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*March 6, 7.
*March 20.

ROBERT THOMAS HOPPER (PLAINTIFF)..... } APPELLANT;

AND

DANIEL HOCTOR AND FRANK W. MAY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Partnership—Syndicate for promotion of joint stock company—Trust agreement—Construction of contract—Administration by majority of partners—Lapse of time limit—Specific performance.

A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom plaintiff was one, furnishing capital, and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants and patent rights were assigned to them, in trust for the syndicate, and the lands and patent rights were to be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the proprietary rights and moneys contributed by the syndicate members, in proportion as follows, 37½ per cent to the defendants who held the property, 32½ per cent to the owners of the patent rights, the other three members to receive each 10 per cent of the total stock. A time limit was fixed within which the company was to be formed and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void and all parties were to be in the same position as if the agreement had never been made. The tenth clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed but, within the time limited, the plaintiff, and the other two members, holding together 30 per

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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cent interest in the syndicate, caused a company to be incorporated for the development and exploitation of the enterprise and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages.

Held, that the tenth clause of the agreement controlled the administration of the affairs of the syndicate and that, as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners and the plaintiff could not enforce specific performance.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

The following statement of the case made by Mr. Justice Hall, in his dissenting judgment, in the court below, was referred to by Mr. Justice Blanchet, in delivering the judgment now appealed from, as a sufficient statement of the facts in controversy. Mr. Justice Hall said:—

"The appellant's action was brought upon an agreement *sous seing privé* of date April 30th, 1900, to which the plaintiff and the defend ants and also Francis C. Crean, Gerald J. Crean, James Dobson and Charles Webb were parties. The appellant, Hopper, acquired, and now represents the interests of Dobson and Webb. By this agreement a syndicate was formed for acquiring and developing certain lots in the Township of Duval, on the east side of the River Natashquan, in the Province of Quebec, containing deposits of iron sand. The Messrs. Crean were proprietors of letters patent for a magnetic separator by which the iron was to be separated from the sand.

"The preamble of this agreement of April 30th, 1900, sets forth that the respondents Hoctor and May have

acquired the lots in question, that the appellant Hopper, and Dobson and Webb, have provided certain large sums of money, which have been expended in exploring for minerals upon the said properties, and in the examination of other properties in the Gulf of St. Lawrence and Straits of Belle Isle, and in the construction of the electrical separator, etc., and that Gerald J. Crean, the owner of the patent for the separator, has transferred it to the respondent Hoctor, in trust for the syndicate formed by the agreement. Clause one of the agreement then continues as follows:

'1. The parties of the first part hereby agree to transfer and convey in fee, to the syndicate composed of the parties hereto, or to the corporation to be formed or other nominee of such syndicate, the lots of land hereinabove described, free and clear of all encumbrance, without any consideration other than the share and interest of said parties in the said syndicate allotted to them as hereinafter set forth, together with all rights in the above mentioned patents transferred by the said Gerald J. Crean to Daniel Hoctor, in trust for the said syndicate, and ratified by Francis C. Crean, tutor of the said Gerald J. Crean.'

"The second and third clauses of the agreement apportion the interests of the several parties in the following terms —

'2. Having taken fully into consideration all the sums of money expended by the parties hereto up to April 9, 1900, the parties agree now to readjust the interests in the said syndicate as of that date, neither party having any claim upon the other for past expenses for any reason whatever up to that date.

'3. The share and interest of the said parties in the present syndicate, and in its assets and rights, or in any corporation to be formed to take over its assets and rights, shall be as follows:

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'Daniel Hoctor, eighteen and three-quarters per cent.

'Frank W. May, eighteen and three-quarters per cent.

'Francis C. Crean and Gerald J. Crean, thirty-two and a half per cent.

'Robert Thomas Hopper, ten per cent.

'James Dobson, ten per cent.

'Charles J. Webb, ten per cent.'

"Crean agrees to transfer to the syndicate, its successors or assigns, all further patents which he may obtain in Canada for inventions of a similar nature, and it is agreed that the members of the syndicate shall contribute whatever money is needed in the enterprise in proportion to their several interests.

"The seventh and eighth clauses, which are important, are in these words.—

'7. It is agreed that on or before September 1, 1901, a corporation or joint stock company shall be formed by the syndicate for the development and exploration of the above mentioned properties, or any others that may be acquired under this agreement and the shares in the said corporation or joint stock company shall be allotted to the members in the syndicate in the proportion of their several interests as herein expressed.

'8. If the joint stock company shall not be formed before the first day of September, one thousand nine hundred and one, or, if after September 1, 1900, a majority in value notify the other members of the syndicate that they require the formation of such company, and for the space of two months after the receipt of such notice the minority members refuse to unite in forming such company, then the whole of the lands above mentioned shall revert to and become the property of the said Daniel Hoctor and Frank W. May; and any transfers made by the said Gerald J. Crean of

his own patent or of any improvements thereof shall be void and of no effect, and all the parties shall be in the same position as if this contract had never been made, without any right to recover any moneys expended in connection with the syndicate after April 9th, 1900, except that any properties acquired by purchase by moneys contributed by members of the syndicate shall be sold and the net proceeds divided among those who contributed in the proportions of their contributions.'

"The tenth clause, which was relied upon at the argument by the respondents, declares that 'all matters affecting anything more than mere detail of administration shall first be approved by all of the syndicate, and in case of difference of opinion three-fourths in value shall control.'

"The parties did not agree upon the formation of a joint stock company. On the 11th May, 1901, by the ministry of Dunton, notary, the appellant, Hopper, specially called upon the respondents to unite in the formation of a joint stock company in accordance with the terms of the agreement, and notifying them that in default of their declaring their willingness to unite in forming such joint stock company the appellant would with others proceed to obtain letters patent of incorporation under the name of 'The Natashquan Iron Company.' The respondents would not unite with the appellant, who associated with himself certain others, and on the 13th August obtained incorporation under the name of 'The Natashquan Iron Company, and on the 28th August, by Derome, notary, appellant and the Natashquan Iron Company notified the respondents of the incorporation of the company and of their willingness to transfer shares in the company in pursuance of the agreement of April 30th, declaring the willingness of the appellant and the Natashquan Iron

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Company to enter into any agreement which would give effect to the syndicate contract of April 30th, 1900, calling upon the respondents, in the event of their refusing to accept shares in the said company, to forthwith transfer and convey the lands and mining lots and patent invention to the syndicate, in which the appellant, Hopper, owned thirty per cent, he having acquired the interests of Dobson and Webb. The respondents replied to the notarial notification of appellant that they were willing to unite in any company which could insure practical results and success, but made no suggestions as to what such a company should be.

"The appellant brought suit, asking that the respondents be ordered to transfer to the Natashquan Iron Company the lots in question, together with the patent for the separator, and alternatively that the judgment should go to transfer the property and patent to the syndicate in accordance with the terms of the agreement, and failing either of these remedies, that the respondents be condemned to pay the sum of $20,000 damages.

"The consideration set forth in the deed by which the respondents acquired the property, appears to be $5,570, though the respondent, May, swears that further sums were paid. The appellant and those whose interests he represents, contributed in cash $4,983 for which they acquired an interest of thirty per cent in the syndicate."

Hoctor and May contested this demand upon three grounds:—(1) that Hopper was not legally seized of the rights of Dobson and Webb, as he had not given proper notice of his purchase of their interests to the respondents; (2) that the Creans had not been called in the case, and that the conclusions of the action could not be granted so long as they were not made

parties to it; and (3) that the Creans and themselves had always been willing to form a company, but had been unable to agree with Hopper as to the amount of its capital; that they had made repeated attempts to dispose of their rights, but had been unsuccessful, without any fault of theirs and sometimes through the opposition of Hopper; that the latter could not form a company without their consent, as they represented 70 per cent of its assets, and that they could not be forced to transfer their properties and rights in the patent to the company organized by him in contravention to the express terms of their agreement which says that the company shall be formed by the syndicate, and that, therefore, his demand in damages was unfounded in fact and in law.

The Superior Court dismissed the appellant's action upon two grounds; (1) because Francis C. Crean and Gerald J. Crean were not made defendants; and (2) because the time limit for the formation of a joint stock company had expired, and the intentions of the other members of the syndicate as to the formation of such a company were frustrated by the plaintiff, and the property had reverted to the respondents.

The majority of the judges in the court below did not adjudicate formally upon the two first objections, but came to the conclusion that the action must fail upon the third plea.

R. C. Smith K.C. for the appellant. It was not necessary to make the Creans parties to this action. They had not any possession or control in any manner of either the lands or the letters patent in question, nor is any condemnation sought against them. In any case, the pleadings did not raise this question in a definite manner. The plaintiff was thus taken by surprise at the hearing and, if necessary, ought then to have been offered an opportunity of joining them in

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the suit, and it was no ground for dismissing the action. Art. 177 C. P. Q.; *Currie* v. *Currie* (1), per Bossé J.; *Chalmers* v. *North-West Shoe Co.* (2); *Jacob* v. *Klein* (3); *Montchamp* v. *Montchamp* (4); *Stewart* v. *Molsons Bank* (5); *McNally* v. *Préfontaine* (6).

The respondents were bound to transfer to the syndicate without any demand whatsoever. They were *en demeure* by the very terms of the first clause. If, however, any demand were necessary, any member of the syndicate could make such demand. This demand was regularly made as evidenced *inter alia* by two notarial protests. The respondents answered by declaring that they "never refused to join in forming a reasonable company which can assure practical results and success," and "that they held the properties mentioned in the deed of agreement of the 29th April, 1900, subject to the terms of said agreement and for the purposes thereof." It is erroneous to say that the appellant had virtually a mere option which expired on a certain date, in default of his having exercised it; that he had under the agreement merely a conditional right which never became effective because the formation of the joint stock company was never fulfilled. Clause 2 of the agreement specifically declares that the re-adjustment of the interests of the parties in the said syndicate is based upon a full consideration of all the sums of money expended by the parties up to 9th April, 1900. Clause 3 then declares what the share and interest of the said parties in the present syndicate and in its assets and rights or in any corporation to be formed to take over its assets and rights shall be. Whatever moneys were expended on either side were fully taken into consideration and the parties received a share in the syndicate "and in its assets" in propor-

(1) Q. R. 3 Q. B. 552.
(2) 4 R. L. (N.S.) 397; 1 Q. P. R. 250.
(3) 3 Q. P. R. 519.
(4) M. L. R. 3 S. C. 98.
(5) M. L. R. 6 S. C. 324.
(6) Q. R. 11 K. B. 370.

tion to what they had actually expended. There was the disbursement of a substantial consideration, and the acquisition of a substantial share or interest in certain assets. The appellant did not acquire an inchoate or an eventual right, but an actual interest in an actual property. The respondents propose to confiscate this interest and despoil the appellant of all his rights in the property and assets of the syndicate upon the ground that a joint stock company was not formed before the 1st of September, 1901, an obligation which rested equally upon each member of the syndicate. The respondents were the obstructionists and held back to let the time expire and oust the appellant of his interest in the property.

The Natashquan Iron Company was formed within the time provided for by the agreement, and if the property and patent be transferred to the company upon respondents being transferred 70 per cent of the stock, they can have nothing to complain of. The directors of the company were duly authorized to allot such stock to the respondents to comply with the terms of the agreement, by resolution of the 27th August, 1901. The other 30 per cent will properly belong to Hopper and his associates as representing his 30 per cent in the syndicate. The respondents will have 70 per cent of the capital, therefore, it is immaterial whether the capital is one thousand dollars or one million dollars.

Francis McLennan K.C. and *DeLorimier K.C.* for the respondents. As to the transfer of the properties to the syndicate, the respondents contend that they were, with the consent of the majority, holding the properties as the nominees of the syndicate for the purposes of the syndicate, and the appellant cannot alone, and against all the other members of the syndicate, take objection to this. It is clear that Hopper

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cannot obtain the transfer of the properties to the company organized by himself, because the company contemplated was to be formed by all the parties to the contract of 30th May, 1900, and no outsiders could be brought into this company against their will. The majority would not confide the management and the disposal of interests valued by them at $1,000,000.00 to a board not selected by themselves. The respondents had 70 per cent of the total assets to be transferred to the company contemplated by them, and although the directors of the company formed by Hopper were authorized to offer and did offer to buy the property for cash, provided they would take in payment an equivalent amount of the stock of the company, it appears from the record that 50 per cent of the stock of the company formed by Hopper was already transferred to these outsiders, and the offer was consequently irregular and insufficient, as it does not appear that the stock already disposed of had been re-transferred to the company. The respondents could not be expected to part with their interests without receiving a full and valuable consideration for the same, as stipulated in the agreement.

The subsidiary demand that a transfer be ordered to be made to the syndicate must also be rejected. The object of the agreements was to give the syndicate a temporary control only of the properties and rights described until the company was formed, the formation of this company being the principal object in contemplation, as the only means by which the mines could be worked or disposed of with advantage. For that reason, if the company was not formed within the stipulated time, the whole scheme was to be abandoned and the parties restored to their original position, and Hopper and his two associates would lose not only their advances but also all their interests

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as well. Under these circumstances a transfer to the original members of the syndicate for one day, as the time expired the day after, would have been absolutely useless, because this syndicate could not have transferred to a company which never existed and had not the remotest chance of existing in the future.

The real difficulty and sole obstacle to the formation of the company projected was a difference of opinion between Hopper, who insisted that its capital should be $100,000, and Hoctor and May and the two Creans, who wished it to be fixed at not less than $400,000, upon the ground that the amount needed to acquire the necessary plant to work the mines, in case they could not dispose of them, would exceed $300,000. There could be no business ground for Hopper to object to the demand of the majority on this point, for he controlled only 30 per cent of the assets and had agreed that, in case of difference of opinion, three-fourths in value would control. The time having expired before a company was formed in accordance with the terms of the agreement, the promise of sale made by Hoctor and May lapsed and does not bind them. See arts. 1851, 1852 C. C.; Fuzier Herman, art. 1859, *n.* 9.

The action is bad because it is taken by the wrong person and against the wrong persons. It sets up a right belonging to a syndicate of seven persons, and alleges that the appellant represents three out of the seven, but there is no proof that he acquired the rights of Dobson and Webb. Art. 1571 C.C.; *Prowse* v. *Nicholson.* (1) He is claiming a right belonging to the syndicate, and it does not appear in any way that he represents the syndicate, but, on the contrary, it appears that all the other members were opposed to his action. Appellant cannot sue in his own name for the benefit

(1) M. L. R. 5 Q. B. 151.

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and on behalf of the syndicate. The obligation to form a company was an obligation of the syndicate, but all the members of the syndicate are not made parties and, therefore, it must fail. Troplong, Société, nn. 525-529; *McFarran* v. *The Montreal Park & Island Railway Co.* (1). As to the damages prayed for there is no proof of breach of contract by default.

The judgment of the court was delivered by :

IDINGTON J.—The questions raised here must be determined by the interpretation of the written contract of 9th April, 1900.

Two of the parties owned lands supposed to contain minerals that might be made productive, especially by the use of appliances and methods for which two other of the contracting parties held patents. Two others joined in the contract after having expended some means in the way of investigation and experiment, and the plaintiff, who introduced these last-named as capitalists likely to aid in the development of the property, also became a party to the contract.

Having assembled, so to speak, their several interests and properties together for the common object of such gain as they might hope for by their joining their forces, they set out in this contract, which seems to have been of a purely tentative character, a method by which they might hope in following the lines laid down, to produce something of a more permanent character.

They assigned to the respective parties, by paragraph two of the contract, the proportion of share and interest each should have in the syndicate and its assets and rights or in any corporation formed to take over its assets and rights.

(1) 30 Can. S. C. R. 410.

They declared this by paragraph two to be a readjustment of their rights so that neither party could have any claim upon the other for past expenses for any reason whatever up to the date of this agreement.

By paragraphs one and four provision was made for the assignment to the syndicate, comprised of the parties to this agreement, of the properties and patents then held by the respective parties I have above referred to as respectively owning same.

Paragraphs five and six look to the acquisition of other properties and the furnishing of means for doing so.

Paragraph nine looked to a possible sale of the property and the recouping of the parties who had advanced moneys for acquisition past or prospective and for preliminary examinations before a division should be made of the proceeds of such sale.

It may be said of all these paragraphs but No. 6 that they were each and all self-operative and could not be governed by the will of a majority or of any one of the syndicate. Therefore none of them need be considered in regard to the effect to be given to No. 10, the last paragraph of the whole agreement.

Now, the judgment prayed for is to have the properties and patents directed to be conveyed to the syndicate, and, if there were nothing more in the contract, this prayer must, as a matter of course in a properly constituted suit, have been granted, or, if not, should now be granted by allowing this appeal, unless we are to accept in its entirety the argument of counsel that the agreement to convey was, as a matter of law, a conveyance, and nothing further needed.

In the agreement there appear the following paragraphs 7 and 8, which, with paragraph 10 following hereunder, give rise to the contention of the parties and

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any difficulties that exist in the interpretation of the agreement.

7. It is agreed that on or before September 1, 1901, a corporation or joint stock company shall be formed by the syndicate for the development and exploration of the above-mentioned properties, or any others that may be acquired under this agreement, and the shares in the said corporation or joint stock company *shall be allotted to the members in the syndicate in the proportion of their several interests as herein expressed.*

8. If the joint stock company shall not be formed before the first day of September, one thousand nine hundred and one, or if, after September 1, 1900, a majority in value notify the other members of the syndicate that they require the formation of such company, and for a space of two months after the receipt of such notice the minority members refuse to unite in forming such company, then the whole of the lands above-mentioned shall revert to and become the property of the said Daniel Hoctor and Frank W. May, and any transfers made by the said Gerald J. Crean of his own patent or of any improvements thereof shall be void and of no effect, and all the parties shall be in the same position as if this contract had never been made, without any right to recover any moneys expended in connection with the syndicate after April 9th, 1900, except that any properties acquired by purchase by moneys contributed by members of the syndicate shall be sold and the net proceeds divided among those who contributed in the proportion of their contributions.

10. All matters affecting anything more than mere detail of administration shall first be approved by all of the syndicate, and in case of difference of opinion three-fourths in value shall control.

It is quite clear from this paragraph 8 that it was intended that if these parties should fail to form a joint stock company by 1st September, 1901, the properties conveyed should revert to the parties who originally owned them, and all parties concerned should stand thenceforth as if nothing had ever been done or contracted for.

I do not understand this to be denied save by saying that there was an implied obligation arising upon and from paragraph 7 that rendered it the legal duty of each member of the syndicate to do what in him lay to form the corporation or joint stock company pro-

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vided for, and that the defendants and others concerned did not discharge this duty, and therefore by reason of this breach of contract the provisions for the returning or reconveying of the properties never came into operation.

I do not intend to be understood as affirming anything beyond what is needed for the purpose of disposing of this appeal.

I think that the powers given by paragraph 10 of the agreement were intended to apply to and control the operation of the seventh paragraph.

There is nothing else but paragraphs 6 and 7 that it can apply to.

Each of these three paragraphs, plainly, to my mind, needed, to make them effective, just some such determining power as paragraph 10 creates.

Paragraphs 6 and 9 are not in question here.

The difficulties in question all arise thus, I think, upon the consideration of, and are to be solved by the construction of paragraph 10 in relation to paragraph 7. Paragraph 10 is not repugnant to paragraph 7. But, on the contrary, the latter needs paragraph 10 or something of its nature to make anything of paragraph 7 at all. But for that it would, on honest differences arising between the parties as to the terms and conditions on which a company should be formed, prove to be impracticable and useless.

Paragraph 7 does not provide for anything that any court if applied to would declare specific performance of. It is of the most indefinite character and, apart from the notion of specific performance, many difficulties suggest themselves as to any remedy for a breach of its obligations whatever they may be.

Can any one man sue any other for damages for such a breach?

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Can one man sue all the rest for such a breach? Or must he sue the syndicate which includes himself?

Can we indirectly, by directing, now that the time for forming a corporation has elapsed, a conveyance of these properties, supply a remedy for this supposed breach? Any such legal speculations I venture to think are beyond what here could be required of us to execute. I think that to avoid such, or any such results, the parties relegated the decision of all such matters and things as could arise in the way of policy to be adopted or rejected, to the decision of the syndicate itself and that three-fourth's thereof in value, at least, should first agree before any policy could be adopted in relation to such things as incorporation and its terms.

Of such matters I think the amount of the capital stock of the proposed corporation or "joint stock company" was one that had to be determined by three-fourth's in value of the syndicate.

The parties never were able to agree upon this initial step. I think that for the court to interfere under the facts here, and directly or indirectly coerce the three-fourths in the way plaintiff seeks would be a direct interference with the rights they reserved to themselves by the plain meaning of the agreement.

The power the plaintiff and his partners constituted for their government and the decision of such questions as in truth and fact are involved here, though that may not in words appear in the pleadings, has decided against plaintiff. He must abide by it.

Unless and until he can reverse that decision I do not think we can go through the idle form of directing a conveyance of properties that should be reconveyed in the events that have happened.

Whether or not in a proper case, if one of the members of the syndicate, moved by improper motives,

could have been restrained from deciding as they did, I am not concerned with here.

I think the defendants and those with them acted within their rights.

I do not attach the importance to the quotation from the evidence of defendant Hoctor that appellant's counsel did, and I do not think it, read with the context, shews an intention willingly to frustrate the formation of a company under the agreement.

I doubt if it was not merely the hasty expression of the irritated witness, rather than the business man giving the result of the true history of the attitude that defendants had assumed or the position they had taken, as shewn by the other evidence regarding negotiations that had taken place.

The rest of the evidence taken as a whole does not permit me to find any such result or determination by the defendants as plaintiff contends is shewn.

It is to be borne in mind that the plaintiff after introducing capitalists whose resources were the one originating cause of any agreement between the parties abandoned the enterprise and left the defendants without any present hope for the working out of the purposes of the parties.

I am not going to scrutinize too closely the action of parties, thus placed by the plaintiff, and I think that the hope of getting capital being lost the defendants were quite within their rights in staying their hands in the forming of any corporation till they saw some way out, other than a way of merely giving plaintiff a lien on defendant's property for some claims he had bought from his associates.

Such a result seemed likely to be all that would flow from the submission of defendants to the dictation of the plaintiff.

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I do not think it necessary in this view to consider the many other interesting questions that have arisen. But one very obvious difficulty is that the terms of the contract by reason of Dobson & Webb assigning to plaintiff could not be carried out as designed since they were to have become corporators and each get a 10 per cent interest or share of the stock. The plaintiff's substitution for them was not contemplated by the contract.

Construing the agreement as I do the facts fall short of entitling plaintiff to any relief and the appeal should be dismissed with costs

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Markey & Montgomery.*

Solicitors for the respondents: *Angers, DeLorimier & Godin.*