization of the company the subscriptions made previous to the incorporation were adopted by the company or that they were entered as stockholders upon the stock ledger of the company, or that the company in any way recog-

(1) 21 L. C. J. 71. (2) P. 171.
(3) 2 Ch. App. 52.

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nized the individual subscriptions as valid subscriptions, nor were they recognized and ratified by these subscribers by payments thereon or in any other manner. If after the corporation was formed it had accepted the subscription and recognized the defendant as a stockholder and he had recognized himself as a stockholder and ratified and confirmed his subscription, the case would have been very different, but the fact is he never took any part in the application or steps for the incorporation of the company or the issuing of the letters patent, or in any way assented to the organization of the company nor to any acts done under it, and it is even curious to notice in view of the present claim what Mr. Hobbs in his examination says :—

I am the originator of the company plaintiff.

I was president of the company for some time and I am now vice-president of the company.

I know the defendant and I witnessed his signature to the stock of the company for ten thousand dollars ($10,000). His signature to the said amount of stock was signed in my presence in the stock subscription book which is now shown to me having been exhibited by the witness already examined, Grant.

Q. Will you say about what date that subscription was made? A. He signed the subscription in September of eighteen hundred and eighty-two (1882) for ten thousand dollars ($10,000).

Q. At the time the defendant subscribed as mentioned above, or at any other time since, was there any company in process of organization or in question by the name of the Magog Textile and Print Company? A. No, there was not.

The general principle of law applicable to contracts must be recognised and adopted and must govern the present case and I can discover nothing whatever that created the relation of stockholder and company as between defendant and the corporation to enable the plaintiff to say that defendant was a shareholder in the company, and that there was a contract by and between him as shareholder and the company to pay the calls as now claimed.

The letters patent do not incorporate those who may

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have associated themselves together by subscribing the memo. with a view to the formation of a company but constituted those only specifically named in the letters patent as the corporators and not such as may have subscribed the memo. but only those named and such other persons who may become shareholders in said company (of whom the defendant is not one) a body corporate and politic by the name of "The Magog Textile and Print Company," nor can I discover any obligation on the part of the company to give the defendant the stock should he have required it.

The question is not before us as to how far there was a contract by the individuals who signed the memo. as between themselves, or if there was, how it could be enforced by this corporation. It is very obvious the breach of such an agreement and the damages incident thereto are very different from a claim for calls by the company on defendant as a shareholder, in which capacity alone he can be liable and called on to pay calls. Morawitz on Corporations (1) says

> It is important to distinguish between the contract of membership actually existing between the shareholders or members of a company and a contract to become a shareholder at a future time.
>
> A contract to become a shareholder or to subscribe for shares in a company at a future day does not give the contracting party the status of shareholder until after the contract has been fully executed by taking the shares or actually subscribing upon the books, and upon a failure to perform the contract the corporation would be entitled to recover only the damages suffered, that is, the difference between the amount which the defendant agreed to pay, or contribute on account of the shares and the value of an equal number of shares in the market."

The single question therefore in this case, in my opinion, is; Was defendant at the time the calls were made a shareholder in the Magog Textile Print Company and as such liable to the payment of calls? And as to this the statute in express and unequivocal terms

(1) Sec. 46.

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declares who are corporators—they are the petitioners and those who may from time to time after the organization is perfected become holders of the capital stock of the company. It is from such stockholders the directors can require payment of calls. The case would have been very different if the words and authority of the act and the wording of the letters patent issued under it had provided as was done in the act in question in *Kidwelly Canal Co.* v. *Raby* (1) where the words of the act were "those who have subscribed or shall hereafter subscribe" and in describing the persons liable to calls as "every person or persons who hath or have already subscribed," "or shall hereafter subscribe" under which it was held that a party who had subscribed and had done no act to discharge himself from the effects of his subscription by reason of his being within the terms of the act, would have been entitled to a share of the profits of the undertaking as a proprietor and must therefore be considered liable as such to losses.

I entirely agree with the courts below that defendant was not a shareholder in the Magog Textile and Print Company and consequently not liable to pay to the company the calls sued for in this action. This conclusion is in accord with the unanimous decision of the Court of Queen's Bench in Quebec, 1878, in the case of *Joseph Rascony* v. *La Compagnie de Navigation Union*, (2) in which it was adjudged :—

"Que les actionnaires incorporées par lettres patentes sont ceux qui y sont nommées ainsi que ceux qui souscrivent après l'émission des lettres patentes. Toute personne non mentionée aux lettres patentes qui aurait souscrit des parts ou actions avant telle émission ne peut être considerée comme actionnaire."

I am therefore of opinion that the appeal should be dismissed with costs.

STRONG J. was of opinion the judgment of the Court of Appeal should be affirmed, adhering to the reasons

(1) 2 Price 93. (2) 24 L. C. J. 133.

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there given.

FOURNIER J.—En septembre 1887, l'intimé signa, à la réquisition de William Hobbs, une liste de souscription ainsi conçue :—

The undersigned hereby respectively agree to take the number of shares of one hundred dollars each in the capital stock of a company to be formed under the name of the Magog Textile and Print Company, hereinbelow set after our names respectively, and to pay the amount of all calls thereon, at the office of the company in Montreal, at such times as the provisional directors or the directors of the company when incorporated may direct.

Plus tard Hobbs, conjointement avec huit autres signataires, donna avis dans la *Gazette Officielle* de Québec, d'une demande de lettres patentes sous le grand sceau de la province, les incorporant avec telles autres personnes qui se joindraient à eux sous le nom de "Magog Textile and Print Company." Cet avis n'avait pas été signé par l'intimé et son nom ne fut pas non plus inséré dans les lettres patentes émises, le 13 avril 1883, en vertu des statuts de Québec, comme l'un de ceux qui devaient former la dite corporation.

Il n'y eut pas de répartition du stock souscrit, mais des demandes de versements furent faites pour le total souscrit, et à défaut de paiement la présente action fut portée contre l'intimé sur le principe que la souscription l'avait rendu responsable. Il nia sa qualité d'actionnaire, et la Cour Supérieure par son jugement, confirmé en appel par la cour du Banc de la Reine, renvoya cette action.

L'intimé n'est pas un membre originaire de cette corporation, car il n'est pas un de ceux qui ont donné avis de la demande de lettres patentes, ni un des signataires de la pétition à cet effet. Il n'y a que ces personnes qui d'après l'amendement de 44-45 Vict., ch. 11, qui peuvent avoir cette qualité. La ss. 2, de la sec. 1ère le dit clairement :

The Lieutenant Governor may grant a charter to any member or person who shall petition therefor. Such charter shall constitute

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the petitioners, and all others who may become shareholders, in the company thereby created, a body politic and corporate.

En vertu de cet acte et des lettres patentes les pétitionnaires seuls, sont membres originaires de la corporation. Ils peuvent, il est vrai, après la constitution de la corporation, en vertu des mots du statut —

Petitioners and all others who may become shareholders,

s'adjoindre des actionnaires. Mais l'appelante ne prétend nullement que depuis l'émission des lettres patentes, l'intimé ait fait aucune démarche pour devenir actionnaire. S'il a fait preuve par sa signature en septembre 1882, d'une intention de le devenir, la compagnie en donnant avis et en pétitionnant sans son concours pour l'organisation de la corporation a aussi de son côté fait preuve qu'elle n'avait pas accepté cette souscription. Pour le faire considérer comme actionnaire, il faudrait prouver contre l'intimé un engagement depuis l'émission des lettres patentes Il n'y en a point. Aucune action n'ayant été prise par l'appelante pour donner effet à la signature de septembre 1882, elle ne peut être considerée que comme démontrant une intention de devenir actionnaire qui est demeurée à l'état de projet ou que la compagnie a refusée.

Les autorités suivantes confirment la légalité des prétentions de l'intimé:

The Union Navigation Company v. *Couillard* (1); *Rascony* v. *The Union Navigation Company* (2); *Arless* v. *The Belmont Manufacturing Co.* (3); *Nasmith* v. *Manning* (4).

Etant d'opinion que l'intimé n'est aucunement responsable, je ne crois pas devoir m'occuper des circonstances dans lesquelles la signature de l'intimé a été obtenue. L'appel doit être renvoyé avec dépens.

HENRY J.—I concur in the reasons given for dismissing the appeal. No one, not a member of a company, can be made answerable for calls. The appellant

(1) 21 L. C. J. p. 71.
(2) 24 L. C. J. 133.
(3) M. L. R. 1 Q. B. 346.
(4) 5 Can. S. C. R. 440.

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in this case, before the company was started, joined in the undertaking, but he afterwards declined to sign the petition for incorporation and never afterwards had any connection with the company. He was, therefore, not a member of it and no board of directors could impose any liability by making calls on him.

TASCHEREAU J.—The respondent's action was limited exclusively to signing the subscription list in September, 1882, and the question in the case is: What legal responsibility if any, does that act involve?

It is plain that the respondent is not an original corporator. He was not one of those who gave notice of applying for letters patent, who petitioned for them or were incorporated by them when obtained. The statute on this point is clear. "The Lieutenant-Gov-"ernor may grant a charter to any number of persons "who shall petition therefor. Such charter shall con-"stitute the petitioners, and all others who may become "shareholders, in the company thereby created, a body "politic and corporate" (44-45 Vic. ch. 11, s. 1) and both under this act and the letters patent the nine petitioners were the sole original corporators. Now while it is not pretended that the respondent became a shareholder subsequent to the charter, it is supposed that the subscription in some way or other created a liability, without allotment of shares as distinctly required by section 25 of 31 Vic. ch. 25, and without acceptance of them after allotment in any form.

But there is no ground for that contention. The respondent did not contract with any one to take these shares, and furthermore, the very words of the subscription list he signed constitute nothing but an undertaking to take shares later, that is when the company would be formed, which he never did, nor was ever asked to do. The cases of *The Union Navigation Company* v. *Couillard* (1); *Rascony* v. *The Union*

(1) 21 L. C. J. 71.

Navigation Company (1); *Arless* v. *The Belmont Manufacturing Company* (2); appear to me in point and against the appellant's contentions.

This appeal should, in my opinion, be dismissed.

GWYNNE J. concurred with Mr. Justice Taschereau.

Appeal dismissed with costs.

Solicitor for appellants: *Joseph G. Bossé.*

Solicitors for respondent Price: *Caron, Pentland & Stuart.*

Solicitors for respondent Dobell: *W. & A. H. Cook.*