THOMAS McCRAKEN, ... APPELLANT;

AND

PETER McINTYRE, ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Public Company under 27 & 28 Vic., Ch. 23—Shareholder's Liability.

Certain shares in a Company incorporated by Letters Patent, issued under 27 & 28 Vic., c. 23, were allotted, by a resolution passed at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount, deducted from their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the Appellant for value as fully paid up. Appellant enquired of the Secretary of the Company, who also informed him that they were fully paid-up shares, and he accepted them in good faith as such, and about a year afterwards became a Director in the Company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share-book the amount mentioned was "Shares, two, at $300=$600."

Held:—Reversing the judgment of the Court of Appeal for Ontario, that a person purchasing shares in good faith, without notice, from an original shareholder under 27 & 28 Vic., c. 23, as shares fully paid up, is not liable to an execution-creditor of the Company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares.

(The Chief Justice and Ritchie, J., dissenting.)

Appeal from a judgment of the Court of Appeal for Ontario, ordering that the rule obtained by the Respondent in the Court of Queen's Bench to enter judgment for him should be made absolute (1).

(1) See case as reported in 37 U. C. Q. B., 422, and 1 App. Rep. O., 1.

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

This action was brought by Plaintiff, who had recovered a judgment against the Lake Superior Navigation Company (limited), under which an execution had been issued and returned *nulla bona*, against the Defendant for the amount not paid up on nine shares of the stock of the said Company held by him. A charter was granted to the Company in February, 1871, under the provisions of the statute of Canada, 27 & 28 Vic. c. 23. Sec. 5, sub-sec. 19, no. 27 (1) of the statute makes each shareholder liable until the whole amount of his stock has been paid up to the creditors of the Company to an amount equal to the sum not paid up thereon. The petition on which the charter was granted, stated the nominal capital to be $64,000. Number of shares 128 at $500 each. Sixty-five shares, $32,500 of the stock, were subscribed when the charter was granted. About a year after the Company went into operation, it appears additional funds were required to carry on the business, and in July, 1872, it was resolved to call a special general meeting of the shareholders to lay before them a proposal to allot the unsubscribed portion of the stock to the shareholders in proportion to the number of shares held by each, at the rate of 60 per cent. of the nominal value of the shares.

At a general meeting of the shareholders on the 15th March, the proposition was agreed to, and resolutions passed for carrying it into effect. In accordance with the resolutions, ten shares (nine of which came afterwards

(1) "Each shareholder, until the whole amount of his stock has "been paid up, shall be individually liable to the creditors of the "Company, to an amount equal to that not paid up thereon; but "shall not be liable to an action therefor by any creditor, before an "execution against the Company has been returned unsatisfied in "whole or in part; and the amount due on such execution shall "be the amount recoverable, with costs, against such shareholders."

into Defendant's hands) were issued on the 5th April, 1872, to Thos. Griffith & Co., at the rate of 60 per cent. of the nominal value, which price they paid. These shares passed from Thos. Griffith & Co. to W. Griffith, and from him to Defendant and were treated as paid-up shares, though in the share book they were not entered as paid-up shares in the name of Thos. Griffith & Co., as other shares that were taken by them were entered; and in the counterfoils of the shares in the share-book the amount was mentioned (each for two shares) "Shares, two at $300—$600," whilst on the certificate itself the shares were mentioned as $500 each. It was represented to the Defendant when he became the purchaser of the shares, which were taken by him towards payment of a debt due the Bank of which he was the cashier, that the shares were fully paid-up and he was so informed by the officer of the Company on enquiring at the office.

The Defendant became a Director of the Company on the 4th February, 1874. The shares were transferred to him individually on the 30th January of that year, he having held them as trustee of the Bank from April, 1873.

The Plaintiff recovered in his action against the Company, on 19th December, 1874, on a bill of exchange, dated 1st July, 1873, for $750. He issued his writ in the present action against the Defendant on 23rd January, 1875.

In the declaration it is averred that "the Defendant (Appellant) was a shareholder in the Lake Superior Navigation Company, holding nine shares, on which there was due and unpaid the sum of $1,800; that Plaintiff had recovered judgment against the said Company for the sum of $806.02 for a debt due from the said Company to him

for a bill of exchange accepted by the said Company, payable to the order of one A. McMicken, and endorsed by said A. McMicken to the Plaintiff (Respondent), together with $20.83 for costs of said suit, which sums together amounted to the sum of $826.85, with interest thereon from the said 19th day of December, A D., 1874."

"That on the 26th day of December, A.D., 1874, the said Plaintiff (Respondent), caused a writ of *fieri facias de bonis* to be issued out of the said Court, directed to the Sheriff of the County of Grey, commanding him that of the goods and chattels of the said Company, he should cause to be made the said sum of $826.85 and interest, costs of writ and Sheriff's poundage.

"That on the 29th day of December, A.D., 1874, the Sheriff caused a return to be made of *nulla bona*, and the said judgment is still in force and unsatisfied; and it is further averred that the said Lake Superior Navigation Co. (limited), is a Company incorporated under the provisions of an act of the Parliament of the late Province of Canada passed at a session of the said Parliament held in the 27th and 28th years of the reign of Her Majesty Queen Victoria, c. 23, and intituled "An Act to authorize the granting of charters of incorporation to manufacturing, mining, and other companies," and thereupon Her Majesty, by letters patent issued by the Lieutenant Governor of the Province of Ontario, under the provisions of the said act, on and bearing date the 25th day of February, A.D. 1871, incorporated the said Company, and by reason of the provisions of the said act, the said judgment so recovered by the Plaintiff against the said Company, and the return of the said execution unsatisfied, the said Defendant as such shareholder became liable to the said Plaintiff as a creditor of the said Com-

pany as aforesaid to the amount of the said judgment, the same not exceeding the amount not paid up by him on the shares held by him in the said Company."

The Defendant (Appellant) pleaded several pleas to the said action, but it is unnecessary to refer to any other than the sixth plea, on which the issue between the parties has throughout the litigation been fought. The sixth plea is as follows :—

"6. And for a sixth plea the Defendant says, that the said nine shares in the declaration mentioned were issued by the said Company as fully paid-up shares to one Thomas Griffith, and were taken and accepted by the said Thomas Griffith as fully paid-up shares in the capital stock of the said Company, and, therefore, the said nine shares were entered upon the books of the said Company as fully paid-up shares in the hands of and held by the said Thomas Griffith, and thereafter the Defendant by several mesne transfers or assignments of the said nine shares, for a valuable consideration, paid by the Defendant in good faith, became the purchaser and holder of the said nine shares under the full belief that the said nine shares were fully paid up, and without any notice or knowledge that the said nine shares had not been and were not fully paid up, and the said nine shares were transferred on the books of the Company to the Defendant in the manner prescribed by the Letters Patent incorporating the said Company, and the Defendant accepted the same as fully paid-up shares and not otherwise."

The cause was tried at Toronto, before the Honorable Mr. Justice *Strong*.

The learned Judge, entered a verdict for the Defendant, with leave to Plaintiff to move to enter a verdict for him. The Plaintiff subsequently moved to enter the

verdict pursuant to leave reserved for $852.32, but the Court of Queen's Bench gave judgment on 23rd December, 1875, discharging the rule. From that judgment Plaintiff appealed to the Court of Appeals for the Province of Ontario, and that Court in September, 1876, allowed the Appeal, reversed the judgment of the Court of Queen's Bench, ordered the rule to be made absolute in that Court, to enter the verdict for the Plaintiff for $852.35 with costs, and also the costs of appeal.

From this judgment arose the present appeal.

The question to decide was whether the Appellant, being a *bonâ fide* purchaser of shares transferred to him as prescribed by the letters of incorporation on the books of the Company as *paid up*, but which had been allotted to the original allottee at forty per cent. discount, is liable, having subsequently become a Director in the Company, under subsection 19 no. 27 of sec. 5 of cap. 23 of 27 & 28 Vict., for the amount unpaid on said shares to a creditor of the Company.

Mr. *J. K. Kerr*, Q. C., for Appellant:—

Defendant was a *bonâ fide* purchaser without notice, and was so declared by the finding of the jury at the trial, and this finding has not been found fault with by any of the Courts below. The action was instituted under sub.-sec. 19, no. 27 of sec. 5, cap. 23, 27 & 28 Vict. It is not the intention of this section to impose any contract upon a shareholder, into which he did not enter, nor does it give any higher rights to a creditor than he formerly possessed, other than giving a right of action against the shareholder, instead of compelling him to assert his right of

action through the Company. The right of the creditor, and the liability of the shareholder is measured by the contract the shareholder enters into and the Court will not extend it.

This is the effect of *Waterhouse* v. *Jamieson* (1), approving of *Currie's* case (2).

In that case, under the acts under which the company was incorporated, the shareholders were liable for the full amount unpaid.

Had the originators of the company been the holders of the shares they would have been liable. At page 31 it is stated they were "undoubtedly guilty of the grossest fraud."

But the court refused to charge the shareholder in that case, because, as stated by the Chancellor, the shareholder had only entered into an engagement to pay £5 a share and the court could not make a new contract for him. It was by the contract his liability was measured and the court having found that he was a transferee for value without notice, that the shares were unpaid, he could not be made liable for more than he contracted to pay.

The learned judges in appeal distinguished the case of *Waterhouse* v. *Jamieson* from the present on the ground that in that case the liquidator represented the company and the defence was one against the company and not against creditors.

With all deference the appellant submits that this view is erroneous and that the House of Lords in *Waterhouse* v. *Jamieson* did not view the case as if the liquidator represented the company, and as if any defence available against the company was available against the liquidator.

(1) L. R. 2 Sc. App., 29; (2) 3 DeG., J. & S., 367; 32 L. J., Ch., 67.

The liability to the Company must exist, and there must be a contract between the Company and the shareholders in existence.

The cases relied upon by Respondent are applicable to subscribers of stock who agree to take shares at all events.

What the House of Lords held in *Oakes* v. *Turquand* (1) was, that the contract was a valid contract to take so many shares with a certain sum still to be paid.

There is, however, a late decision which favors Appellant's contention, *Re Carling* (2).

All that the statute gives the creditor is to dispense with notices and calls to compel the shareholder to pay up what is due, and it can only be by the aid of the shareholder's contract that the creditor can have any advantage. In this case the Appellant has protected himself against any new liability, the statute cannot make a new contract for him. All that Appellant contracted for was to take paid-up shares. He entered into no contract with the Company to take shares with 40 per cent. unpaid, and cannot be made liable beyond the measure of his contract.

Further—The position of a transferee for value without notice is different from that of an original shareholder. There is a difference between buying stock at a discount and stock being issued with only 60 per cent. paid up.

The remedy should be against the Directors for doing what the law forbids them to do, and not against an innocent purchaser. *Waterhouse* v. *Jamieson* (3); *Spargo's* case (4).

To hold that the purchaser of shares in a Company

(1) 2 H. L., 325; (2) L. R., 1 Ch. Div., 122; (3) L. R. 2 Sc. App., 29; (4) L. R. 8 Chy., 407.

represented to be, and appearing to be, paid up, are liable, if it should appear that the Directors have been guilty of an act *ultra vires* in selling at a discount or otherwise, would hamper mercantile operations and practically make all shares unmarketable.

Mr. *Richard Snelling* for Respondent :---

The 19th subsection No. 27 of section 5 of ch 23, 27 & 28 Vict., gives to Respondent a statutory right without reference to any contract.

As against the creditors of the Company, Appellant is a shareholder within the statutory definition of a "shareholder" given in the Consolidated Statutes of Canada, where we find it enacted as follows :— "The word shareholder shall mean every subscriber to, or holder of, stock in the undertaking, and shall extend to and include the personal representatives of the shareholder" (1).

This includes all transferees and Respondent's statutory right to be paid by Appellant, a transferee of the original subscriber to the undertaking, if not in full, at any rate to the extent of the amount not paid up on the shares, cannot be taken away by any default or remissness of the Company or its officers.

The charter of incorporation recites *inter alia* that the number of shares is 128, and the amount of each $500. Every shareholder, in accepting shares in this Company, engaged himself to pay money or money's worth to the nominal value of each share.

It is true they were issued as paid up, but the evidence clearly establishes that Appellant was a purchaser of shares which had been allotted at a discount of 40 per

(1) Ch. 66 sec. 7, sub-section 19.

cent. to the original allottee, and he could not take them at a lower rate than the fullypaid up value, and so defraud the creditors of the Company. There is a difference between the Canadian Act of 1864 and the English Joint Stock Companies' Act. Under the latter the official liquidator stands in the position of the Company, and winds up the estate for the benefit of each concerned; he cannot repudiate the contracts of the Company, and it would seem that under that Act creditors are bound by such contracts (1).

As to notice, the evidence does not sustain the averment that the shares were entered upon the books of the Company as fully paid up. In the language of the Defendant himself "the scrip did not, on its face, show it was paid." Defendant, before Respondent was a creditor, became a Director, and the moment he knew the shares were not actually paid-up, he could have repudiated the contract and got rid of them.

This case is distinguishable from *Waterhouse* v. *Jamieson* (2), as in that case the creditor was enforcing his right through an official liquidator.

Moreover, although as between the Company and the Defendant the Company cannot claim what remains unpaid in respect of shares held by him, yet Defendant is liable to a creditor of the Company to an amount equal to that not paid thereon. *Oakes* v. *Turquand* (3); *In Re Hoylake Railway Company, ex parte Littledale* (4). The policy of the statute is that a creditor of the Company should not suffer by any contract entered into between the Company and its shareholders.

The case of *Waterhouse* v. *Jamieson*, on which Appellant relies, and upon which the judgment of the Court of

(1) See Lindley on Partnership, pp. 657 et seq; (2) L. R. 2 Sc. App., 29; (3) L. R. 2 H. L., 325; (4) L. R. 9 Ch. App., 257, 260, 262.

Queen's Bench proceeded, is distinguishable from the present case. The only agreement Mr. *Waterhouse* entered into was to pay up £ per share. The deed or articles of association so stated it, and the registered memorandum of agreement gave notice to the public that these shares were to be so treated, and that only a certain amount was to be paid in respect of them.

This case is very different. This is an action expressly given by the statute to a creditor against the holder of any shares at the time execution is returned unsatisfied. The Plaintiff, (Respondent), creditor, does not claim through the Company, but the act gives a personal, individual and original right, as against the individual shareholder, a right paramount to any right of the Company, and which the creditor exercises adversely in order to reach certain assets of the Company, that is to say, the amount unpaid on any of its stock.

No case in England can overrule this statutory enactment, the wisdom of which shews itself here. The Judges of the Common Pleas have adopted this view. *Benner* v. *Currie* (1); *McGregor* v. *Currie* (2). The public must be protected and there can be but one answer, viz.: payment.

Nor can a creditor of the Company be affected by any fraudulent representations made by the Directors or officers of the Company to its shareholders or those who become shareholders on the faith of such representations.

Henderson v. *the Royal British Bank* (3); *Daniel* v. *the Royal British Bank* (4); *Powis* v. *Harding* (5); *Deposit Life Assurance Company* v. *Ayscough* (6); *The Western Bank of Scotland* v. *Addie, Addie's* Case (7).

(1) 36 U. C. Q. B., 411; (2) 26 U. C. C. P., 58; (3) 7 E. & B., 356; (4) 1 H. & N., 681; (5) 1 C. B., N. S., 533; (6) 6 E. & B., 761; (7) L. R. 1 Sc. App., 145.

Nothing in the statute of 1864, or the Letters Patent issued thereunder, relieves the Company or its individual shareholders from the liabilities imposed on an ordinary partnership or the individual members thereof, and on this point the following authorities were referred to :—

Lindley on Partnership (1) ; *Re Electric Telegraph Company of Ireland* (2) ; *In re The London and County Assurance Company, Wood's* claim and *Brown's* claim (3) ; *Macbeth* v. *Smart* (4) ; *Ryland* v. *Delisle* (5).

Finally, the Respondents fully submit on the whole case that a creditor of such a Company as this, when sueing a shareholder, does not claim through the Company, but that he has a paramount right accorded to him by our statute, and that even if it were certain that the Company could not maintain a suit to recover from the Defendant (Appellant) the unpaid balance due on his shares, which in this case it is submitted it is unnecessary to determine, that would not, upon the authority of the cases cited and upon our statute, absolve him from liability to a creditor.

Mr. *J. K Kerr*, Q. C., in reply :—

It is now too late to fasten any liability on facts found by the Judge, viz. : That Appellant purchased these shares in good faith for value without notice.

In the course of the argument reference was also made to :—

Buckley on Joint Stock Companies Act (6) ; *Spargo's* case (7) ; *Bush's* case (8) ; *Wynne's* case (9) ; *Ashworth* v. *Bristol and North Somerset Railway Company* (10); *Beck's*

(1) Pp. 206, 556, 562, 565 ; (2) 2 De G., F. & J., 275, 295 ; (3) 9 W. R., 366 ; (4) 14 Grant, 310 ; (5) L. R., 3 P. C., 17 ; (6) Pp. 37, 65, 66 ; (7) L. R. 8, Ch. App., 410 ; (8) L. R. 9 Ch. App., 554 ; (9) L. R. 8, Ch. App., 1002 ; (10) 15 L. T, N. S. 561.

case (1); and *South Staffordshire Railway Company* v. *Burnside* (2).

June 28th, 1877.

THE CHIEF JUSTICE :—

[After reviewing the facts of the case, proceeded as follows :—]

A caustic writer, who has considered the subject of Joint Stock Companies in England, thus refers to those of limited liability :—

"The advantages to be enjoyed by reason of limited liability, may be thus enumerated :

"You are permitted to incur debts without limit, but to prescribe your own limit for payment of them. You may invest £20 and trade to the amount of £250,000. If you succeed your profits will be enormous, if you fail you can only lose your £20, the rest of the loss must fall upon your creditors. You are placed by this law in the advantageous position of a man who has everything to gain and nothing to lose. It is obvious wisdom, in any game of chance or skill when the sum staked by you is limited, but the sum for which you play is unlimited, to play for the highes stake upon the table. Limited liability places you precisely in this desirable position. You cannot lose more than your £20 while it is open for you to speculate for £1,000 or for £100,000. The reason why prudent persons did not so speculate formerly was their consciousness that they must stake, not merely the £20 they laid down, but also an amount equal at least to the sum played for. Released by the law from that liability, and your loss limited

(1) L. R. 9, Ch. App., 392; (2) 5 Exch., 138.

to your small stake, you have no longer need for caution, and not only may you safely speculate without limit, but according to the well-known doctrine of chances it will be the most prudent course for you to do so."

According to the contention on the part of the Appellant in this cause, applied to the position of Griffith, who took the shares in question, he might have all the advantages of having paid for his stock in full when he had, in fact, paid but little over half of the price of it. If the Company were successful, and he made his $1,000 on an investment of $300, none of his brother stockholders could complain, as they all had agreed that he should take the stock at the rate he paid for it. If the Company turned out a failure, according to his present contention, he could not be responsible even for the amount unpaid on his stock.

At best, these acts afford but poor protection to the creditors, but in this view they would have none.

Under the statute in question, those applying for a charter must state the amount of the nominal capital of the Company, half of it must be subscribed in good faith, and five per cent. of the whole capital paid in.

The number of shares and amount of each share must be stated. The creditors of the Company, after having exhausted the remedies against the property of the Company, may recover from the *shareholders* any amount not paid up on their shares, (and this seems to be the remedy the creditors have against the shareholders.) As to the unpaid instalments on the shares necessary to be subscribed to obtain the charter, I apprehend there can be no doubt that the original subscribers, who had not paid up the whole amount of their stock, would be liable to creditors though, as between themselves and the Directors, if all had agreed

to pay a less sum than was due, such agreement might be valid and binding.

Under such circumstances, if a stockholder transferred his shares, representing to the purchaser that the whole amount of his stock had been fully paid up, and on enquiring at the office of the Company he received the same information, would the purchaser, after having held the stock for a year or more, and until new debts were contracted, be freed from the liability to the creditors of the Company, because the stockholder who sold him the stock, and the officers of the Company had declared that to be paid up, which was really not paid up? I should say not, for in such a case the creditors would have no protection at all. If the purchaser of the stock, on examining the books of the Company, had found out the stock had really not been paid up, and continued to hold the stock, and continued to be a shareholder, he could not complain if creditors called on him for the unpaid portion of his stock, he thus choosing to remain a shareholder. If he considered himself placed on the list of shareholders by fraud, he should have had his name removed from the list, and the fraudulent transaction set aside. Failing to do so, he must be considered as acquiescing in his position. He must seek his remedy, if he has any, from those who committed the fraud on him.

If this be the correct view to take as to those who had subscribed the half of the stock on which the application for the charter was based, why should it not equally apply to those holding the rest of the stock. There can be no doubt, I apprehend, if Griffith and the other parties had subscribed for the unallotted shares, and had paid fifty per cent. on them, and after that the directors and shareholders had decided, that on paying

ten per cent. more, such payment would be received as payment in full of the stock or shares, that such a resolution would not bind the creditors.

What is admitted to have been done is, in effect, just the same thing. The answer is, that Griffith did not agree to take shares in the Company to be paid up and afterwards change the agreement and pay only a portion of the amount due and get discharged from paying the rest, but that he bought the shares as paid up shares, and to make him liable for the unpaid amount is to make a new contract for him. To this it is urged that the Company was not authorised to issue paid-up shares as such, and to issue these shares with an abatement of 40 per cent. on the value was a fraud on the creditors of the Company, which Griffith, as a Director and stockholder, must have known.

The proper view to take of the transaction is, that he intended to become the holder of the shares, and he had them allotted to him, and as to that the transaction would be affirmed and he be held bound as a shareholder; that being a shareholder he was bound to show how he had paid for his stock and would be liable to creditors for anything unpaid on it. If it is to be viewed as a fraud, that portion of the transaction consisting of the allotting of the shares was perfectly valid and might be affirmed, but that which related to the deduction of 40 per cent. could be repudiated, and he could be called on to pay the 40 per cent. This view would be sustained by *Daniell's* case (1), decided in 1857, and the remarks made on that case by *James*, L. J., and *Mellish*, L. J., in *Carling's* case (2); and by *Turner*, L. J., in *Saunders* case (3), decided in 1864. *Turner*, L.

(1) 1 De G. & J., 372. (2) L. R. 1 Ch. Div., 115. (3) 10 L. T., N. S., 6.

J., said in that case, if the shareholder was privy to the breach of trust, he would be liable as a contributor.

There is still another question as to these disputed shares. If they must be considered as paid-up shares, or that Griffith was not a shareholder at all in relation to them, how long is that state of things to continue? Suppose a Company is prosperous, declares dividends from time to time, giving back to each shareholder more than he ever paid for his stock or even its nominal value; afterwards some great disaster befalls the Company, and the shareholder is asked to pay up the unpaid 40 per cent. to satisfy debts due by the Company, would he then be allowed to say he was not a shareholder at all as to these shares, though he had received dividends on and large profits as a shareholder? I should say not. With a full knowledge of his own illegal conduct as a Director and a shareholder, Griffith chose to place himself in a position to receive benefits; as holder of this stock he ought to be compelled to bear the burthens incident to it.

The doctrine put forth in some of the cases, and which seems to be assented to by some of the Judges, that the rights of creditors cannot be greater than the rights of the Company, cannot apply to all cases. If it does, it seems to me it would work gross injustice to creditors. Take the case before us. If each Director and each shareholder had taken additional shares at 40 per cent. discount, and they had all agreed to it, as between themselves, I see no reason why that arrangement should not be binding; as co-partners they might make between themselves any agreement they thought proper, which would affect their own rights only, but the creditors of the Company, in my humble judgment, could not be bound by such an agreement if it was not authorized by

the charter or the statute under which the charter was granted. If this doctrine be laid down as a rule applicable to these Joint Stock Companies, all that the shareholders and directors will be required to do, still more to limit their liability, will be to buy their shares at fifty or seventy-five per cent. discount, and have them allotted to each shareholder as shares paid in full. If the Company is successful, they make large profits from their investments; if the Company becomes insolvent, they are not liable to pay anything more on their stock.

In some of the cases the matter is put in this way: either the party holds the stock under the original agreement and cannot be called on to pay more than the agreed price for it; or, secondly, the whole matter is to be considered fraudulent and void as against the creditors, and in that view he does not hold the stock at all and cannot be made to pay; or that he allotted the stock to himself at 60 cents on the dollar, and unless it can be shewn that was not all it was worth at the time, no claim can be established against the Director or stockholder for the taking of the stock under the circumstances. This, in case of the failure of the Company, still produces the same result, the stockholder limits his own liability as to risk in a way not allowed by the statute, but has unlimited chances of gain as to profit. Besides, a creditor, who has become such after the stock has been allotted at a discount without his knowledge or consent, might well say: "if your enterprise was of so uncertain a character that after you had carried on business for a year you could not induce persons to take stock except at a discount, you should have wound up the concern. If you had done this in March or April, 1872, you would not have contracted the debt for which I sued the Company on a bill of exchange accepted by

them 1st July, 1873. When I became a creditor of the Company I had a right to suppose that the stock was allotted at par and had been either paid in full, or if not paid, I should have my remedy against the stockholders holding stock not paid in full. You had no right to allot this stock to yourself and others at 40 per cent. discount. You cannot place matters in the position they were when you did this illegal act. You are, therefore, not in a position to assert as against me, that this, which is not stock paid in full, has been paid up and I have a right to claim from you the unpaid amount to satisfy my debt."

I have considered the matter thus far in relation to Griffith. Is the Defendant in relation to this suit and the Plaintiff's claim in any better position than Griffith? I think not.

It is true, when he took the stock he was informed it was paid in full, both by the person from whom he took it, and the officer of the Company. I do not consider that the register of stock is kept for the purpose of making shares articles of commerce, to pass like Bills of Exchange, and that everything stated in it must bind everyone who buys shares, or has dealings with the Company.

If shares actually paid up were not so entered in the register, I do not think the holder could be made to pay the nominal value of his shares a second time, and if they were not in fact paid up, and were entered as paid, I am not satisfied, as against a creditor, that the shareholder could not be made to pay the unpaid amount to the creditor. But here, as a matter of fact, the ten shares acquired by Griffith on 5th April, 1872, are not entered in the stock book as paid up, and the counterfoils on the share book shew, that the certificates

issued for two shares were at $300 each when the full amount of the shares was $500 each.

The Defendant became the absolute owner of these shares on 30th January, 1873, and he became a Director of the Company on the 4th February. In his position of Director he had ample means of knowing all about the transaction, in relation to the shares he held. As a Director of the Company, it is not unreasonable to suppose he would enquire into its concerns and hear something of its assets and management. If he had made such enquiry he would have learned that the shares now in dispute had been paid for at the rate of 60 per cent. of their nominal value. In one of the latest cases, *in re Imperial Land Co. of Marseilles, ex parte Larking* (1) it is said you must attribute to a Director all the knowledge which, by reasonable diligence, he could have acquired. If after that he chose to remain the holder of these unpaid shares, it is not unreasonable he should take the burthens that were upon them. A reasonable time had elapsed before the commencement of this suit (January, 1875) to enable him to make himself acquainted with the title under which he held the shares. If he did not choose to do so, he cannot now complain that he is called upon to discharge the liabilities attached to them. If he, knowing the whole truth about them, chose to retain them when possibly he might have had the transfer to himself set aside as fraudulent, he cannot now repudiate them. It appears to me he is in no better position in relation to these shares than Griffith was.

It is laid down in some of the cases, that the owner of shares in a public company is bound to know how his title is derived, and after a reasonable time he

(1) L. R. 4 Ch. Div., 576.

must be presumed to have this knowledge, and, in this view, I think the Defendant should be held liable.

One of the cases which, I consider, lays down a doctrine that accords with the Respondent's view is *Daniell's* case (1) decided in 1857, which, if good law, fully sustains the view of the Court of Appeal, and although questioned in some of the subsequent cases, has never been expressly overruled, and if it had been, would not necessarily shew that the decision in the Court of Appeal was wrong.

Oakes v. *Turquand* (2) (1867) reviews the whole law on the subject of these Joint Stock Companies, and traces the legislation in relation thereto. The Court there, adverting to the analogy between a stockholder under the act and a co-partner in a Company without a charter of incorporation, shows, that a person, who becomes a shareholder, incurs liabilities to the creditors of the Company, which, as between the stockholders themselves, may not arise. The views there put forth, I think, sustain the judgment of the Ontario Court of Appeals. There are some other cases decided in Chancery which seem to me also to be in accord with the doctrine that a stockholder may be called on to show that his stock has been paid up, though he himself, when he acquired it, did not intend to become the owner of unpaid stock.

On the other hand, it is contended that *Waterhouse* v. *Jamieson* (3), favors the Appellant's views. That case, in effect, decides that the Appellant, having paid what he agreed for the shares, and all that was required to be paid by the registered articles of the association, was not liable to be called on to contribute to pay the debts of the Company, though it had been fraudulently

(1) 1 De G. & J., 372; (2) L. R. 2 H. L., 325; (3) L. R. 2 Sc. App., 29, (1870).

entered on the articles of association that £100,000 was paid up and only £5,000 would be called for. It was not alleged or pretended that the Appellant was a party or knew of the fraud. The House of Lords held the Appellant was only liable to pay what he was required to pay by the articles of association and his agreement with the Company, and having done so he could not be compelled to pay more by the liquidator representing the rights of the creditors, than he would have been obliged to pay the Company under the articles of association (1).

There the deed showed the liability of the shareholders and persons taking stock under it, and by the statutes the articles of association bound the Company and the shareholders therein to the same extent as if the shareholder had subscribed his name and affixed his seal thereto, If, under the Canadian statute under which this Company's charter was obtained, the Company and the Directors had been authorized to issue stock on the terms on which these shares were issued to Griffith, then *Waterhouse* v. *Jamieson* would apply, and shew that the Defendant, if he had taken the stock from the Conpany or from Griffith, would not be liable for what is now the unpaid portion of the stock.

Carling and *Hespeler's* cases (2) really do not touch the point which arises in the case before us. There the Company were authorized to issue paid-up shares to Walker, and they were issued at his request to Carling and Hespeler as such. They were Directors of the Company, ; it was held that as they never intended to become proprietors of any but paid-up shares, they would not be liable as contributors. In that case *ex*

(1) Joint Stock Companies Registration Act, 1856, sec. 10; (2) L. R. 1 Ch. Div., 115.

parte Daniell, though not sustained on the ground on which it was put in the report, another view was suggested which was thought to be more correct, yet the case itself, though not approved of, was not overruled. In argument it was clearly distinguished from *Carling's* case, as the Directors in *Daniell's* case were not authorized to issue paid-up shares; in *Carling's* they were. So here they were not authorized to issue stock as paid up, which was only half paid up. *Currie's* case (1), decided before the Lords Justices, asserts the same doctrine as in *Carling's* case, and lays down the proposition that you cannot fix upon any person any engagement larger or other than that into which he has entered.

In that case the 100 shares on which Currie was intended to be made liable, were issued to one, Butcher, as paid-up shares on an arrangement between him and the Company, and *Turner*, L. J., said:—"The agreement with Butcher was either valid or invalid. If the agreement were valid, then neither Butcher himself nor any alienee from him could be called upon to contribute in respect of those shares. But if, on the other hand, that agreement was invalid, the transaction must be disregarded altogether." The Directors were held liable as contributors on a hundred shares required to be held by them as Directors, and which they had agreed to take under the articles of association.

The case of *Guest* v. *Worcester, Bromyard & Leominster Railway Company* (2), which was not referred to in the Courts below or on the argument, seems to be in favor of the Appellant's contention. That was an application to issue a *scire facias* against Padmore & Abell, alleged shareholders in Defendant's Company. The ap-

(1) 32 L. J. Ch., 57; 7 L. T., N. S., 487; (2) L. R. 4 C. P., 9.

plication was made under section 36 of 8 & 9 Vic., c. 16, Imp. st., Companies' Act, 1845. That section, with others, having been made applicable by the special act, the effect of the section is, that if any execution be issued against the Company, and there cannot be found sufficient whereon to levy such execution, then such execution may, by order of the Court, to be made after notice given to the shareholder, be issued against any of the shareholders to the extent of their shares not then paid up ; and the execution creditor may inspect the register of shareholders to ascertain the names of the shareholders, and the amount of capital remaining to be paid on their respective shares. An execution had been issued against the Company and returned *nulla bona*. It was sworn that Padmore & Abell, appeared, from an inspection of the register to be holders of 1500 shares of £10 each in the Company, no part of which had been paid up. From affidavits filed it appeared that the Company in 1864, being in want of money, applied to a Banking Company with whom they kept an account to allow them to overdraw £5,000. After some negotiation, their request was acceded to, on the terms of their depositing with the Bank, by way of security, fully paid up shares in their Company, to the nominal value of £15,000. On 7th September, 1864, a resolution of the Directors was agreed to for the purpose of carrying out the arrangement, and a certificate for 1,500 shares of £10 each was issued to Messrs. Padmore & Abell, the Chairman and Manager of the Bank, as trustees for the Bank, in the following form :—

"These are to certify that Richard Padmore and Martin Abell, of Worcester, Bankers, are the registered proprietors of 1,500 shares, No. 4308 to 5807 of the Worcester, Bromyard & Leominster Railway Co., subject to the

rules and regulations and orders of the said Company, &c."

Across this certificate was written by the Secretary of the Company: "These shares are registered as fully paid up in the books of the Company." After they were threatened with proceedings, Messrs Padmore & Abell inspected the register of the shareholders and call book of the Company and found their names appear in the former as the holders of 1,500 shares, number 4,308 to 5,807, and opposite their names in the call book was the following memorandum: "Deposited at bank as security for overdraft." It was stated that Padmore & Abell had not given the Company authority to place their names in the register of shareholders otherwise than as above. That the Company obtained the £5,000 which still remained unpaid. No calls had ever been made on them, though the whole £10 per share had been called up against the other shareholders.

It was contended on the argument, that a creditor cannot stand in a better position than the Company itself. If the Company could not enforce the calls against these gentlemen by action, a judgment creditor could not have a *scire facias* against them.

On the other hand, it was argued, the true doctrine was laid down in *Lindley* on partnership, at p. 618, that the issue of paid-up shares otherwise than for full value received, is *primâ facie* a breach of trust on the part of the Directors and the Company, and its creditors are entitled to have such shares treated as not paid up. It was further argued, that if they have for an illegal purpose allowed themselves to be held out as shareholders they are bound, and that *Oakes* v. *Turquand* (1) shewed that there may be a difference between the rights of a

(1) L. R. 2. H. L., 325.

creditor and the rights of the Company against a shareholder.

Bovill, C. J, :—" The bank never contemplated paying calls, but accepted the certificate as a security for their advance on the faith of the statement written thereon, that the shares were registered in the books of the Company as fully paid-up shares."

In order that the matter might be taken to a Court of Error, the Court allowed a special case to be prepared within a month. *Bovill*, C. J., thought this the proper course, though he said he had not the shadow of a doubt. He further said the authorities referred to were very strong, but, independently of them, he should be prepared to hold that these gentlemen were not liable. *Byles* and *Keating*, J. J., concurred.

There does not appear to be any further report of the case, and it is probable it rested there.

There is this distinction between that case and the one before us. There the paid up stock was merely held as a security, and the holders did not claim to exercise the rights of a shareholder, or apparently authorize their names to be entered on the register as such. It may be proper to observe here, that in subsequent editions of *Lindley* on Partnership, the passage above referred to is altered.

The language of the Companies Act of 1845 referred to, giving the creditors of the Company the right to issue execution against the shareholders to the extent of their shares not then paid up, is very like the right to the creditors to sue the shareholder for an amount equal to that not paid up of his stock by the Canadian statute.

It is urged, that the state of things which would give the right to issue an execution under one statute ought to sustain an action under the other, and the case just

referred to seems to me to be the strongest authority I have met in favor of the Defendant. But the parties in whose names the shares were registered were not in truth shareholders in the ordinary sense. They were mere trustees holding the shares as security for a debt, and the Company would have all the value of them if they increased in value, and they could not enforce the payment of calls or treat them as shares not paid up.

This vein of argument, that the creditor could not enforce rights which the Company could not, runs through the later cases, and seems strongly put forth in *Carling's* case, which was only recently decided.

It must not be overlooked that the person who took this stock from the Company intended to become a *shareholder* of the Company, and so did this Defendant, and by the express words of the statute (no. 27 subsection 19, sec. 5) until the whole amount of his stock has been paid up, the shareholder is declared to be individually liable to the creditors of the Company to an amount equal to that not paid up thereon. No doubt the purchaser paid up all he agreed to pay, but still there was 40 per cent. of the amount of this stock not paid up, and it is the statute which makes this payable and not the agreement of the party.

I think the doctrine contended for by Appellant, if carried out, will work great injustice to creditors, and as there is a distinction between the decided cases and the one before us, I do not feel warranted in overruling the judgment of the Ontario Court of Appeals. No doubt the language of some of the cases referred to might justify a contrary decision, but the cases are distinguishable, and, as I think, the view presented by the Court of Appeals the correct one, and calculated to work out

what was the real intention of the Legislature, I think we ought to sustain their judgment.

I do not think we should give a strained construction of these statutes for the purpose of giving increased and perhaps fictitious value to stocks in incorporated companies; we ought rather to have in view the protection of the creditor against the devices of reckless or unscrupulous speculators who may manage these companies or purchase their stock.

RITCHIE, J.:—

I think there are really only two questions in this case to be determined. At the times mentioned in the declaration, was Defendant a shareholder in the Lake Superior Navigation Company, holding nine shares as alleged? If he was, had these shares in fact been actually paid up?

As to the first, I think beyond all doubt Defendant was a duly registered shareholder, had been elected, and had consented to become a director in the Company, and acted as such, and now actually claims to be the holder of the shares in controversy, simply affirming, as to the second question, that the shares, so far as he is concerned as a shareholder, are paid-up shares, and that nothing remains due thereon that he is liable to pay.

It cannot be disputed, that these shares never were actually paid up, but were issued as paid-up, on payment of 60 cents in the dollar instead of 100, leaving 40 per cent. of the capital of the Company represented by these shares wholly unpaid. It is not, in my view, necessary to inquire why this was done, the question being, could it be legally done so as to relieve the holder of the stock from the claim of a creditor of the Company in the

position of the Plaintiff? The 27 and 28 Vict. ch. 23, section 27, expressly declares: "That each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon."

The effect of such an arrangement, if valid and effectual to make the shares paid up shares, would simply be practically to alter the terms of the charter and the liability of shareholders under the law without any authority of law that I am aware of.

The allotment of these shares was perfectly valid, and the acceptance of them and causing himself to be registered in the books of the Company as the holder of them made the recipient a shareholder, and fixed on him all the liabilities which were imposed by law on shareholders; any understanding or agreement, which was entered into between the Company or the Directors and the person taking such shares, to interfere with such legal liability and deprive creditors of rights thereby secured to them, cannot be, in my opinion, of any avail as against creditors; any such understanding or arrangement was, in my opinion, a collateral agreement between the Company or Directors and the shareholder, and, I humbly think, the mistake in Defendant's contention is in assuming that Plaintiff's rights depend upon a contract between the Company and the Defendant or the party under whom he became a shareholder. I think, on the contrary, Plaintiff's rights depend on a statutory contract between himself as a creditor and the Defendant as shareholder, wholly independent of any contract between the shareholder and the Company; that the shareholder's liability is not to be measured or governed by any such contract, but by the liability to creditors imposed on the shareholder the moment he becomes a stockholder;

that neither the charter nor the law ever contemplated that, as regards the creditors or as affecting their rights, the Company could issue, or shareholders accept, shares as paid up, which, in fact, were not paid up; that it was intended creditors should have a right to look to the actual value subscribed and to the full amount of the shares so subscribed as their security.

As we are not now settling the rights of the Defendant and the Company as between themselves, or of the shareholders as between themselves, it is unnecessary to discuss or express any opinion in respect to these matters. It may be, that as between the Company and the shareholder this collateral arrangement may have secured the shareholder immunity from calls, and as between the shareholders themselves, may have entitled the holder of this stock for all purposes of internal management and regulation of the Company, voting, receipt of profits or dividends, &c., &c., to be considered a holder of paid-up shares, but in regard to the payment of debts, he cannot, I think, be heard to say as against creditors, that he is a holder of paid up shares, when in fact he is not, but is in truth and in fact the holder of shares on which 60 cents on the dollar only have been paid.

In *Hope* v. *International Financial Society* (1), *Brett*, J. A., says,—"I think that the amount of capital which may be embarked in a Company, and which amount is named in the memorandum of association is a condition of the memorandum of association. So also is the kind of business which the Company has to carry on."

Now, in this case the charter provides that the nominal capital of the Company is $64,000, that the number

(1) L. R. 4 Ch. Div., 339.

of shares is 128, and the amount of such shares is $500, that the amount of stock subscribed is $32,500, and the amount paid up was $3,400, and then the law provides as we have seen, that each shareholder shall be individually liable to creditors until the whole amount of his stock is paid up. I must confess my inability to understand how any Company or directors can legally make a new charter for themselves and say that each share of stock shall be $300 instead of $500, and each shareholder not be individually liable to creditors for the amount of the stock as fixed by the charter, but only be liable to the extent of 60 per cent. as fixed by the Directors.

If the Directors could issue these shares at 60 per cent., I can see no reason why they might not do so at a much lower rate or even at a nominal sum, and so carry on business with a limited liability but with no such capital as the charter contemplated, and no such security as the law provided for the protection of the public, thus availing themselves of all the privileges and benefits conferred by the charter, but ridding themselves of all the burthens and liabilities imposed on them, and without which it cannot be presumed such privileges and benefits would ever have been created.

The interest of the public and the law alike, in my opinion, demand that parties, who have obtained special privileges for carrying on mercantile, manufacturing or other businesses with limitations of liability and possibly in direct competition with individuals whose whole wealth may be at stake dependent on the result of the enterprise, should be held with a certain degree of strictness to the charter; and the restrictions and protections, which the Legislature has, for the security of the public, imposed, should be fairly enforced on behalf

of the public, and that, thus privileged, the Company and those becoming shareholders and availing themselves of the limited liability thus secured to them, should not be permitted, by arrangements amongst themselves, to neutralize and destroy the security the law gives those dealing with them.

If Defendant had been induced to take these shares by the Company's representations, fraudulent or otherwise, the contract was not void, but at most only voidable, and subsisted until rescinded (1).

It never was rescinded in this case; on the contrary, the holder became and acted as a Director when he might or ought to have known from the books of the Company exactly how the stock stood.

If he wished to get rid of the liability incident to a shareholder, and he had a right to repudiate the transaction, he should have done so at the earliest time possible; have disaffirmed and determined his relation, or, in the words of the Vice-Chancellor (2) "promptly, clearly and unequivocally" repudiated the contract. Any laches in this respect would undoubtedly preclude him at this late day, and after the rights of creditors have intervened, from setting up such representations as a release of his obligations as a shareholder. But the contract has never been annulled or sought to be annulled on either side, the Defendant desires to remain a shareholder still, he wishes only to get rid of the obligations which, as a shareholder, the law imposes on him.

It would appear, however, that the Company were by no means clear as to this stock being paid-up stock

(1) See *Reese River Silver Mining Company; Smith's* case, L. R., 2 Ch. App., 604, and L. R. 4 H. L., 64; and *Ogilvie* v. *Currie*, 18 L. T., N. S., 593; *Ætna Insurance Company* v. *Shields*, Ir. L. R. 7 Eq., 246;
(2) *Ætna Insurance Company v. Shields*, Ir. L. R. 7 Eq., 274.

though issued as such; for, in the stock book of the Company, the stock in question is not entered as paid up. The entries in the stock book relating to Griffith's stock, are:—

Subscribers Seal.	Residence.	Date of Signing.	No. Shares.	Remarks.	Attestation.
T. Griffith & Co., L. S.	Toronto.	January 16, 1871	Two	Paid up.	C. P.
" " "	"	February 6, 1872	One	Paid up.	J. L.
" " "	"	March, 7,	Two	do	E. M. L.
" " "	"	April, 5,	Ten		J. S.

Under these headings are four entries. The three first are all filled in, and under the heading "Remarks" are entered as "paid up"; but with respect to the last entry which covers this stock, there is no such entry as "paid up," and on the counterfoil from share book signed by Griffith is entered two shares at $300=$600. Thos. McCraken says: "The scrip did not, on its face, show it was paid up, so I made enquiry, as usual. I asked Mr. Carruthers if they were fully paid-up shares, and he told me they were. I did not ask Mr. Carruthers to let me examine the books of the Company, the ledger, stock book or journal or any book, and I did not in fact examine them." On 25th April, 1873, Griffith assigned to McCraken the shares in trust. In January, 1874, McCraken became a Director, and on 25th April, 1874, he became holder of the shares absolutely.

On the contrary, the copy of Mr. Griffith's transfer to Defendant is as follows:----

"For value received, William Griffith, of Toronto, hereby assigns and transfers unto Thomas McCraken, of Toronto, in trust, and assigns fourteen shares, on each of which has been paid five hundred dollars, amounting

to the sum of seven thousand dollars, in the capital stock of L. S. N. Co., limited, subject to the provisions of the Act which incorporates the said Company, as well as the rule and regulations laid down by the Board of Directors."

"Dated 25th April, 1875."

"I do hereby accept of the foregoing assignment of fourteen shares in the L. S. N. Co., limited, assigned to me in trust above mentioned, at the office of the Company, this 25th day of April, 1873."

"THOS. MCCRAKEN,"

"*In Trust.*"

This puts the stock forward not as stock issued as paid up, but as stock "on each share of which had been paid $500," certainly a most inaccurate way of stating the transaction, for on each share $500 had certainly not been paid up But, in my view, this does not alter the case. I only mention it to show that there is really no hardship on Defendant of which he can fairly complain should he be held liable. Had a proper examination of the books of the Company been made, the true state of the stock would have been readily ascertained, and the Defendant, having, so soon after becoming the registered holder and before being registered as the absolute owner, acted as Director, was in a peculiarly favorable position in this respect.

With respect to this, Lord *Chelmsford* says, in *Downes* v. *Ship* (1) "In the case of *Oakes* v. *Turquand*, I expressed my agreement with the opinion of my noble and learned friend, Lord *Cairns*, in the case of *ex parte Peel* (2), as to its being the bounden duty of a person to ascertain, at the earliest practicable moment,

(1) L. R. 3 H. L., 359. (2) L. R. 2 Ch. App. 674, 684.

what is the charter or title deed under which the Company in which he has agreed to become a shareholder is carrying on business."

In *Bridgers'* case (1), a Bank local agent, being requested to take shares in order to induce others to become shareholders, offered to apply for shares on condition that he should be called on to pay nothing for the shares; but that all payments should be deducted out of his commission on shares sold by him, and upon being told by the manager of the Company that he would "be allowed the privilege of paying them up as convenient," he applied for 100 shares, which were allotted him, and he was registered as the shareholder of the shares, but he never paid any money. He signed a proxy paper under protest that it should not cancel the agreement as to the non-payments on his shares, and attended two meetings of the Company. His commission was insufficient to pay for the shares. Held, that he had entered into an absolute contract to take shares with a collateral agreement as to the effect of taking them, which did not prevent him from being made a contributory.

Giffard, L. J., in *Bridger's* case (2), says: "There may have been an agreement that his calls were to be paid only in a particular way, but he agreed to be a shareholder *in præsenti*, and cannot be heard to say he was not a shareholder, because he had entered into that collateral agreement."

Langer's case (3), confirming decision of *Stuart*, V. C., by *Cairns*, L. J., shows, that if a party has become a registered shareholder on certain false representations, that is not a question as to which the public or other share-

(1) L. R. 9 Eq., 74; (2) L. R. 5 Ch., 308; (3) 18 L. T., N. S., 67.

holders have anything to say, he may have cause for redress against some person who has made an untrue representation to him, but has no case for having his name removed from the list.

The Defendant may or may not have any remedy against the persons making the representations. The creditors certainly could not. The Defendant ought to have known exactly what the law was, and what obligations it imposed on shareholders, and he cannot, in my opinion, escape any liability by showing that he inadvertently became a shareholder, or that others misrepresented the true facts, and so induced him to become a shareholder in ignorance of the extent of liability he incurred.

The 25th section of the Companies' Act, 1867, says: "Every share in any Company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract, duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

Equally strong are the words of the Statute of Canada, 27 and 28 Vict., ch. 23, which says:—

"That each shareholder, until the amount of his stock has been paid, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon."

In *Blyth's* case (1), it was held that this 28th section of the Companies' Act was in favor of creditors, and did not apply as between the Company and the shareholders.

As in that case, so in the case before us between

(1) L. R. 4 Ch. Div., 140.

Griffith and the Company, the shares may be paid up, but the shares were not actually paid, and so Plaintiff is, in this case, as Blyth was in that, "a holder of unpaid shares," and is liable unless he can prove that the shares have been paid for.

STRONG, J.:—

I need not repeat the facts of this case, or the question which is presented for the decision of the Court, as they have already been fully stated in the judgment just delivered by the Chief Justice.

Two cases have been decided on an enactment contained in the Railway Act (1), precisely similar in expression to that in question here (2); *Macbeth* v. *Smart* (3) in the Court of Appeals in Upper Canada, and *Ryland* v. *Delisle* (4) in the Privy Council, on an appeal from the Court of Queen's Bench for Lower Canada.

I refer to these cases to point out that they are no authorities for a proposition which it has been assumed they warrant, viz.: That in an action brought by a creditor under this enactment the creditor sues on a statutory liability imposed upon the shareholder by the statute, and not upon the contract entered into by the shareholder with the Company. This proposition has, it appears to me, been too readily assumed by the Court below, and in that lies the fallacy of the judgment which we are called upon to review in this appeal.

The words of the statute are: "Each shareholder, "until the whole amount of his stock has been paid up, "shall be individually liable to the creditors of the Com-

(1) Cons. Stat. Can., cap. 66, sec. 80; (2) 27 and 28 Vict., cap. 23, sec. 5, sub-sec. 19, no. 27; (3) 14 Grant, 298; (4), L. R. 3 P. C. C., 17.

" pany to an amount equal to that not paid up thereon, " but shall not be liable to an action therefor by any " creditor before an execution against the Company has " been returned unsatisfied in whole or in part, and the " amount due on such execution shall be the amount " recoverable with costs against such shareholders."

This section is in *pari materiâ* with the 36th section of "The Companies' Clauses Consolidation Act, 1845" (1), the only difference between the two enactments being, that the English Act authorized the creditor to apply summarily to the Court in which the action against the Company had been brought for leave to issue execution instead of requiring him to bring a new action against the shareholder as provided by the Canadian statute. The liability of the shareholder was defined in almost the same words, for the execution against shareholders was to be limited " to the extent of their shares in the capital of the Company not then paid up." The Courts, although possessing the power of ordering execution to issue, upon motion in the first instance, yet, in order that questions relating to the shareholder's liability might be raised on the record and so made subject to review in error, without which there could have been no appeal, invariably required the judgment-creditor applying for execution against a shareholder to proceed by writ of *scire facias*; a mode of proceeding which was substantially equivalent to the action against the shareholder required by our statute. Therefore, decisions upon this section 36 of the English Act are directly applicable to the present case.

Then, *Macbeth* v. *Smart* did not decide that the statute in any way extended the liability of the shareholder to the creditors beyond that which he had undertaken in

(1) Imp. Stat. 8 and 9 Vict., Cap. 16.

his contract with the Company, save, perhaps, in this respect, that whilst a call was by the statute made a condition precedent to the right of the Company to sue, the right of the creditor to bring an action was not dependent on the action of the Company making a call. What was decided in *Macbeth* v. *Smart*, and the only point there adjudged, was that the shareholder could not set off against the creditor a debt due by the Company which in an action for calls would have constituted a good subject of set-off against the Company; the grounds being that the statute of set-off was applicable only in cases where there was mutuality of liability, which the rule of Courts of Equity as to equitable set-off also made essential. The Court of Chancery had determined that the creditor's title to sue was derived through the Company, and that, as in the case of an ordinary assignment of a chose in action, the assignee takes subject to the debtor's right of set-off against the original creditor, the assignor, so the shareholder's action was open to the same defence. This contention was clearly erroneous, for, as the Court of Appeals determined, the creditor did not sue on a title derived through the Company, but on one which the statute, subject to the fulfilment of certain conditions, vested in him as soon as he became a creditor, and therefore there was no such right of set-off as had been established by the decree of the Court of Chancery.

In *Ryland* v. *Delisle* (1) a different point was determined, for that decision of the Privy Council did not, as has been assumed, involve the same question of equitable set-off which had been raised in *Macbeth* v. *Smart*.

In *Ryland* v. *Delisle* the action was on the same statute, the Railway Act (1), sect. 80, but what was

(1) Con. Stat. Canada, cap. 66.

there insisted on by the Defendant was not set off, but that the liability on the shares had been extinguished and satisfied by the compensation of a debt due by the Company to the shareholder prior to the bringing of the action; a very different question from that of set off. For had the debts by and to the Company been mutually exigible at the same time, by the operation of the law of Lower Canada, as to compensation, they would have extinguished each other *ipso jure*, and there would have been no more a liability remaining which the creditor could enforce against the shareholder than in the case of payment to the Company by the shareholder of the full amount of his shares before the bringing of the creditor's action.

No calls having, however, ever been made by the Company, it was held in *Ryland* v. *Delisle* that the debt of the shareholder to the Company had never been payable, and that consequently no compensation had been operated.

This case, whilst it recognizes the right of the creditor to sue as an original right conferred by the statute, not one derived through the Company, also concedes the right of the debtor to discharge himself from liability to the creditor by paying or satisfying the Company.

The conclusion to which I have come that the judgment of the Court of Appeals is erroneous, and ought to be reversed, is founded on two distinct propositions. First: I am of opinion that if this had been an action against Thomas Griffith, the original allottee of these shares, the Plaintiff would not have been entitled to recover. Secondly: That the Defendant having purchased the shares for value and in good faith as fully

paid up, is not liable in this action, even if the original allottee would have been. I will take up these two grounds *seriatim.*

The allotment of the remaining shares of the Company, pursuant to the resolution passed at the general meeting of the shareholders of the 15th March, 1872, at a discount of 40 per cent. deducted from the nominal value of the shares, though beyond all question *ultra vires* of the Company, illegal and void, as being in effect a reduction of the share capital prescribed by the charter, has been nevertheless found by all the Courts who have had to deal with this case, to have been a measure adopted without any taint of a fraudulent object, but in perfect honesty and good faith. It is equally a fact beyond all controversy, that these shares were not subscribed for eagerly as a matter of speculation, but were purchased to assist the Company, and to enable it to carry on its business, and that Mr. Griffith and the other subscribers would not have taken the shares on any other condition than that they were not to be called upon to pay for them more than 60 per cent. of their nominal amount; that this discount on the price was not a condition collateral to a contract to purchase shares at all events, but was an essential part of the contract entered into by each subscriber for shares allotted under the resolution of the 15th March, 1872, and that the payment of the 60 per cent. was a condition precedent to the vesting of the shares.

Then the contract being to pay sixty cents in the dollar and no more, could the Company in an action on the contract for the price, after making a call for the whole value of the shares, have sued Mr. Griffith for the whole amount? Certainly not. Why? Because when an obligation arising *ex-contractu* is sought to be enforced,

the measure of the Defendant's liability is to be found in the terms of the contract itself. Then Mr. Griffith had paid for these shares all he ever agreed to pay, and satisfied all the liability he ever contracted for in respect of them. It is, however, said that although as between Griffith and the Company, he might not have been liable beyond his contract, yet the statute makes him liable to the creditors beyond his contract. That it makes him liable to the creditors of the Company for the full amount of the shares in money, although he may have guarded himself by the most positive contract not to pay the full amount or to pay the full amount not in cash but in money's worth, work or goods. This is assumed to be warranted by the words "until the whole amount of his stock has been paid up." The question is then brought to this, did the Legislature intend by these words to impose, beyond the express agreement of a party taking shares, an obligation to pay the whole nominal value of the shares in cash, for, if in spite of his express agreement, a party who contracts to purchase shares at a discount for less than their nominal value is liable to make good a residue of the price which he expressly contracted not to pay, so also if he contracts to pay for his shares not in cash but in goods or money's worth he is equally liable to lose the benefit of his latter contract if he is sued by a creditor. Now, a *priori*, putting the authority of decided cases aside altogether for the present, I am of opinion that the statute contains decisive internal evidence that the proper construction of these words is that the shareholder shall be liable for the unpaid residue of what he contracted to pay and for that alone.

The words "not paid up" imply an obligation existing before the right of the creditor attaches

by the return of the writ of execution *nulla bona*. Then in whose favor could an obligation to pay the nominal value of the shares exist? Not certainly in favor of the Company upon a contract which the shareholder never entered into with them, or rather in contradiction of the express contract which he did enter into, that he was only to pay a reduced price or money's worth, (this is the expression used in the English cases) instead of money; and, of course, the price remaining unpaid which the statute gives the creditor the right to avail himself of cannot mean any unpaid liability to any other person or body than the Company.

That there is nothing to prevent a Company such as this from agreeing to take payment for its shares not in money but in money's worth, work or goods, at agreed on rates according to calls, is shewn by numerous English cases. The nice question which has arisen in these cases, and which has no application here, is whether the agreement to take shares is separate and distinct from that to receive payment otherwise than in cash; for, if the exceptional mode of payment is a condition or essential term of the contract, there can be no question but that the Company and its creditors are bound by it (1). The distinction I have adverted to is well defined by two well known cases which have arisen in England, *Simpson's* case (2) and *Elkington's* case (3). Lord *Cairns*, in *Elkington's* case, puts it thus: "The question for determination is, did "the Applicants intend and agree to become shareholders *in præsenti* with a collateral agreement as to what "should be the effect of their so becoming shareholders?

(1) Brice Ultra Vires, 2 Ed. p. 357. and cases there collected; (2) L. R. 5 Ch. App., 306; (3) L. R. 2 Ch. App.,522, see also *Currie's* case, 2 De G., J. & S., 367.

"or, on the other hand, did they agree, that if, and "when, a certain preliminary condition should be per- "formed,and not otherwise,they would become members "and shareholders? In the first case they are contri- "butories, in the second case they are not." This still remains the law in England, subject to this, that a contract to pay for shares otherwise than in cash now requires registration. No similar provision requiring registration has been enacted here.

If, therefore, the interpretation the Respondent contends for is to be given to this section when applied to a case like the present, of an illegal purchase of shares as paid-up shares at less than their nominal value, it must equally apply to a case of a perfectly good legal contract for the purchase of shares in consideration, not of money, but of the equivalent for money, of value to be paid in goods or work. If in the one case the contract of the parties is overridden by the statute, so equally must it be in the other. If in the case where the shares have been issued at a discount and the party taking them has expressly contracted that he shall not pay more than the cash price which he has handed over, so equally in the case, where he has agreed not to pay any cash at all but to pay with his goods or his work—a contract not *ultra vires* like the other but perfectly legal—he can be made by the creditor, in spite of his bargain, by force of this section of the statute to pay in cash. In other words, in every case, beyond the contract which the shareholder enters into with the Company, the law invariably annexes another in favor of the creditor, which may vary, even contradict the express terms of the actual contract, and that this is an effect of the statute which it is beyond the power of a shareholder to con-

trol. Independently of the English authorities, which, as I shall show, are altogether against such a construction, the very unreasonableness of the consequences points to a different intention on the part of the Legislature, which, without doing any violence to language, is compatible at once with the rights of the shareholders and the reasonable claims of the creditors.

The bargain with the Company must be the measure of the shareholder's obligation; the liability sought to be enforced under this section is not one arising *ex delicto*, but is entirely based on contract, whether arising from the agreement of the parties or from the statute, for at most, if the statute has the effect the Court below has attributed to it, it can only be considered as annexing an additional term in favor of the creditor to the contract, not fixing the Defendant with liability for any tortious conduct. Then, there being this single liability on the part of the shareholder to pay just what he has agreed to pay and no more, and to pay in the particular manner he has contracted to pay and not otherwise, there is still ample room for the application of the statute, by giving it the construction which the English cases have put upon the precisely similar provision in the statute already referred to (1), namely: that whilst the extent of the shareholder's responsibility, whether he has agreed to take paid-up shares at a discount for cash, or shares to be paid for otherwise than in cash, is to be found in his contract, he is liable upon that and upon that alone. Whilst every presumption repels a construction which makes a man liable under the statute beyond the terms of the agreement he entered into, there is nothing unreasonable in providing that on a certain contingency,

(1) 8 and 9 Vict. cap. 16, sec. 36.

and subject to certain conditions, a contract originally entered into with a corporation may inure to the benefit of the creditors of that corporation. The words "amount equal to that not paid up" have, therefore, reference to the amount in cash not paid up under the agreement for the purchase of the share. In other words, the shareholder undertakes an alternative liability; it can make no difference to him whom he pays. *Primâ facie* he is to pay his primary creditor, the Company, but in a certain alternative, and subject to compliance with certain preliminary conditions, the contract for the shares is to inure to the benefit of a secondary creditor, the judgment-creditor of the Company, but the shareholder's liability is precisely alike in both cases—the object of the statute having been not to compel shareholders to pay the full cash value of their shares in all cases, if called on to do so by the creditors of the Company, but to transfer to the unsatisfied execution-creditor the benefit of the contract between the Company and the shareholder, whatever that contract might happen to be. Let me guard myself here against misapprehension by saying that I by no means adopt the doctrine of the Court of Chancery in *Macbeth* v. *Smart*, for, in my judgment, that decree was most properly reversed by the Court of Appeals. I do not regard the execution-creditor as being subrogated to the rights of the Company against the shareholder, such as they stood at the time of the action brought against the shareholder, and as being, therefore, liable to be affected by equities or anything else short of actual payment, or satisfaction, equivalent to payment, arising subsequent to the contract for the shares. The statute, in my view, gives a contingent right to the creditor originally which nothing done by the Company short of obtaining actual satisfaction can prejudice.

The Company and the execution-creditor whose execution has been returned *nulla bona* are both creditors *in solido* and up to the time of an action being brought by the creditor against the shareholder, he may, if he does so without fraud, pay either the Company or the execution creditor at his election.

Then how does the case stand in point of authority? We find at least two cases in the English Reports which are authorities for the construction I have propounded. The cases of *Ashworth* v. *Bristol and North Somerset Railway Co.* (1), and *Guest* v. *Worcester Railway Co.* (2), both decided under the corresponding section of the English Act before referred to, are precisely in point. The shares, it is true, in these cases were deposited by way of security ; but no legal distinction can depend on this difference in the facts, since the persons sought to be made liable in both of these cases were shareholders whose shares were not fully paid up, and to make a distinction between absolute purchasers and holders of shares for security merely, would be to introduce a purely arbitrary qualification not warranted by the terms of the statute.

Without intending to set up a text writer however eminent as an authority against the learned Judges of the Court of appeal, I may venture to refer to a work on a subject with which English lawyers of the present day are necessarily very familiar, and which contains internal evidence of its value as a safe guide in applying the English authorities. I mean Mr. *Brice*'s treatise on the doctrine of *Ultra Vires*, a book which, as it has reached a second edition in less than three years, must enjoy some celebrity in England.

At p. 357, of the second edition of his book, pub-

(1) 15 L. T., N. S., 561; (2) L. R. 4 C. P., 9.

lished in March of the present year, Mr. *Brice* cites these cases as authorities for the exact proposition on which, I think, this case ought to be decided; he lays it down in the 117th of the propositions into which his work is divided, that "a person who contracts to take "shares of any kind, or under any condition, can only "be compelled to do exactly what he has contracted to "do." And commenting on this he proceeds to say: "This qualification, if such it be, is clear. A contract "to take shares is like any other contract,—one which "binds both parties to what they have agreed, neither "more nor less. Consequently, the first question is,— "has the person agreed to take paid-up shares and "nothing else, or has he agreed in any event to take "shares, and to call and deal with them as paid up, if "and so far as the law allows?" The answer to this test question in the present case I have already given in the reference before made to the admitted fact that these shares were taken on the express condition that they were to be assumed as paid-up shares at a discount of 40 per cent. deducted from their nominal value.

Therefore, in my judgment, if the Defendant here was Mr. Griffith, the original shareholder, instead of the present Defendant, his transferee, the Plaintiff could not maintain this action.

To go, however, a step further, and to assume that the agreement to treat the shares as paid-up shares was not an essential condition of the bargain, as in fact it was, but that it was, if made contemporaneously, an agreement for payment collateral to an agreement to take shares at all events, or a subsequent agreement as to a particular mode of payment, and that consequently the original subscriber

could, on the principle of *Elkington's* case, have been made liable, the present Defendant would, as a *bonâ fide* purchaser without notice, which he was found to be at the trial, a finding not found fault with in either of the Courts below, be entitled to be exempted from liability. This is the ground on which the judgment of the Queen's Bench proceeded, and it is entirely distinct from that which I have first put forward. It is also amply supported by authority, *Waterhouse* v. *Jamieson* (1), *Bush's* case (2), and *Spargo's* case (3) being all directly in point. The reference in *Spargo's* case to the liability of the original shareholder, who has taken paid-up shares, means, of course, a shareholder who would be liable under the test given by Lord *Cairns*, in *Elkington's* case (4), as having purchased shares, the agreement to treat them as paid-up being collateral, and not an essential condition of the contract as here.

Daniell's case (5) shews that the original shareholder here would be liable not as upon contract but *ex delicto* or *quasi ex delicto* in a Court of Equity, on a bill filed by any shareholder who did not acquiesce in the allotment of shares under the resolution of the 15th of March, the principle being that well known doctrine of Courts of Equity, that every participator in a breach of trust is equally liable with the trustee to make good the consequences of any misappropriation of the trust property. Here the Directors were trustees, and their distribution of these shares at less than their nominal value was a breach of trust, and all shareholders who participated in and authorized that misdealing were equally liable with the Directors. Shareholders who acquiesced in the re-

(1) L. R. 2 Sc. App., 29 ; (2) L. R. 9 Ch., 554; (3) L. R. 8 Ch. App. 410; (4) See ante; (5) 1 De G. & J., 372.

solution would, of course, not be entitled to complain, but those who were not present might do so, and possibly a suit might be maintained in the name of the Company. But this would not make the Defendant liable, as the principle only applies to those who participated in the breach of trust, and the Defendant is expressly found to be a *bonâ fide* transferee for value without notice (1).

Moreover, the Plaintiff, as an execution creditor, could not assert such an equity. And here I would advert to a distinction between the English Winding-up Acts and the statute applicable to this case, which shews that a false analogy is presented by many of the English cases which, although they are perfectly sound law in themselves, do not apply here. I will suppose that the Defendant here, instead of being a purchaser for value without notice, had, in fact, been a participator himself in the original misapplication of the shares. Under the English acts he would undoubtedly have been put on the list of contributories, and his equitable liability made available to the creditors in that way. Here, however, under the statute which we are construing and applying, all that can be enforced is the common law liability of the shareholder, which must, I submit, be measured by contract only, the creditor having no right to enforce any equities which the Corporation itself might have against its shareholders.

The Court of Appeals were disposed to attach weight to the consideration that the Plaintiff might have contracted on the faith of the liability in respect of these shares, and to assume that any person would have a right to examine the books and records of the Company. Nothing in the act warrants any such assumption. A Company chartered under this statute

(1) *Saunders* case, 2 De G. J. & S., 101.

has a right to keep its books and records as much concealed from the public eye as an ordinary man of business has, except in so far as the statute has otherwise provided; and no provision touching a right to examine the books can be found except that in section 5, sub.-sec. 19, no. 22, which requires that the books shall "be kept open for the inspection of "shareholders and creditors of the Company." As a man must therefore be a creditor before he has a right to inspect the books, it is hard to see how he can say he became a creditor on the faith of what he found in the same books.

There is one point which I have not mentioned, and on which I at one time thought this case might have to be decided. I allude to this: How far can the nullity of a contract, on the ground of its being *ultra* powers, conferred on a corporation by statute, be set up by those who are parties to it; and to what extent is the doctrine of estoppel applicable? This is a very different case from *Oakes* v. *Turquand* (1) where it was held that a transaction voidable, not absolutely void as between the company and a shareholder on the ground of fraud, could not be invalidated after the rights of creditors had attached. The question is a distinct one when the transaction is *ultra vires*, and is thus absolutely void *ab initio*, but whether it is to be considered void to the same extent and in the same manner as a contract is said to be void which offends against the positive rules of law where a party to the contract can set up the illegality (2) does not seem yet to have been entirely settled, though there are authorities favoring the affirmative of this proposition, particularly some of the judgments in

(1) L. R. 2 H. L., 325; (2) *Collins* v. *Blantern*, 2 Wilson, 341.

the *Bank of Hindustan* v. *Alison* (1) in error. If the transaction was wholly void the Defendant would not, of course, in point of law, be a shareholder at all, and on that ground alone would be entitled to keep the verdict (2). I do not, however, place my opinion at all on this principle, but on that which I have first stated, as well as on the distinct ground relied on in the judgment of the Court of Queen's Bench.

I think the order of the Court of Appeals of Ontario should be reversed, and that the verdict as originally found for the Defendant should stand, and that the Respondent should pay the costs both of the Court of Appeals and of this Court.

TASCHEREAU, J. :—

The facts of the case having been fully exposed, I shall make very few observations on the merits of the case. The sole important question we are called upon to decide, is whether a person having in good faith, and for valuable consideration, without notice, purchased shares in a Joint Stock Company incorporated by the Government of Ontario, under 27 and 28 Vict., chap. 23, on representation that the shares were fully paid-up, and which representation was confirmed by the proper officer of the Company, can afterwards be sued under no. 27 of sub-sect. 19 of sect. 5 of the Act, by a creditor, who has discovered that in truth the shares were never fully paid up.

With the greatest respect for the private opinions of the learned Justices of the Court of Appeals for Ontario,

(1) L. R. 6 C. P., 222; (2) See per *Giffard*, L. J., in *Stace* v. *Worth's* case, L. R. 4 Ch., 690.

and for the unanimous judgment rendered by them in this case, I am obliged to differ from the conclusion arrived at by that Court, and to hold that the Appellant should be relieved from the consequences of that judgment, and that this appeal should be allowed.

Starting from the point that the Appellant had no notice or knowledge of the issue of the shares at a discount, but was, on the contrary, informed by the officers of the Company that the shares in question were all paid up, I fail to see how, in contracting with his vendor to purchase shares of a certain value, he can be said to have contracted any other obligation, either towards the Company or the creditors of the Company. To render him so liable would be to declare that the Courts can make contracts for parties and not merely interpret those they have made. Enforcing a different contract against Appellant, would virtually change his contract and make him liable to pay what he did not intend to pay. It would give the creditor in that case two different rights, one against the shareholder for the whole amount and one against the Appellant. The framer of the statute had no such intention. The right to recover against the original shareholder is not lost because he has sold his shares; and to test this:—suppose the first allottee of these shares wished to free himself from his liability towards the creditor, he could in that case effect his object by selling to a person not worth a shilling, and forsooth the Company would have to submit to this. The liability of the Appellant cannot be created in this way in favor of the creditors of the Company if his contract is a limited one, and one in which he entered in good faith.

I fully agree, however, with the proposition that the original shareholders of the Company would be liable,

because they would have entered into the contract with notice. Undoubtedly the contract is voidable, and could be made so at the proper time, but the time being gone by, I do not think Appellant deprived of his right to plead inavoidance as against the creditor of the Company. The recourse of the Respondent is against Griffith, and especially against the Directors of the Company, a recourse which seems to me to be warranted not only by the English law, but by the laws of all civilized nations. The same recourse could be had against the shareholders who were parties to that very extraordinary transaction of altering the amount of the capital and reporting the shares to the public at large as fully paid up, if really the transaction was *ultra vires*.

Now, it is a principal of law, when some person must suffer from the wrongs of the others, the guilty should be in the first instance held responsible, rather than to see those who have not participated in the fraud put in the same footing as the perpetrators of the illegal act. The consequences of a different doctrine are fraught with danger to the commercial world. I, therefore, am disposed to reverse the judgment of the Court of Appeals of Ontario, and to confirm that of the Court of Queen's Bench, with costs in favor of Appellant in each and every Court.

FOURNIER, J.:—

Par lettres patentes émises en vertu du ch. 23 de la 27 et 28 Vict., une société limitée fut constituée sous la désignation de "The Lake Superior Navigation Company," au capital nominal de $64,000, représenté par 128 actions de $500 chacune.

Après quelque temps d'existence, les deniers prélevés

par la souscription au capital et par l'émission d'un certain nombre d'actions, se trouvant épuisés, il devint nécessaire de s'en procurer d'autres afin de continuer les opérations commencées. Dans ce but on essaya de mettre sur le marché une autre émission d'actions, mais il ne se présenta point d'acheteurs. Après cette tentative infructueuse, les Directeurs prirent la résolution d'émettre à 40 pour cent d'escompte la balance souscrite du fonds social, en le répartissant parmi les actionnaires dans la proportion du nombre de parts que chacun d'eux possédait déjà. Ce projet soumis à une assemblée générale des actionnaires, spécialement convoquée pour le prendre en considération, fut adoptée sans opposition.

En conséquence de cet arrangement Thomas Griffith, un des actionnaires originaires, souscrivit dix parts additionnelles pour lesquelles, après avoir payé 60 pour cent il reçut le certificat ordinaire constatant qu'il était propriétaire d'autant d'actions payées. Il transporta plus tard ces mêmes actions, avec quelques autres, à William Griffith, son frère, de qui l'Appelant McCraken en fit ensuite l'acquisition le 25 avril 1873. Dans ces divers transports ces actions sont mentionnées comme complètement payées (paid up).

L'Intimé McIntyre ayant obtenu contre la dite Compagnie, le 18 décembre 1874, jugement pour la somme de $852.35, fit ensuite émaner contre les biens de celle-ci, une exécution à laquelle le shérif fit un rapport de carence.

Après ce préliminaire indispensable pour recourir à l'action directe donnée par la loi ci-dessus citée, aux créanciers d'une Compagnie dont les actionnaires n'ont pas complètement payé leur parts, le Demandeur porta la présente action pour obtenir le montant de son juge-

ment de l'Appelant McCraken, sur le principe que ce dernier était encore débiteur d'une somme de $1800, sur le nombre de parts qu'il détenait dans la dite Compagnie. McCraken répondit à cette action par divers plaidoyers, dont un seul reste maintenant pour la considération de cette Cour, savoir: que les actions dont il était propriétaire étaient complètement payées, *paid up in full*, entrées comme telles dans les livres de la compagnie, et qu'il en était devenu acquéreur de bonne foi, pour bonne et valable considération.

L'honorable Juge qui a présidé au procès en première instance après avoir entendu la preuve a prononcé son verdict en faveur de l'Appelant, déclarant qu'il était acquéreur de bonne foi " that the Defendant was a *bonâ fide* purchaser for value received without notice."

Le jugement de la Cour du Banc de la Reine fut conforme à ce verdict; mais plus tard, la Cour d'Appel et d'Erreur d'Ontario l'infirma sur le principe que malgré sa bonne foi, l'acquéreur en vertu de la 27me section de l'acte déjà cité, demeurait responsable envers les créanciers de la compagnie pour un montant égal à celui de l'escompte de 40 pour cent auquel les parts en question avaient été vendues.

Cette clause est ainsi conçue :

" Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor before an execution against the Company has been returned unsatisfied, in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against such shareholder."

Ce langage est certainement assez clair pour ne laisser

aucun doute sur l'existence du recours des créanciers contre les actionnaires dont les parts ne sont pas complètement payées. Mais en est-il de même pour celui qui devenu, de bonne foi, acquéreur au-dessous du pair, de parts mises dans la circulation publique a été ensuite régulièrement reconnu par la Compagnie comme actionnaire et propriétaire de parts acquittées (fully paid up) ? Ou en d'autres termes, un actionnaire devenu tel par transport de bonne foi, d'actions dans une Compagnie incorporée, est-il obligé de justifier qu'il a payé le pair pour les actions dont il est devenu propriétaire ; ou ce qui revient au même, les actions de la Compagnie lors même qu'il apparaît à leur face qu'elles sont payées, ne peuvent-elles être ni vendues ni achetées au-dessous du pair, sans que par cela même l'acheteur ne soit exposé un jour ou l'autre à devenir responsable envers les créanciers de la différence entre le pair et la valeur commerciale qu'il a payée.

Poser ainsi la question c'est presque la résoudre, et cependant elle ne peut l'être autrement, d'après les faits ci-dessus exposés. C'est donc sur l'interprétation de cette section 27 qui semble n'avoir aucun caractère exceptionnel, que repose toute la difficulté. Cette disposition ne concerne que les actionnaires endettés, et en les déclarant responsables envers les créanciers, elle est conforme au droit commun qui, en cas de faillite, rend exigibles toutes les obligations à terme du failli et soumet tous ses biens à l'action de ses créanciers. Elle n'accorde, en réalité à ces derniers qu'un moyen plus expéditif de se faire payer sur les biens de leur débiteur. Il me paraît clair qu'elle n'a pas eu en vue d'atteindre l'actionnaire qui ne doit rien. Sur quoi pourrait-on en effet se fonder pour lui en faire l'application, si la loi ne le déclare formellement.

L'Appelant que l'on prétend ici, tenir responsable, n'a pu s'obliger envers la Compagnie qu'en la manière ordinaire soit *ex contractu* soit *ex delicto*. Par le verdict prononcé en sa faveur il est évident qu'il ne s'est rendu responsable par aucune faute ou délit de sa part. Ce n'est donc que par les termes de son contrat qu'il a pu s'obliger envers la Compagnie. Cependant cela ne se peut, puisque par son contrat tel que ratifié par elle, il est devenu propriétaire d'actions payées *en plein*. Il ne les aurait certainement pas achetées, s'il n'avait sincèrement cru qu'elles étaient intégralement payées. Si, lorsqu'il s'est présenté pour se faire inscrire, les Directeurs l'eussent averti qu'il restait encore 40 pour cent dû sur ces actions, pour lesquelles la Compagnie, ou ses créanciers, pourraient revenir contre lui, il n'eut sans doute, pas voulu payer plus qu'il n'était convenu, et il aurait alors certainement, ainsi qu'il en avait le droit, répudié le contrat qu'il avait fait avec son vendeur. Mais bien loin d'en agir ainsi, la Compagnie qui connaît son contrat l'approuve et inscrit l'acquéreur comme propriétaire d'actions payées. Il y a eu alors de la part de celle-ci, de la négligence ou de la mauvaise foi en ne révélant pas à l'Appelant le fait que ses actions n'étaient pas réellement acquittées. En effet la loi impose aux Directeurs l'obligation de n'admettre aucun transport d'actions sur lesquelles il y a des versements dus, etc. Alors, comment leur faute ou leur négligence qui peut bien, comme administrateurs, les rendre responsables envers les intéressés, peut-elle en même temps entraîner la responsabilité de leur victime? Pour arriver à cette conclusion il faudrait du moins établir, ce qui n'a pas été fait, la complicité de l'Appelant dans leur conduite. Prouver de plus que le dommage éprouvé par la Compagnie ou ses créanciers, est bien

son fait, soit qu'il ait violé une disposition formelle de la loi, soit qu'il ait omis de se conformer à une de ses dispositions impératives. Aucune de ses conditions ne se rencontrent dans le cas actuel.

Pour le rendre responsable, ne faudrait-il pas au moins trouver dans ce statut une disposition spéciale déclarant non-seulement la nullité de sa transaction, mais prononçant en outre, comme pénalité pour y avoir pris part de bonne foi, l'obligation de payer une somme qu'il ne s'est jamais engagé de payer. La loi n'a déclaré rien de tel et n'a pu le faire. Puisqu'elle a bien pourvu au mode de faire payer l'actionnaire endetté, si elle eût voulu atteindre l'acquéreur de bonne foi de parts ostensiblement acquittés, mais qui en réalité ne le seraient pas, elle n'eût pas manqué de l'exprimer. Ne l'ayant point fait, on ne peut tirer argument de son silence pour sévir contre des actionnaires induits en erreur par les directeurs. Je ne vois donc rien dans cette loi pour justifier la prétention du Demandeur. En l'admettant, ce serait au contraire se mettre en contradiction manifeste avec ses dispositions au sujet des pouvoirs des Directeurs concernant les transports d'actions, en imposant aux actionnaires une responsabilité que la loi n'a pas en vue et à laquelle ils n'ont jamais entendu se soumettre. En effet, la loi, n'a pu vouloir assimiler l'acquéreur d'actions payées avec le souscripteur originaire ou avec l'actionnaire encore débiteur. Cet acquéreur n'a point contracté les mêmes engagements qu'eux, il n'a même fait aucune remise de fonds à la Compagnie, ni contracté l'obligation d'en faire, puisque le montant de ses parts a été versé entre les mains de son vendeur. Mais s'il en était autrement et que la prétention de l'Appelant fut admise, toute société incorporée deviendrait impossible ; la cir-

culation de ses actions serait arrêtée, et une loi qui a pour objet de les protéger, interprétée de cette manière, n'aurait en réalité abouti qu'à les faire disparaître. Telle n'a pas été assurément la pensée de notre législature qui, évidemment, n'a eu en vue par la 27e sec. que de faciliter le recours des créanciers contre les débiteurs de la Compagnie et nullement de créer une responsabilité nouvelle dans un cas où il n'en existait pas auparavant. Les créanciers, en vertu de cette section, n'exercent que les droits de la Compagnie contre ses débiteurs, l'Intimé n'a donc rien à réclamer de l'Appelant que celle-ci n'a jamais considéré comme son débiteur et qu'aucune disposition légale ne déclare responsable en pareil cas.

En outre, si on remonte à la transaction intervenue entre les Directeurs et Thos. Griffiths, premier acquéreur du stock en question, qu'arrivera-t-il dans ce cas-là ? Elle ne peut certainement pas être considérée autrement que comme légale ou comme nulle. Dans le premier cas, elle doit être exécutée ; dans le second, si on la considère nulle, elle doit l'être dans son entier. Elle ne pourrait être acceptée pour une partie et répudiée pour l'autre. Alors il s'en suivrait que la nullité n'en pourrait être demandée à moins d'offrir en même temps de remettre le prix d'achat. L'adoption de ce parti, en forçant ainsi les créanciers à racheter des parts sans valeur deviendrait désastreux pour eux. S'il est vrai qu'en aliénant des actions au-dessous du pair les Directeurs ont fait un contrat que les tribunaux doivent déclarer nul, cela ne leur donne certainement pas le pouvoir d'en substituer un autre tout contraire à la volonté des parties. Puisqu'un pareil transport est nul comme contraire à la prohibition de la loi, n'est-il pas plus raisonnable et plus juste d'en tirer la conclusion

que l'actionnaire qui l'a consenti est, malgré cela, demeuré responsable envers la compagnie du montant des actions qu'il a souscrites, et que c'est à lui et non à son acheteur de bonne foi qu'il faudrait s'adresser pour obtenir le paiement de la balance due.

Une autre considération qui n'est pas sans importance, c'est que la conduite des Directeurs n'a point causé de dommage à la Compagnie ni à ses créanciers. Tout au contraire, ce stock qui, d'après la preuve n'avait pu trouver d'acheteur à aucun prix, a réalisé pour le bénéfice commun des intéressés un profit de 60 centins dans la piastre. N'ayant rien trouvé ni dans notre statut ni dans les faits de la cause pour justifier la prétention de l'Intimé, j'ai été très heureux de rencontrer des décision rendues en Angleterre qui la repousse comme exorbitante et souverainement injuste. Ces décisions ont été prononcées dans l'interprétation d'une loi dont le principe, quoique mis en pratique par des procédés différents, est le même que celui introduit par la 27e sect. de notre statut. Je ne les passerai pas en revue, l'analyse complète qui en a été faite par quelques uns des mes collègues me dispensent de le faire. Je me bornerai à en rapporter quelques passages d'une application évidente à cette cause.

In re The Imperial Rubber Co. (1). Dans cette cause, comme dans celle qui nous occupe maintenant, on voulait aussi tenir responsable un acquéreur de *paid up shares.* Sir *W. M. James* en prononçant son jugement sur l'appel, après avoir mentionné que Bush (la partie que l'on voulait rendre responsable) "had bought under that title which is a perfect and complete title upon the documents *which this Company* is itself bound by " continue à s'exprimer dans

(1) L. R. 9 Ch. App., 554.

le vigoureux langage qui suit : " I am of opinion that it would be an act of the grossest injustice if we are to endeavour to make him liable on these shares." " I am bound to express my regret and disapprobation at and of official liquidators in these Companies who think that this particular section of the Act, because it was made for the benefit of creditors, is intended to enable them to make innocent and honest men pay money which they never intended to pay. It is a mistake to suppose that the Court is called upon to put a forced construction upon the Act for the purpose of enabling that injustice to be done."

Je citerai encore la cause du " *Great Northern and Midland Coal Company* (1), dans laquelle il a été décidé " That the transaction could not be affirmed in part and repudiated in part, and consequently the directors if treated as shareholders must be treated as *paid up* shareholders and not placed on the list of contributors in either case."

Je m'appuie également de l'autorité des décisions rendues dans les causes suivantes dans lesquelles la même doctrine a été maintenue.

Re Western Canada Oil Lands and Works Co., Carling's case (2) ; *Gray's* case (3) ; *Saunderson's* case (4).

HENRY, J. :—

This action is brought by the Respondent to recover from the Appellant, a shareholder, the amount of a judgment for eight hundred and twenty-six dollars and eighty-five cents, which he recovered against the Lake Superior Navigation Company (Limited), with interest

(1) 3 De G. S. & J., 367 ; (2) L. R. 1 Ch. Div., 115 ; (3) L. R. 1 Ch. Div., 664 ; (4) 3 De G. & S., 66.

and costs. An execution against the Company was issued and a return of *nulla bona* thereon made as required by the statute.

The Defendant has filed several pleas, but the only important ones are—

1st. A denial that any more money was due on the shares.

2nd. On equitable grounds, that the shares were fully paid up, entered, as such, in the books of the Company, and that the Appellant purchased them for a valuable consideration and in good faith. Issue was taken upon all the pleas in the suit, but any reference to the other pleas is unnecessary.

I need not repeat the facts in evidence, further than to state that the shares in question were issued to Thomas Griffith, a Director, and other shares to the other Directors, at the rate of sixty cents in the dollar, and he received the certificates of stock. Attempts had been *bonâ fide* made to sell the stock, but no purchasers could be found; and I feel satisfied the shareholders took the stock at the price named, more to obtain funds for the Company than as a desirable speculation, and gave, as subsequently shown, full value for it, if not more. This purchase, under the circumstances, may have been voidable, as being apparently against the terms of the charter, which provides for the nominal capital of the Company, but as to which, in this case, I feel it unnecessary to give an opinion. So far, however, as appears, the transaction bears no mark of fraud or moral breach of faith.

Those shares, therefore, so alloted and paid for, were subsequently transferred to William Griffith, *as fully paid-up shares*, he purchasing them in good faith *as such*, and without notice that they were not so. He subsequently, for valuable consideration, sold and transferred

them to the Appellant, who purchased them for a valuable, and, in my opinion, sufficient consideration, in good faith, and without notice. It is, however, sought in this action to make him pay the remaining forty per cent. of the nominal value of those shares, under the provisions of section 27, cap. 23, 28 and 29 Victoria.

The right of action being founded solely on that section, it is, consequently, of the first importance that we should interpret it so as properly to carry out the objects it had in view ; and we can only effectually do so after a consideration of the position of creditors of an insolvent company in the absence of such legislation. The part of the section referred to reads thus :—"Each share-"holder, until the whole amount of his stock has been "paid up, shall be individually liable to the creditors "of the company to an amount equal to that not paid "thereon." I have carefully considered all the cases cited at the argument, and many others, and I have failed to find one to sustain the position necessary to success, taken by the Respondent; but, on the contrary, several in opposition to his right to recover.

The Appellant, and those under whom he claims, paid all they ever expected or agreed to pay; and I must be fully convinced of my obligation to construe this section so as, under the circumstances, to make him pay more, before deciding that he should be required to do so.

Section 10 of the same Act authorizes the Directors to "call in and demand from the shareholders thereof, "respectively, all sums of money by them subscribed, "at such times and places, and in such payments or "instalments as the by-laws of the Company may "require and allow."

The power of the Directors to enforce collections for stock is limited to "all *sums subscribed.*" As, therefore,

neither the Appellant nor either of the Griffiths' *subscribed* to pay at any time the remaining forty per cent. of the nominal value of the stock, it could not be recovered by the Company for the best of all reasons—the absence of any contract or promise, express or implied, to do so. If, indeed, the transfer was fraudulent on the part of Thomas Griffith and the other Directors, or amounted to a legal breach of trust on his part and theirs, the Company might, if it did not ratify the transfer, have avoided it, and caused it to be returned under proper and equitable terms; but here the Company did ratify the transfer and were all parties to to it. Reading sections 27 and 10 together, is it unreasonable to conclude that the former refers to, and was intended to refer to, the amount of stock "subscribed" and agreed to be paid for? It is clear *the Company* could recover for no other, and if the Legislature meant that a creditor should recover money from a man who had never agreed to pay it, I cannot help feeling that more explicit terms should, and would have been, employed. After reading all the cases most carefully, I have failed to discover one which sustains the contention that a person in the position of the Appellant should be made a contributory; or forced to pay more than he contracted to do, under the circumstances like those in this case. In some particulars the judgment-creditor after a return of *nulla bona*, occupies a more favorable position than the Company. The latter, in cases where instalments under by-laws are payable, can only recover *after calls duly made*. The creditor can recover *without any calls being made*, but this is from the peculiar wording of the statute, and imposes no liability beyond which the party contracted for, dispensing merely with the "call;" and is similar in princi-

ple and result to the legislation which would dispense with the presentation of a promissory note payable on demand. The money was due in both cases, but, in the present one, no money was *due* between the original contracting parties.

In the matter of the equitable set off, the creditor is placed in a better position than the Company, for when his writ is issued, the money then due and unpaid for stock, becomes a debt due to the creditor, and shuts out, at all events, any set-off accruing due subsequently. *Watson* v. *Mid-Wales Railway Company.* (1)

The directness and certainty of the remedy is of vital importance to a creditor acting promptly, but for which, he might be almost without any, having otherwise to enforce his claim by tedious and often unsatisfactory proceedings against the shareholders. These, and other material advantages given by the legislation in question, are sufficient, in my opinion, to warrant it, independent of the one now contended for, and I feel, justified in concluding that the clause in question is abundantly beneficial; and quite sufficient to satisfy the amending spirit of the Legislature, without giving it such a forçed construction as is asked for; and by which contracts would be improperly extended beyond the intention of the contracting parties, and money recovered by a creditor to which he has no equitable or legal right. From evidence before us, it is clearly shown that the stock was not, at the time of the allotment, or since, worth more than it was sold for, and the creditor is no worse off, at all events, than he would have been had it not been sold. It may be answered that if the stock had not been so sold, the Company would have been then incapable of going on, and the Respondent would not,

(1) L. R. 2 C. P., 593.

in that case, have become a creditor. That argument I consider of too speculative a character to be entitled to much weight. Why then should he (the creditor) be put in a better position by the sale, and be permitted to recoup the loss in a business transaction with the Company out of funds never due to the Company? And I may here say that the English statute is the same in substance as the Canadian; the only difference being that the creditor in England could issue an execution on a *scire facias*, instead of bringing a suit. I am sustained in my conclusions on this point by the judgment *in re Imperial Rubber Company* (1). The Company in that case had agreed to purchase property by fully paid-up shares from Tucker. They were allotted to Tucker, and he sold those in question to Bush. Held, that the shares were fully paid-up shares in the hands of the purchaser from the allottee. This case was decided in 1875, and shows pretty significantly that we would commit an error were we to put the forced construction on the governing section of the Act we are asked to do. It was on an appeal by the official liquidator of the Company from the decision of Vice Chancellor *Bacon* against the application to make Bush a contributory. Lord Justice *Sir William James*, delivering judgment on the appeal, after stating that "apparently Mr. Bush brought under that title, which is a perfect and complete title, upon the documents *which the Company* is itself bound by," gave utterance to the following significant and wholesome language: "I am of opinion that it would be an act of the grossest injustice if we were to endeavour to make him liable on those shares. I am bound to express my regret and disapprobation at and of

(1) L. R. 9 ch., App., 554.

official liquidators in these Companies, who think that this particular section of the Act, because it was made for the benefit of creditors, is intended to enable them *to make innocent and honest men pay money which they never intended to pay.* It is a mistake to suppose that the Court is called upon to put a forced construction upon the Act for the purpose of enabling injustice to be done."

If, then, to permit the creditors, through the official liquidator, to recover money in opposition to an agreement "which the Company is itself bound by," and to make innocent and honest men "pay money which they never intended to pay," would be "enabling injustice to be done," I can discover nothing in the section in question to give *one* creditor suing thereunder any better right than the liquidator for *all* the creditors, to seek payment from an "innocent and honest" shareholder occupying the position of the Appellant. From the latest governing cases, as well as from my own appreciation of legal and equitable principles, I feel myself called upon to decide against the Respondent. I feel convinced that we have no power in the present proceedings to alter the contract of the Appellant, and that the creditor is not in a position to ask to have the contract avoided. If the Company ever could have done so, it was only by remitting the Appellant to his *status quo*, before the purchase, and that the Respondent does not seek for or wish. Were we in a position to decree anything to the Respondent (which I feel we are not), it could be only to the extent of the difference between the actual market value of the stock and the price given by Thomas Griffith, when it was purchased by him, and such a decree would in this case I presume, be of little service to the Respondent. My opinion, is, however

clearly against the existence of any such power, and I feel that the creditor in such case can do no more than the Company, and must either wholly adopt, or seek to avoid, the contract, if the circumstances should warrant the latter course.

In re Great Northern and Midland Coal Company, *Currie's* case (1), the directors became alienees of 100 paid-up shares of an allottee, who received them from the Directors as an alleged part payment of property purchased by the Company. The same directors were holders also of other paid-up shares taken by them for attendance fees. The validity of the purchase and the attendance fees were both impugned "Held, that the transactions could not be affirmed in part and repudiated in part, and consequently the Directors, if treated as shareholders, must be treated as paid-up shareholders, and not placed on the list of contributories in either case." Lord Justice *Turner*, in delivering judgment, says: "Contribution must be made according to the liability of the parties at law and equity." "That purchase was either valid or invalid. If valid, it is clear that neither he (the allottee) nor his alienees, can be called upon to contribute in respect of these shares. If invalid, I cannot see my way clear to hold that either a Court of Law or a Court of Equity could do more than treat the purchase as void, and annul the transaction altogether. It could not, as I apprehend, be competent either to a Court of Law or to a Court of Equity, to alter the terms of the purchase, and treat as *not paid-up* shares, what were, given as *paid-up shares*. Fraud, assuming there was fraud, would, of course, warrant the Court in treating the purchase as void, or in undoing it; but it could not,

(1) 3 De G., J. & S., 367, (1862.)

as I conceive, authorize any Court *to substitute other terms.*"

"As to the shares taken for attendance fees, I am also of opinion that the Appellants are not liable to contribute in respect of those shares. They were taken, and as it seems to me, improperly taken, as paid-up shares, but the principles which apply to the 100 shares, apply, I think, to these shares also. The transaction *might be undone*, but could not be modelled."

The sale and transfer of stock throughout the world is one of the most important branches of trade. That of one country is sold all over it, and in many others; and a decision such as that asked for by the Respondent, would, and should have, in relation thereto, the most damaging results. No man would be safe in buying stock on certificates setting forth that it was fully paid up, or that which was held out, as such, by the Company issuing it through their responsible officers; and the difficulty of ascertaining the truth of such representations from long distances would necessarily put an injurious clog on sales. I feel myself compelled to the conviction that if my judgment should, in some few cases, prevent a creditor from recovering his claim in the way the Respondent now seeks to do, an immeasurably large balance of evils to the trade of the country would otherwise result; and I, therefore, the more readily conclude the Legislature did not so intend it. I believe the proper jurisprudence to be that which throws a large part of the onus of inquiry upon the party sought to be made the creditor of a Company, and, before occupying that position, of ascertaining precisely how the matter of unpaid-up stock stands. In this case, perhaps, a party could not, as of right, inspect the books of the Company before becoming a creditor, as he might do under the

English statutes, but he always had the option of refusing credit until satisfied of the position of the Company. Had the Respondent here done so he would have no doubt been informed that the Appellant's stock *was fully paid-up*, and if, after that intimation of what all parties considered an honest and fair sale and transfer, he gave credit to the Company with the intention of evoking the aid, to say the least, of a doubtful statute, to intrude a claim for payment between the company and the innocent holder for valuable consideration without notice, by which he would seek to take from the latter more than he agreed to pay, and failed in the attempt, I don't think he should be the object of much commiseration. If he failed to make that inquiry I think he must be taken to have given the credit irrespective of the stock in question, and solely upon the general credit of the Company, and should not be permitted to intervene to the injury of an innocent holder, as the Respondent here seeks to do.

The case of *Macbeth* v. *Smart* (1) was cited as authority for the position that a shareholder, in an action against him, by a judgment creditor of the Company could not set off in equity a debt due to him by the Company, before the judgment was recovered. The decision in that case was by a bare majority of one out of the seven judges. No calls for the unpaid stock had been made, and the case virtually only decides that inasmuch as in the absence of any call *no money was due and payable* to the Company, a set-off could not be allowed. The Company could not sue, and therefore there could be no set-off. The stock, in that view of the law consequently remained unpaid, and in a suit by a judgment creditor he acquired a right under the statute

(1) 14 Grant, 298.

to recover from the shareholder the amount so unpaid, which the Company could not have done in the absence of a call. Had, however, calls been duly made, a sum would then be due to the Company to which the doctrine of set-off could be applied, and to an action to a judgment-creditor of the Company, the shareholder could legally plead a set-off for money due and payable to him by the Company previous to the accruing of the creditor's right of action (1). From all the authorities taken together, I consider that the accruing of the right of action to a creditor of a Company under the section in question, has the same effect and no more, than the notice to a debtor by the assignee of a debt, or *chose in action*, and that therefore a shareholder may defend a claim made by a judgment-creditor, by means of a set-off, for money due and *payable* to him before the accruing of such right, or by showing that he was not *then* indebted to the Company. *In re Mattock Old Bath Hydropathic Company* (2) the shareholders owed £1,000 for shares, but the Company owed him £1,000 for property sold and conveyed by him to the Company. He was placed on the list of contributories by Vice-Chancellor *Bacon*, but, on appeal, his decision was reversed, and it was held that Maynard was to be treated as the holder of fully paid-up shares. Lord *Selborne*, L J., said: "The question in this case is one of payment or no payment. The liability of the Appellant to pay up to the Company the full amount of the shares for which he subscribed, the memorandum of association being unquestionable, and the Company having been free to accept the payment in any honest way. If the contract for the sale of the Appellant's property to

(1) See *Watson* v. *Mid-Wales R. Co.*, L. R. 2 C. P., 593; (2) *Maynard's* case, L. R. 9 Ch. App. 60, (1873.)

the Company, dated the 1st March, 1866, and the conveyances consequent thereon, expressed the true agreement between the parties, the Company became bound to pay the Appellant £1,000, the same sum which he was liable to pay for the shares in question, and there was no difficulty in point of law in setting off one payment against the other. * * * Consistently, therefore, with all that was decided in *Fothergill's* case (1) I think that the Appellant ought not to be on the list for those 100 shares otherwise than as fully paid-up shares." Concurred in by the other Lords Justices *Sir Wm. James* and *Sir T. Mellish.* Under the governing principle of that judgment, I feel justified in concluding, as I have before intimated, that the liability of the shareholder in a case in liquidation, is not greater than that to the Company at the commencement of winding up, with such exceptions as do not touch the points in this case ; and that the position of the liquidator is no better than that of the Company, where the liability to pay, on each side, had previously arisen, and was payable ; and I will here add that I have seen or can find no case where a different rule has been authoritatively laid down or enforced.

In *Leifchild's* case (2) an attempt was made to put him on the list of contributories as the assignee of certain shares in a Company. The shares were subscribed for by Claypole, who assigned a patent to the Company for a nominal consideration of ten shillings, there being also a parol agreement that the delivery of the paid-up shares was the consideration of the assignment. The shares were also represented in the Articles of Association as paid up. Vice-Chancellor *Kindersley* says : " The question is here whether W. Liefchild ought to

(1) L. R. 8 Ch., 270; (2) 13 L. T., N. S., 267 (1865).

be put on the list of contributories." * * * Again " It appears to me there is no reason why Mr. Liefchild should be put upon the list, unless, according to the terms of the Act, he is liable to contribute to the assets." " What do these words mean? Why, that the contributory is liable, with other persons, to pay a certain contribution to make good the liabilities, no one in this case having the right to say that Mr. Liefchild is bound to assist in paying the debts; but it is said that does not apply to creditors. Now, under the original Act, the Court did not concern itself with creditors, but the interests of creditors are now to be consulted; that is to say, by means of contribution the Court is to make up, if it can, the means of paying them. But, unless they can say it is a fraudulent transaction, they can have no remedy anywhere, and if they had, how is the matter to be decided upon a question whether a party is to be placed on the list of contributories or not? Their remedy would be by a bill seeking to set aside the whole transaction."

Here, then, it is again unequivocally held that the only remedy (if any) was, not by making the shareholder a contributory, but by proceedings in equity to avoid the original transfer of shares; and I quote the case, and the learned Vice Chancellor's dicta, in further proof of the position that the Plaintiff here cannot, in the present proceeding, adopt the contract in part and reject it in part, and that, if he cannot do so, the Appellant is entitled to our judgment.

I will now refer to another recent case (in 1868), *Guest* v. *The Worcester, Bromyard and Leominster Railway Company* (1). The Company deposited with the Bank 1,500 shares of £10 each, as security for an advance of

(1) L. R. 4 C. P., 9.

£5,000, the certificates endorsed purporting that the shares were "registered as fully paid-up in the books of the Company (1)." In the "Register" of shareholders the chairman and manager of the Bank were inserted simply as holders of the shares, but in the "call book" was this memorandum: --"Deposited at Bank as security for over draft." No calls had ever been made on them, though the whole £10 per share had been called up against the others. *Bovill*, C. J.: "Mr. Bridge (the Counsel) does not desire to contest the fact, and very properly, for upon the affidavits it is clear that the Bank never undertook any liability to the Company in respect of these shares. *They never contemplated paying calls "but accepted the certificate as a security for their advance, "on the faith of the statement written thereon, that the "shares were registered in the books of the Company as "fully paid-up shares,*" and again, "in a case of this sort, "though I must confess I do not entertain a shadow of "doubt, I do not think the Plaintiff ought to be pre-"vented from trying the question in the form of a "special case. The authorities referred to are very "strong, but, independently of them, I should be pre-"pared to hold that these gentlemen are not liable." *Byles* and *Keating*, J. J., concurred. The points, therefore, that decided that case were, firstly, *That the Bank never undertook any liability to the Company*, in regard to the shares; and, secondly, that they *never contemplated paying the calls*, but, as did the Appellant in this case, took them on the faith of the statement, *that the shares were registered as fully paid-up shares.*

This decision clearly establishes my contention, that applications to make shareholders contributories can only be successfully made where it is in pursuance of

(1) L. R. 4, C. P. 9.

the contract, express or implied, between them and the Company, that the shares are not fully paid-up shares. When that element is wanting, I cannot feel myself justified, in the face of all the controlling authorities, in modelling the contract in this case, in which the Appellant *never undertook any liability to the Company* in respect of his shares, and *never contemplated paying calls.* The *bona fides* and legality of transfers of stock in many of the English cases were impugned, but the invariable answer of the Court has been, in effect, that which I give to the present application, and that is—*that the contract cannot in such proceedings be either avoided or in part only adopted, and, therefore, the shareholder cannot be made a contributory.* I will now refer to another case by which I feel sustained in all the positions I have taken, *in re Western of Canada Oil Lands and Works Company* (1). Previous to this case there were several wherein sales and transfers of stock given in payment of property in violation of the English statute, which provided that *all stock should be paid* for in money, were declared illegal as to consideration, and parties who paid otherwise, and their transferees, were required to pay over again. Those decisions, however, do not appear to have affected late decisions on the other statutes. Walker, in the case last mentioned, entered into an agreement with a person as trustee of an intended Company for the sale to the Company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the Company when formed. The Company was formed and the agreement was set out in the articles. Walker applied to the Appellants to become Directors, which they

(1) L. R. 1 Ch. Div., 115.

agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as Directors and adopted the agreement for the sale of the property. The number of shares requisite for the qualification of a Director was five; but after the completion of the purchase thirty paid-up shares were, by the direction of Walker, *allotted* to each of the Appellants, and they were entered on the register as holders each of thirty fully paid-up shares; and received certificates to that effect. An order was afterwards made for winding up the Company, and the Master of the Rolls settled them on the list of contributories for "thirty unpaid shares each." "Held, on appeal, that the Appellants (Carling and others), as to the shares allotted to them, stood in the same position as if those shares had been allotted to Walker, and transferred to them by him, and that as there was no contract between them *and the Company* that they would take shares independently of their accepting certificates stating them to be holders of these fully paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares, and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the *Companies Act*, 1862, sec. 165, or otherwise, on the ground that they had entered into a corrupt bargain with Walker. To the statement of the liquidator's Counsel, that Walker, by means of the shares had bribed the Appellants to ratify the provisional contract, by giving them shares as a portion of the proceeds thereof, *James*, L. J., remarked: "There is no doubt that such a transaction cannot stand, but the question before us is whether this order gives you the proper remedy." *James*, L. J., again "There was no contract between the

Appellants and the Company, besides the acceptance of a certain document giving them fully paid-up shares. Are you not altering that by fixing them with unpaid shares?" The Counsel replied: "Where a Director obtains the shares in breach of his duty to the Company, he cannot hold them as fully paid-up;" citing *ex parte Daniell* (1). *Mellish*, L. J.: "There is an affirmance by one Lord Justice, the other doubting or dissenting. Has it been followed?" The latter question was not directly answered, but I can say in relation thereto that if it has been, I have been unable to find any record of it. In delivering judgment, *James*, L. J., says: "We entirely "agree with the Master of the Rolls that these gentle- "men committed a very grave and very reprehensible "breach of trust in accepting a qualification from a "person who was a vendor to the Company, and with "whom it would be their duty to deal as trustees for "the Company; but then the question arises, what is "the mode in which relief is to be given in respect of "such a breach of trust? Of course we are not capric- "iously to punish the persons who have committed it.

"We have to see that if they are punished they are "punished in due course of law. The mode in which "the Master of the Rolls has fixed these gentlemen "is by treating as unpaid shares the shares for which "they are entered in the Register of paid-up shares. "Now, beyond all question, *they never made themselves "liable to take any shares at all. They never contracted "to take shares or to pay for shares; the only contract "between them and the Company was the contract that "arises from the fact that certificates of the shares, as paid "up shares, were sent to them, and they accepted those "certificates.* If, therefore, the case depends on a con-

(1) 1 De G. & J., 372.

"tract between them and the Company, the contract "must either be approbated or reprobated. If the con- "tract was a contract that they would take paid-up "shares, we cannot convert that into a contract to take "unpaid shares." Further on, the learned Lord Justice, referring to the proceedings against the Appellants for the alleged breach of trust committed by them in the acceptance of the shares, says; "I therefore purposely "abstain from saying anything about what may be the "possible results of any proceeding against the Appel- "lants, but I am of opinion *that we cannot in law make* "*these shares unpaid.*"

Mellish, L. J.: "I am of the same opinion. I "entirely agree that the acceptance of these shares on "the part of the Directors was a breach of trust. " * * * There are certainly three things, any one "of which the Company might do," and after stating two of them, he says: "And, thirdly, the Company "might say, although you have made no profit by "selling these shares, yet, by having had them allotted "to you, you deprived us of the power of allotting them "to other persons, therefore you must pay us the sum "which we have lost by reason of our being deprived "of the right of allotting those shares to other persons "who would have 'paid them up.' Of these three "remedies the liquidators may, in my judgment, take "whichever is most beneficial to the Company. But can "they do any more? Can they say, 'although the "'shares which you have taken, which were the "'property of the Company, were absolutely worthless "'or worth very little, both at the time when you took "'them and ever since; nevertheless, inasmuch as nomi- "'nally they were £100 shares we will make you liable "'for that full sum of £100 on each share?' In my

"judgment that would be inflicting an arbitrary punish-
"ment on a trustee for his breach of trust. It would
"not be indemnifying the *cestui que* trust for the injury
"he had sustained, and would be giving him a sum
"which, if the breach of trust had never been com-
"mitted, he would not have acquired. This appears
"to me to be, in principle, wrong." And again: "I
"feel grave doubt whether there is any contract between
"the person who accepts the shares and the Company,
"beyond this, that, of course, by being entered on the
"register as a paid-up shareholder, he at any rate
"becomes a paid-up shareholder. It appears to me,
"therefore, that there is nothing to compel us to do what
"I cannot help thinking it would be a great injustice
"to do, namely, to make gentlemen, who no doubt
"have committed a breach of trust, liable, not for the
"consequences of that breach of trust, but liable to pay
"to the Company a sum of money which, if that breach
"of trust had not been committed, the Company could
"not have recovered. It appears to me that the only
"contract entered into by these gentlemen with the
"Company being that they became members of the
"Company by accepting the certificates of paid-up
"shares, that contract must either be adopted or rejected
"in its entirety. If it is rejected, they are not sharehol-
"ders at all. If it is adopted, the Company is entitled
"to say, 'They are not your shares but ours,' but that
"does not make them hold unpaidup shares."

Bramwell, B.: "I am entirely of the same opinion,
"and, therefore, I shall say nothing except that I should
"be very sorry to have it supposed for a moment that
"we consider these gentlemen not to have done wrong.
" * * * I, however, think that the law has quite
"sufficiently provided a remedy for misconduct like

"this without doing what I think we should do if we "supported this order; that is to say, distort the facts "of the case and find that to exist which in reality "does not exist."

Brett, J.: "I am very sorry to be obliged to agree in "this judgment. I should have been exceedingly happy "if I could have agreed with the judgment of the "Master of the Rolls, for I think that the law ought "to be kept as wide as it can be, in order to put an "end, if possible, to this system of Directors taking "paid-up shares; but it seems to me that we cannot, in "point of law, hold that these persons are liable to "pay to the Company the amount of these shares as "if they were unpaid. They can only be made liable "to pay anything to the Company in respect of these "shares *under contract to pay calls in respect of them*, or "by reason of a breach of trust. Now, as I apprehend, "*there never was a contract at all between these gentle-*"*men and the Company* with regard to these shares. "They never entered into a contract with the Company "to take shares at all. If they had entered into a "contract with the Company to take shares, that would "have involved a contract to pay for them. But by "merely taking paid-up shares from a third person "they certainly never entered into any contract with "the Company to pay anything in respect of those "shares, and, therefore, they cannot be held liable to "pay on the ground that they contracted to pay. The "fact of their accepting these shares at the moment "they did, was a breach of trust, but the effect of that "breach of trust *is not to make them liable to pay the* "*nominal amount* of their shares, but to make them "liable as trustees of the Company *for the real value of* "*the shares.*"

I have given lengthy extracts from the judgments in the latter case, as it is one of the latest, and, as I take it, the governing one. There is but one reported since—*Gray's* case (1), and that approves the leading principles in *Carling's* case. Shares were transferred to Gray and another Director as trustees of the Company, to be held as security to the Company for a contract of the party who transferred them. They were not to be registered unless by the direction of the Directors, and were not, until it was done by the official liquidator, who also placed the Directors on the list of contributories, "Held, "that they were not liable to be placed on the share "register or list of contributories * * * under "the express provision that they should not, except by "their own direction, be registered as holders of such "shares."

I will quote shortly from the judgment of *Bacon*, V. C.: "If I were" he says, "to listen to the application "of the liquidator to place the names of these gentle- "men upon the register, I should be doing a thing "directly at variance with common honesty and com- "mon sense. If the law required me to do it, I must "do it, but I feel under no such obligation. The law "has been distinctly settled in *Saunders* case (2), and "the attempts which have been made to diminish the "weight of authority of that case, have been, in my "opinion, wholly unsuccessful." Referring to the agreement not to register the shares without the direction of the Directors, the learned Vice Chancellor says "and these gentlemen consent to become trustees, "but with the express condition that they * * shall "not be entered upon the register of shareholders with- "out their written consent, because that would place

(1) L. R. 1, Ch. Div., 664, (1876); (2) 2 De G. J. & S., 101.

"them under certain legal liabilities. In face of that "plain contract I am asked to hold that what has been "done is equivalent to a registration which would be "altogether to omit and neglect what is the real nature "of the transaction."

Here again is it declared to be law that no person can be put on the register against his own contract, and that principle applies equally strong where an innocent purchaser of paid-up shares and so registered is attempted to be made a contributory for unpaid shares; for the latter would be, equally with the former, a violation of the contract. But let us look at *Saunders* case (1) so recently marked by high legal approval.

Saunders was a local manager of a Company, 500 shares were transferred to him by the manager as a trustee for the Company, by deed which he also executed. He paid nothing for the shares. He subsequently acted as a Director. He was not registered as a shareholder (but the decision was not influenced by that circumstance) and never received any dividends, and the Court was satisfied *that he had never agreed to purchase the shares.*

"Held, that if the Company, which could not be "bound by the transaction, elected to affirm it, Saunders "was only a trustee for the Company and so not a "contributory, and that, if they elected to disaffirm it, "then it not appearing that Saunders was privy to the "breach of duty on the part of the Directors, it must "be rescinded altogether, and that Saunders therefore "was not a contributory."

An order for winding up the Company being made, a question arose as to the liability of Saunders to be placed on the list of contributories, and it came for decision before the Lord Justices.

(1) 2 DeG. J. & S., 101.

Lord Justice *Turner*: "Now, as the case stands on the "evidence, * * * I think the fair and just conclu- "sion to be drawn is, that there never was, in fact, "anything like a sale of the 520 shares in question to "the Respondent, George Leman Saunders, but that "those shares belonging, as they appear to have done, "to the Company, were transferred by the order of the "Directors into the name of the Respondent *in order to* "*qualify him for the Directorship.*" [The final transfer to McCraken, the Appellant, in this case was solely to qualify him as a Director.] "The Respondent would "then become a trustee of the shares for the Company "as Williams had previously been. How then would "the case stand as between the Company and the "Respondent? The company, of course, could not be "bound by such a transaction. They might adopt or "repudiate it. Supposing them to adopt it, they "certainly could not insist on their own trustee being "put on the list of contributories. Supposing them, on "the other hand, to repudiate it, would it not be open "to the Respondent to say that the transaction must "be undone *in toto*—that the Company could not affirm "the transaction in part and disaffirm it in part? I "think it would. It might, indeed, be otherwise if it "were shown on the part of the Company that the "Respondent was party or privy to the breach of trust "or duty on the part on the Directors in directing the "transfer to be made. But I am satisfied upon the "evidence that this was not the case, and that the "Respondent did not, in truth, know how these shares "were provided for hi qualification. Upon this ground, "therefore, I am of opinion that this motion ought to "be refused."

The last three cases establish, to my mind most

satisfactorily, what the law is, and the several propositions: First, that before making a shareholder, such as the Appellant, of unpaid stock, liable as a contributory, it must be of the essence of his contract that he should be the holder of *unpaid stock*, as in the cases where the statute requires payment in money. Second, that no stronger position is held by a liquidator to enforce payment of alleged unpaid-up stock than that of the Company; and, third, that the alienee of shares transferred by Directors in breach of their trust, through other persons without notice, and for a valuable consideration, cannot be made a contributory in disregard of his contract, or contrary to its terms. The essence of the contract in this case was the acceptance of fully paid-up shares. The Appellant gave the full market value for them, and if he did not expressly contract not to, he certainly did not contract, to pay any more for them, and never intended or expected to do so. But we are told that the word "unpaid" in this section includes *what was never due or payable* under any contract, and that we are bound so to construe it, and thereby oblige an innocent holder, who has paid the full market price of fully paid-up shares, liable for all the breaches of trust committed by Directors in allotting or issuing shares of which he is in total ignorance, after having made all reasonable enquiries, to pay the difference between the sum paid the Company and the nominal value of the shares. I cannot subscribe to that doctrine; which, with all deference, I must characterize as against "common law and common sense," but. on the contrary, feel bound to hold that "unpaid" in the section means not that which neither of the contracting parties contemplated, but what was fairly and reasonably due and payable

under the terms of the contract by the one to the other.

Appeal allowed with costs.

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