JOHN NASMITH.....APPELLANT; 1880

*Nov. 16.

AND

ALEXANDER MANNING.....RESPONDENT. 1881

*Feb'y. 12.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

R. W. Co.—Action by creditor against a shareholder—Conditional agreement—Allotment, notice of, necessary.

The appellant, a judgment creditor of the *T. G. & B. Railway Co.*, sued the respondent as a shareholder therein, for unpaid stock. From the evidence it appeared that the respondent signed the stock book, which was headed by an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay ten per cent of the amount of the said shares and all future calls. The company, on the 1st July passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for the respondent, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper notifying subscribers to the capital stock of the *T. G. & B. Railway Co.*, that the first call of ten per cent. on the stock was required to be paid immediately to them. The respondent never called for or received his certificate of allotment, and never paid the ten per cent, and swore that he had never had any notice of the allotment having been made to him.

The case was tried twice and the learned judge, at the second trial, although he found that the respondent had subscribed for fifty shares and had been allotted said fifty shares, was unable to say whether respondent had received actual notice of allotment.

Held, affirming the judgment of the Court of Appeal, that the document signed by the respondent was only an application for

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*PRESENT—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

1880

NASMITH v. MANNING.

shares, and that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved.

[*Ritchie*, C. J., and *Gwynne*, J., dissenting.]

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), reversing a judgment of the Court of Queen's Bench (2), and directing a verdict to be entered for the defendant.

This was an action or proceeding, in the nature of *scire facias quare executionem non*, instituted by the plaintiff, a judgment creditor of *The Toronto, Grey and Bruce Railway Company* against the defendant, who, as the plaintiff alleges and contends, is a holder of fifty shares in the capital stock of the said company, of which there remains still unpaid an amount more than sufficient to pay and satisfy the plaintiff's judgment.

To the plaintiff's declaration the defendant pleaded:

1. That he was not nor is the holder of the said shares as alleged.

2. That he was induced to become the holder of the said shares by the fraud of the said company, and that within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of said shares or any of them, and before the debt due by the company to the plaintiff was incurred, he repudiated and disclaimed the said shares and all title thereto and all liability in respect thereof, and gave notice thereof to the company, whereof the plaintiff had notice.

3. That he was induced to become the holder of the said shares by the fraud of the said company and the plaintiff, and that he repudiated the stock after notice of the fraud, as in the second plea, and afterwards, in order to defraud the defendant, the plaintiff, colluding

(1) 5 Ont. App. R. 126. (2) 29 U. C. C. P. 34.

with the said company, instituted the action in which the plaintiff obtained judgment against the company.

4. That the company had sufficient goods to satisfy the plaintiff's judgment and from which the amount of the execution could and would have been realised, but for the fraud and collusion of the plaintiff and the said company, whereby the sheriff was induced falsely to return the said execution, as if the said company had no goods and chattels in his bailiwick whereof he could make the amount of the said execution in whole or in part.

5. That it was agreed between the defendant and the said company that if the defendant would sign an agreement to take the shares, the company would give to the defendant and one *John Ginty* a contract for the construction of the company's railway, and that until the said contract should be given the defendant should not be bound by his signing said agreement, that relying upon such agreement of the said company and not otherwise, the defendant did sign the said agreement to take said shares, but that the company have refused to give the said contract to defendant and the said *John Ginty*.

The sixth plea is somewhat similar to the fifth.

Issue being joined the case came down for trial before *Armour*, J., without a jury in the spring of 1878, (the evidence is set out in the report of the case in 29 U. C. C. P. 34 and 5 *Ont.* App. Rep. 127,) when a verdict was rendered in favor of the plaintiff. Upon a motion to set aside that verdict, a rule was made absolute for a new trial in consequence of a then recent decision in *Denison* v. *Lesslie* (1) in the Court of Queen's Bench and in the Court of Appeal of *Ontario*, and in consequence of the construction which the company by a certificate of allotment produced at the trial seemed to

(1) 3 Ont. App. R. 536.

1880

NASMITH v. MANNING.

have put upon the document signed by the defendant, namely, that it was only an application for shares, which if a correct construction would, upon the authority of several English cases, have required a response either in writing or verbally, or by conduct communicating to the defendant that the company had accepted his application and himself as a shareholder before he could be liable as such, a point as to which there had been no finding at the trial.

The case accordingly went down to trial a second time and was tried by *Cameron*, J., without a jury, who by his verdict found: 1. That the defendant subscribed for fifty shares in the stock book of the company, and that the fifty shares were allotted to him by the company, and that the company sent notice to him of calls, and that his name was published in the *Globe* newspaper as a shareholder, and that he was at the time of such publication a subscriber to the *Globe*, and that all was done by the company to give the defendant a claim against the company for the stock and to have any benefit that might accrue therefrom. He further added that he could not say that the defendant received actual notice of the allotment, but he found that the company by notices sent to his address gave him notice of their considering him a shareholder. Upon this verdict being moved against the Court of Queen's Bench after argument held, that the evidence supported the findings of the learned judge.

Upon appeal by the defendant to the Court of Appeal of *Ontario*, the majority of that court reversed the judgment of the Court of Queen's Bench, and ordered a verdict and judgment to be entered for the defendant. From that judgment the plaintiff has appealed to this court.

The printed documents connected with the case, viz.: the heading of the stock book, extract from the minutes

of a meeting of the directors of the company, the form of certificate of allotment, resolutions and notices, &c., are referred to at length in the judgment of *Ritchie*, C. J., hereinafter given.

Mr. *Blake*, Q. C., and Mr. *Proctor*, for appellant:

The appellant is a judgment creditor of the *Toronto, Grey & Bruce Railway Company*, incorporated by 31 *Vic.*, c. 40, *Ontario*. The several clauses of "The Railway Act" (1), relating to calls, shares, and their transfer, are expressly incorporated therewith.

By referring to sections 1, 2, 6, 7, 15, 17, 18, 27 and 28 of this Act it will be seen that in the mind of the legislature the word "subscriber" is equivalent to the word "shareholder."

The paper signed by *Manning* was a paper prepared by the company, and was executed under seal. The Act empowered the provisional directors to open stock books, to make a call upon the shares subscribed therein, and to call a meeting of the subscribers for the organization of the company, and it was in pursuance of this statute that the subscription of the respondent was made in the company's stock book under his hand and seal. It seems fanciful to give decisions in this country based on decisions of another country where an entirely different mode of dealing with subscribers exists. We all know of the mania that prevailed in *England* some years ago, to get stock in a joint stock company. It was sufficient to announce that a company was being organized, the eagerness of the public was such that there were immediately more applications for stock than was wanting, and it was only after allotment that the applicants could be said to be shareholders.

The document signed by respondent being a covenant to pay under seal, the assent of the company thereto is

(1) Con. Stat. Can., c. 66.

1880

NASMITH v. MANNING.

sufficient, and such assent might be inferred, if, as in this case, it was not repudiated by the company; but the evidence shows the company did actually assent to the subscription, and sent respondent notices to pay calls.

The earliest decision on this point in our courts was that given by the Court of Common Pleas in the case of *Smith* v. *Spencer* (1); so again in *Lake Superior Navigation Co.* v. *Morrison* (2); so again in *European & North American Railway Co.* v. *McLeod* (3).

Now, what are the admitted facts as to the mode in which Mr. *Manning* became what he did become.

The capital stock of the company was $3,000,000. It was never contemplated to get more than 10 per cent. of that amount subscribed, the intention of the provisional directors being to get a respectable list of *Toronto* shareholders in order to induce the counties to give the company municipal aid. Accordingly, after a deal of manipulation and canvassing, Mr. *Laidlaw*, one of the most active provisional directors, and Mr. *Campbell*, the company's broker, succeeded in getting subscriptions for their stock to the amount of $300,000, the amount required for organization. *Manning* was induced to subscribe stock at the instance of Mr. *Laidlaw*. This subscription was admitted by him, although at first he alleged it was conditional, and his main defence was that he was only to become a shareholder on his getting the contract to build the company's road about to be constructed in connection with one *John Ginty*, who was also a partner of his in building another road. The court held this defence could not avail him, but in the latter stage of the proceedings he thought it better to say he was not a shareholder at all. But how can it be seriously contended that the company who

(1) 12 U. C. C. P. 281. (2) 22 U. C. C. P. 217, 220.
(3) 3 Pugs. N. B. 3, 34, 35, 40.

wanted all the subscribers they could get, who sent out brokers canvassing, intended to take conditional subscriptions? There was no danger of any subscriber not having his stock. It was even deemed necessary to publish the stock sheet, in order to show who were interested in the scheme, and that the company was *bonâ fide* organized. All this was known to Mr. *Manning*, and we are entitled to contend that what took place is real evidence of his becoming a shareholder. Then, also, it is in evidence that he not only consented to sign the list of subscribers which was published, but he aided publicly the directors in getting municipal bonuses and aid. This, it is argued, does not prove he had knowledge of the allotment, but surely he knew he was a shareholder, and if anything more was to be done, it was only some mere formal matter. Under all these circumstances we have very strong evidence to sustain that construction upon which we primarily rely, *i. e.*, that the effect of signing this document was to create that relation between the company and the respondent as to make him a subscriber. Within the four corners of this paper we find a perfect contract, the minds of both parties were brought together.

The second point relied on is, that if it was an imperfect contract, the only condition was the "allotment," and upon allotment, and not upon "notice of allotment," the respondent became a shareholder. What the court of appeal has done is this: that they have interpolated the words "upon notice of" in this document under seal. They have not taken into consideration that acceptance by the subscriber had taken place. Now, there can be no doubt that an allotment was made, and we cannot therefore be hampered with this objection, for the evidence shows that the company sent respondent calls to pay.

If notice of allotment were necessary it may be implied

1880

NASMITH v. MANNING.

from the facts of the case, or the conduct of the parties; and the court of first instance having found that respondent was aware of the company's acceptance of his subscription, or was in a position to have known the same and could have taken advantage of any benefit which might have resulted from the acceptance of himself as a shareholder, consequently he is liable. *Levitas' Case* (1); *Wheatcroft Case* (2); *Pritchard* v. *Walker* (3); *Crawley's Case* (4); *Fletcher's Case* (5).

If the respondent expected or required notice of the allotment or call, he should have taken pains to have informed himself when the same was made, for there was a duty upon him to pay the calls made by the directors. Sec. 48, 49 and 50, Con. Stat., c. 66. *Sparks* v. *The Liverpool Water Co.* (6); *Aylesbury Railway Co.* v. *Mount* (7).

The cause having been twice tried, and a verdict on both trials having been for the plaintiff upon evidence deemed sufficient by the learned judges who tried the case, and the same having been expressly approved of by the court below, the Court of Appeal should not have turned the verdict so obtained into a verdict for defendant, but should have ordered a new trial. *Merchants' Bank* v. *Bostwick* (8).

The following authorities were also cited and commented on by counsel: *Denison* v. *Lesslie* (9); *Gun's Case* (10); *Nixon* v. *Hamilton* (11); *Harrison's Case* (12); *Moore* v. *Murphy* (13).

Mr. *Ferguson*, Q. C., for respondent:

If the true construction and meaning of the document

(1) L. R. 3 Ch. 36.
(2) 29 L. T. 324.
(3) 24 U. C. C. P. 434, 472, 477.
(4) L. R. 4 Ch. 322.
(5) 1 L. T. 136.
(6) 13 Ves. 428.
(7) 4 M. & G. 651.
(8) 28 U. C. C. P. 465.
(9) 43 U. C. Q. B. 22.
(10) L. R. 3 Ch. App. 40.
(11) 2 Or. & Wal. 364.
(12) L. R. 3 Ch. 638.
(13) 17 U. C. C. P. 444.

signed by respondent, is, that it was not an application for shares, but a subscription without any condition, I must admit the authorities cited by the learned counsel for appellant have great weight; but if it is only an application for shares, and that on the face of the document itself there was something else to be done, it is clear the company have no right against the respondent until they do that further act—so I say that upon signing this document respondent did not become *eo instanti* a shareholder. By this document the company need not allot unless they choose, and therefore at that time there was no complete contract, the mind of the company and of the subscriber had not yet come to any decision as to the ownership of the $5,000 stock.

In this document which is said to be the stock book, we find the expression "upon allotment," it shows clearly that in the minds of the parties there was to be an allotment. The proposal was to take, if allotment is made and not otherwise, and it is upon these words that the construction of this agreement must turn. The remedy sought is an extraordinary one given by statute, and unless the requisites of that statute were in all matters strictly made out by the appellant, he was not entitled to succeed.

Now, in order to make out that the respondent was a shareholder, and liable as such by reason of his having so signed the same, it was necessary for the appellant to prove that the respondent had received notice of an allotment of the shares, or at least that there had been a response to this application received by, or communicated to, the respondent, stating, or to the effect, that the said company had accepted his application and himself as a shareholder of the said shares, and this within a reasonable time after the making of such application, and in this respect the evidence adduced by the appellant entirely failed, and there was a positive

1880

NASMITH v. MANNING.

denial by the respondent of his having received any such notice of allotment or response. It was not proved that there was any verbal response to the said application, even if that were possible and would be sufficient. Nor was it proved that any letter or other document containing any such response was delivered to the respondent or even mailed to him, if this last could have been held sufficient in the face of the respondent's denial of the receipt of it, which it could not. Nor was it proved that the respondent had any knowledge of an allotment of the said or any shares to him, and besides, it appears by the evidence and the circumstances thereby disclosed, that a long series of years passed away after the time of the said application during which neither the said company nor the respondent considered that the respondent was such shareholder, and for these reasons it was not established that the respondent was such shareholder, and the judgment of the court below is correct and should be affirmed. *Denison* v. *Lesslie* (1); *Redpath's* case (2); *Wall's* case (3); *Pellatt's* case (4); *Gunn's* case (5); *British American Tel. Co.* v. *Colson* (6); *Kipling* v. *Todd* (7); *Ness* v. *Angus* (8).

The newspaper publication and the publication of list of shareholders relied upon by the appellant as being some evidence that the respondent had notice or knowledge that the company had accepted the said application and the respondent as a shareholder, were not evidence against the respondent, and besides, knowledge of them was not brought home to the respondent by the evidence.

The findings of the learned judge who tried the cause were not sufficient to warrant the entry of a verdict for

(1) 3 Ont. App. R. 536.
(2) L. R. 11 Eq. 86.
(3) L. R. 15 Eq. 18.
(4) L. R. 2 Ch. 527.
(5) L. R. 3 Ch. 40, 55.
(6) L. R. 6 Ex. 108.
(7) 3 C. P. D. 350.
(8) 3 Ex. 805.

the plaintiff (the appellant), nor were the said findings supported by the evidence, and it was competent to the court below, if necessary, to reverse these findings, they being based, at least in part, upon inferences of fact drawn by the learned judge, from facts stated in the evidence and not resting upon different degrees of credibility considered to be due to the witnesses from their demeanor before the court, and, moreover, I submit there was no finding on the point for which the case was sent back The *Glannibanta* (1); *in re Randolph* (2).

The learned counsel also referred to and relied upon the authorities following: *Household Fire Insurance Company* v. *Grant* (3); *Reed* v. *Harvey* (4); *Byrne* v. *Van Tienhoven* (5); *Jones* v. *Hough* (6); *McCraken* v. *McIntyre* (7); *Nasmith* v. *Manning* (8).

Mr. *Blake*, Q. C., in reply.

RITCHIE, C. J.:—

The *Toronto, Grey & Bruce Railway Co.* was incorporated by 31 *Vic.*, c. 40 of the *Ontario* Legislature, by the second section of which act certain clauses of the Railway Act of the Consolidated Statutes of *Canada* are incorporated with and to be deemed a part of this act, viz:—

The several clauses of the Railway Act of the Consolidated Statutes of *Canada*, and amendments with respect to the first, second, third, fourth, fifth and sixth clauses thereof, and also the several clauses thereof with respect to "interpretation," "incorporation," "powers," "plans and surveys," "lands and their valuation," "highways and bridges," "fences," "tolls," "general meetings," "president and directors," "their election and duties," "calls," "shares and their transfers," "municipalities," "shareholders," "actions for indemnity and fines and penalties, and their prosecution," "by-laws, notices,

(1) 1 P. D. 283.
(2) 1 Ont. App. R. 315.
(3) 4 Ex. D. 216.
(4) 5 Q. B. D. 184.
(5) 5 C. P. D. 344, 348.
(6) 5 Ex. D. 115. 122.
(7) 1 Can. S. C. R. 479, 526.
(8) 29 U. C. C. P. 52, 53.

1881

NASMITH v. MANNING.

Ritchie, C.J.

&c.," "working of the railway," and "general provisions," shall be incorporated with and be deemed to be a part of this act, and shall apply to the said company and to the railway to be constructed by them, except only so far as they may be inconsistent with the express enactments hereof, and the expression, "this act," when used herein, shall be understood to include the clauses of the said Railway Act so incorporated with this act.

Section 14 provides:—

As soon as shares to the amount of three hundred thousand dollars of the capital stock of the said company, other than by municipalities, shall have been subscribed, and ten per cent. thereof paid into some chartered bank, having an office in the city of *Toronto* (which shall on no account be withdrawn therefrom, unless for the service of the company), the directors shall call a general meeting of the subscribers to the said capital stock, who shall have so paid up ten per cent. thereof for the purpose of electing directors of the said company.

Section 17 provides:—

At such general meeting the subscribers for the capital stock assembled who shall have so paid up ten per cent. thereof, with such proxies as may be present, shall choose nine persons to be the directors of the said company, and may also make or pass such rules and regulations and by-laws as may be deemed expedient, provided they be not inconsistent with this act.

Section 27 provides:—

On the subscription for shares of the said capital stock, each subscriber shall pay forthwith to the directors for the purposes set out in this act, ten per cent. of the amount subscribed by him, and the said directors shall deposit the same in some chartered bank to the credit of the said company.

Section 28 provides:—

Thereafter calls may be made by the directors for the time being, as they shall see fit, provided that no calls shall be made at any one time of more than ten per cent. of the amount subscribed by each subscriber.

By the consolidated statutes of *Canada* "shareholder" shall mean any subscriber to or holder of stock in the undertaking, and shall extend to and shall include the personal representatives of the shareholder.

1881

NASMITH v. MANNING.

Ritchie, C.J.

Under heading "shareholder:"

Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the company, and until the whole amount of his stock has been paid up, but shall not be liable to an action therefor 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.

This being the state of the law, the company prepared a stock book and solicited subscriptions to stock, and the plaintiff signed the stock-book containing this agreement:

EXHIBITS.

(1)

HEADING OF STOCK-BOOK.

We, the several persons, firms and corporations whose names and seals are hereunto subscribed, severally and respectively agree to and with the *Toronto, Grey* and *Bruce Railway Company*, and bind ourselves, our executors and administrators or successors respectively, to become holders of the capital stock of the *Toronto, Grey & Bruce Railway Company* for the number of shares of one hundred dollars each, and amounts set opposite to our respective names, and upon the allotment by the said company of my or our said respective shares, we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively; provided always, that no calls shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per centum of the amount subscribed.

Toronto, April, 1869.

1869.	Name.	No. of shares.	Amt.	Seal.	Residence.	Amt. Paid.	Witness.
May 14	John Ginty...	40	$4,000	Seal.	Toronto	10p.c.	N. Barnhart.
June 19	Alex. Manning.	50	5,000	Seal.	Toronto		C. J. Campbell.

(2)

EXTRACT FROM THE MINUTES OF A MEETING OF THE DIRECTORS OF THE TORONTO, GREY & BRUCE RAILWAY COMPANY, HELD ON 1ST JULY, 1869.

The president stated that on the previous evening the amount of

1881

NASMITH v. MANNING.

Ritchie, C.J.

stock required by the charter for organizing the company, viz., $300,000, had all been subscribed, and that therefore it was necessary at once to devise means to collect and pay into the bank the first instalment of ten per cent. on the shares, so that the meeting for the election of directors and organizing the company could be called at as early a date as possible; the brokers, Messrs. *Campbell & Cassels*, were instructed at once to collect the first instalment of ten per cent. on the stock, and to have the amount required by law, viz., $30,000, paid into the bank to the credit of the company before Saturday, the 10th July, so as to enable an advertisement calling the general meeting of the shareholders to appear in the *Ontario Gazette* of that date; the secretary was also instructed to prepare advertisements for the *Ontario* and *Dominion Gazettes*, and such other papers as were necessary, calling the meeting, the date of which was left to be decided by the solicitor; the secretary was also instructed to issue allotment certificates to each shareholder for the amount of shares held by him.

(Signed,) *John Gordon.*

(3)

FORM OF CERTIFICATE OF ALLOTMENT.

Toronto, 1st July, 1869.

To Alexander Manning, Esq., Toronto:

This is to certify that the *Toronto, Grey & Bruce Railway Company*, in accordance with your application for fifty shares of $100 each of their capital stock, have allotted to you fifty shares, amounting to $5,000, the first instalment of ten per cent. thereon being payable forthwith, and all future calls to be made at a rate not exceeding ten per cent. on the amount of said shares, and at intervals of not less than sixty days.

W. Sutherland Taylor,
Secretary

FORM OF ENDORSEMENT ON NOTICE.

$500. *Toronto*, 3rd July, 1869.

Received from the within-named the sum of five hundred dollars, being amount of first instalment of ten per cent. on the amount of stock allotted by the within certificate.

Campbell & Cassels

(4)

COPY OF A RESOLUTION PASSED AT THE MEETING OF THE SHAREHOLDERS HELD ON 10TH AUGUST, 1869.

It was then moved by Mr. *John L. Blaikie*, seconded by Mr. *Ginty*, and unanimously resolved, That the Directors this day elected be instructed to pay an amount not exceeding four dollars per meeting

to the provisional directors for each meeting which they have severally attended.

Yours truly,

(Signed,) *W. Sutherland Taylor,*
Sec.-Treas.

NOTICE PUBLISHED IN "GLOBE."

TORONTO, GREY & BRUCE RAILWAY NOTICE.

Subscribers to the capital stock of the *Toronto, Grey & Bruce Railway Company* are hereby notified, that the first call of ten per cent. on the stock is required to be paid immediately to the brokers of the company, Messrs. *Campbell & Cassels,* 60 *King Street East.*

By order,

(Signed,) *W. Sutherland Taylor,*
Secretary.

The above notice appeared in the daily *Globe* from the 2nd to the 9th July, 1869.

(5)

TORONTO, GREY & BRUCE RAILWAY.

Take notice, that a further call of ten per cent. on the capital stock of the *Toronto, Grey & Railway Company* has been authorized by the directors, and that the same is payable at the company's offices, corner of *Front* and *Bay Streets, Toronto,* on the 16th day of May, 1870.

By order of the Board.

(Signed,) *W. Sutherland Taylor,*
Secretary.

The above is a copy of the notice for calls in *Gazette* on the dates mentioned by the secretary of the company.

I think on allotment by the company, the subscribers became in fact and in law shareholders in the company, liable to pay to the company ten per cent. of the amount of the shares, and to pay all future calls, subject to the proviso in the memo. so signed and sealed; and they became entitled to all privileges, benefits and advantages that might accrue to such shareholders in said company, and became subject to all liabilities and responsibilities attaching to shareholders in the company.

The contract in this case was this: The company applied to the respondent to take shares; the respondent

1881

NASMITH v. MANNING.

Ritchie, C.J.

agreed to do so, and bound himself under seal to pay a percentage on allotment, the assent of the respondent to the application of the company, and the binding agreement signed and sealed by him, imposed on the company the binding duty of allotting the specified shares to him, and constituted an agreement completed, binding on both parties, which either could enforce, entirely distinguishable from an agreement merely resting on an application for shares. The applicant was the company, and the sealed undertaking of the respondent was the acceptance of the company's offer, and fixed on the company the obligation to allot them, and when so allotted, they became *eo instanti* vested in the respondent. In other words, the company sent an offer by which they were bound, and under which, on receiving back the offer accepted, signed and sealed by the respondent, a contract complete and binding on both sides was constituted. This conclusive and binding agreement on both parties was, on the respondent's part, that he should become a shareholder of 50 shares and pay; and, on the company's part, that they should grant him the said fifty shares, and the company being under this direct obligation to grant those shares, discharged that obligation by allotting to him the shares in a due and formal manner, and regularly placing him on the register. Surely the contract was then full, perfect and complete; a valid and unimpeachable contract, the effect of which was to make this respondent the holder of 50 shares in the company. I think there was quite enough to satisfy the judge who tried this case, that the respondent knew that the company had acted on the agreement, had treated him as a shareholder, and had placed him on the register, and so had notice that the company had allotted to him the stock; and had the application come from the respondent to the company, that would have been sufficient to show that

he knew that the company had assented to his request, and had completed the contract. In fact, this is to be gathered from defendant himself.

He says:—

I am the defendant. I have not and never had any papers or documents relating to the shares in question in this action. I have no allotment of shares, and never heard of any allotment. Some eight years ago I put my name down for shares conditionally in the *Toronto, Grey & Bruce Railway*, and in the *Toronto & Nipissing Railway*. I cannot swear what amount I took in each; I think it may have been about $5,000 worth in the *Toronto, Grey & Bruce*, and $2,000 or $2,500 in the *Toronto & Nipissing*. This was just before the companies were organized, to the best of my recollection. *George Laidlaw* asked me to take these shares. No call was ever made on me for these. I have never paid any call or anything on the *Toronto, Grey & Bruce* shares. I forget what it was that I signed. I do not know whether it was the stock book that I signed or some other paper. The proposal on the part of *Laidlaw* was made on the corner of *King* and *Church Streets*, I think the south-west corner; we agreed there, but I cannot positively say where I signed. Mr. *C. J. Campbell* came up afterwards, or else *Laidlaw* took *Ginty* and myself round to his office. I do not know who was present when we signed; I think that *Ginty* was there, and signed at the same time that I did. I think that *Campbell* was present when I signed. As far as I recollect, there was nothing appearing in the books in connection with my name, except my signature. I refused to take stock in the first place; then there was a verbal agreement made between *Laidlaw* and myself. I would not have taken the stock except for the inducement that *Laidlaw* offered. He asked *Ginty* and myself to take stock, and I refused. He wanted to raise a large amount of stock here, so as to show to the people outside who were giving bonuses that the people here were contributing largely to the undertaking. He agreed that if we took stock we should get the contract for building the road; that we would not be called on to pay unless we got the contract, and he said that if we got the contract, under any circumstances we should not be called on to pay more than ten per cent. upon the stock. Upon that agreement and conversation we agreed to take the stock. I think that we each took stock separately. We tendered for the *Nipissing* work and got it; we also tendered for the *Grey & Bruce Railway* and did not get it. I supposed that the contracts would be let by tender, but not necessarily to the lowest tender. *Laidlaw* was the only one who had

1881

NASMITH v. MANNING.

Ritchie, C.J.

made the agreement with me. I had been out with him and *Gordon* canvassing for a week in the townships. If I got the contract I understood that my stock would be paid out of my estimates, but not more than ten per cent. I supposed that if I had got the contract I should have been in the same position as any other stockholder. I subscribed to the *Toronto & Nipissing* on the same terms. They were separate transactions, but *Laidlaw* was acting in both as the prime originator. We got the contract for the *Nipissing;* I paid up my stock in full in this. My stock was paid principally out of my estimates. I sold out my stock in this road, and hold no stock in it now. Tenders were called for the *Toronto, Grey & Bruce,* and I put in one; the tender was that of *Manning & Ginty.* I do not know why it was refused. I cannot tell whether it was the lowest. When my tender was rejected, I did not consider that I had any stock. No director ever spoke to me about my stock. I never was asked to pay any calls; I may have been notified when the first call was made. I never wrote to the directors about my stock, nor they to me. I was surprised when I was served with the writ in this action.

By Mr. *Ferguson*—I never at any time paid anything on account of the stock, either when I signed or afterwards. It was distinctly agreed that I was not to pay anything on it unless I got the contract; without this condition, I would not have taken a cent's worth of stock. There was no connection between my subscriptions to the two railways each was a separate transaction. I did not get the contract for the *Toronto, Grey & Bruce* road, and never was asked to pay; I never was a shareholder. I would have been a shareholder if I had got the contract. Mr. *Laidlaw* was the moving spirit in the undertaking; there would have been no *Toronto, Grey & Bruce Railway* without him. I do not recollect whether they had the act at the time that he solicited me to take stock: he was the chief actor in soliciting stock. The *Toronto, Grey & Bruce Railway* is in operation, and there is a large amount of rolling stock in use on it, and the company has other property, such as furniture and safes at all of their stations, and tools on the line of their railway. The road runs through the counties of *York, Peel, South Simcoe, Grey* and *Bruce.* Some of the property I refer to is in each of these counties.

(Signed,) *Alexander Manning.*

Certified a true copy.

(Signed,) *Geo. M. Evans.*

(11)

TORONTO, GREY & BRUCE RAILWAY COMPANY.

List of shareholders at 31st December, 1877.—Revised up to the 30th June, 1877, and 30th Sept., 1877, and 31st Dec., 1877.

NAME.	Address.	No. of Shares.	Calls.	Unpaid.	Amt. paid up.
John Ginty....	*Toronto.*	40	$3,600	00	
Alex. Manning.	*Toronto.*	50	5,000	00	

But apart from this, I think there was a completed contract, and no notice of allotment was necessary to constitute the defendant a subscriber to the stock and a shareholder.

It is clear the company allotted the stock, 50 shares, to the defendant. This is not the ordinary case where a person applies for a maximum number of shares undertaking to accept them or any less number, and the company is under no obligation to give him any, in which case, I take it, a reply to the application is necessary, for the very good reason "that when an individual applies for shares in a company, and there is no obligation to let him have any, there must be a response by the company, otherwise there is no contract (1);" but in this case the application or offer proceeds from the company, and the answer comes from the party applied to, who signs the company's stock book, and who binds himself under seal to become the holder of the number of shares set opposite his name, and on allotment of his shares agrees to pay a certain percentage, &c. The company allotted the shares, and he was placed on the registry, and this constituted a completed transaction, and made him to all intents and purposes, in my opinion, a shareholder in the company.

I think there cannot be the slightest doubt that the defendant did intend and agree to become a member *in praesenti*; there may or may not have been an agreement or understanding—I should rather say simply an expectation—that he should get a contract; but this, whatever it was, was purely collateral, and as was said

(1) Per Lord *Cairns* in *Elkington's* case L. R. 2 Ch. 535.

1881

NASMITH v. MANNING.

Ritchie, C.J.

in *Bridge's* case (1), "having agreed to be a shareholder *in praesenti*, he cannot be heard to say that he was not a shareholder because of this collateral matter."

See *Elkington's* case (2), and what was said by Lord *Cairns* cited in this case.

But the contention set up on this point has been abandoned. I think the authorities clearly establish that no notice of allotment in a case of this kind was necessary.

In the last edition of Mr. *Leake's* work, 1878, on Contracts, p. 36, it is said :—

> If a definite offer of the shares proceed in the first instance from the company, or if there be a previous definite agreement respecting them, the application for the shares in pursuance of the offer or agreement may make a complete contract without further notice of allotment.

He cites *Tucker's* case (3); *Adams'* case (4); *Davies'* case (5).

This doctrine was enunciated and acted on by the Supreme Court of *New Brunswick* in *European & North America Ry. Co.* v. *McLeod* (6), and also in *The New Theatre Company (limited)—Bloxam's* case (7).

This latter case is as follows :

> This company established under the 25 and 26 *Vic.*, c. 89, had been ordered to be wound up. This was an application on behalf of the official liquidator to settle Mr. *Bloxam* on the list of contributories in respect of 100 shares.
>
> It appeared that Mr. *Bloxam* had verbally applied for 100 shares, and he was told by the secretary that he could have them on payment of the deposit. He called at the office of the company in *Cornhill* on the 25th of April, 1863, and handed to the secretary his cheque for £100 for the deposit upon the shares; but before handing it over he asked the secretary when he could have the shares, and was told by him that he could have them in a few days, as the company were about to allot them. He then stipulated with the secretary, that if

(1) L. R. 3 Ch. App. 308.
(2) L. R. 2 Ch. 522.
(3) 41 L. J. Ch. 17.
(4) 41 L. J. Ch. 270.
(5) 41 L. J. Ch. 659.
(6) 3 Pugs. N. B. 3.
(7) 33 Beav. 529.

he did not get the shares in a few days, the secretary would return him the cheque. The cheque was duly paid into the bankers of the company.

The shares were actually allotted to Mr. *Bloxam* on the 27th of April at a meeting of the directors, and his name was entered as the allottee for 100 shares in "the Register of allotment of shares." It was not shown that Mr. *Bloxam's* name had been entered in the share registry book (25 and 26 *Vic.*, c. 89, s. 25). Mr. *Bloxam* did not sign any written application for the shares, and no letter of allotment, no scrip certificate of the shares, and no return of the allotment had ever been sent to him.

It did not appear that Mr. *Bloxam* had ever applied for the scrip certificates, but he had called at the office in *Cornhill*, and found it closed, and he was told that the company had gone to pieces, but the office had in fact been removed to *Westminster*. He appeared to have done nothing further, when, on the 27th of July, 1863, the company was ordered to be wound up. Mr. *Selwyn* and Mr. *Beavan*, for the official liquidator, argued that Mr. *Bloxam* ought to be placed on the list of contributories, for the contract for the shares by application and payment of the deposit was complete when the shares had been allotted to the applicant by the company, and that nothing further was wanted to make the allotment effective. They cited *ex parte Yelland* (1); *ex parte Cookney* (2).

Mr. *Roxburgh*, *contra*, argued that no perfect and complete contract fixing Mr. *Bloxam* with the ownership of any particular shares existed. That an allotment alone, without notice to the allottee was insufficient, for it was not possible to know what number of shares had been allotted, or which they were. That here there had been no notice, no acceptance of the shares, and that no entry on the share registry, as required by the act had been proved.

The *Master of the Rolls*:—

I must hold Mr. *Bloxam* to be a shareholder. *Cookney's* case and *Yelland's* case determine this: that if a person applies for shares and pays what is necessary and has the shares allotted to him he becomes a shareholder, and that the application need not be in writing.

Here Mr. *Bloxam* applies for 100 shares, and he is told he can have them; he then pays a deposit of £100, the secretary promising him that if they are not allotted the cheque shall be returned. There is a book called a register of allotment of shares which answers all the requirements of a register, and in this the allotment to Mr. *Bloxam* appears. It is true that no further deposit is made, and that no notice of the fact of allotment was given to him. But if the company

(1) 5 DeG. & Sm. 396. (2) 26 Beav. 6 & 3 DeG. & J. 170.

1881

NASMITH v. MANNING.

Ritchie, C.J.

had been extremely prosperous, how could the company deny that Mr. *Bloxam* was a shareholder; how could they dispute the fact after this entry in their book? After accepting his money they allot him these shares. The rights and obligations are co-extensive, and I must hold him to be a contributory.

And in *Tucker's* case (1) it was contended that *Tucker* had never received notice of allotment of the shares to him, and *Pellatt's* case (2) and *Bloxam's* case (3) were cited.

In *Tucker's* case *Bacon*, V. C., says:

In order to constitute a man a shareholder, all that was required by the provisions of the Companies Act, 1862, was that he should agree to take shares, and that his name should be duly placed upon the share register. These provisions had been made for the benefit of the creditors of the company; therefore in questions as between shareholders and creditors, persons who had complied with the requirements of the act could not be heard to say that they were not shareholders.

* * * * * *

As regarded Mr. *Tucker*, the evidence was not quite so satisfactory. He had, however, received a letter and form of application similar to those sent to Mr. *Brown*, which form he had filled up and returned to the company, and therefore the company was bound to allot to him, and he was bound to take the shares for which he had so applied. There was therefore a binding contract between Mr. *Tucker* and the company, of which either party might have enforced the specific performance.

Mr. *Tucker's* affidavit, stating that he had no recollection of ever having received, and that he did not believe he ever had received, any notice of allotment, was not sufficient; but it was immaterial whether or not he had received notice of allotment, for the contract with the company was complete immediately on his filling up and returning to the company the form of application for shares. Messrs. *Brown* and *Tucker* must therefore be placed on the lists of contributories.

The marginal note in *Adam's* case (4) is:

B. Company agreed to transfer their business to P. Company. One of the terms of such agreement (which was sanctioned by the court

(1) 41 L. J. N. S. 161.
(2) L. R. 2 Ch. 527.
(3) 33 Beav. 529.
(4) 41 L. J. N. S. Eq. 270.

1881

NASMITH v. MANNING.

Ritchie, C.J.

under the winding-up of B. Company) was that the holders of shares in B. Company should receive an equal number of shares in P. Company. A circular letter was sent by P. Company to the shareholders in B. Company, referring to these terms, and requesting the B. shareholders to fill in a form of application for the shares to which they were entitled under the arrangement. *A.*, a holder of fifty shares in B. Company, filled in and returned this form, applying for fifty shares in P. Company. The directors of P. Company by resolution allotted to him that number of shares. Before receiving notice of allotment, *A.* wrote to withdraw his application. After considerable delay the solicitor of P. Company, to whom the question of *A's* withdrawal had been referred by the directors, wrote to *A.*, stating (erroneously as now appeared) that by a resolution of the board the allotment of shares to him had been cancelled. The company had no share register, but *A's* name was entered in their allotment book for fifty shares, though no particular shares were appropriated to him: Held, that as soon as *A's* application had been accepted by the company, there was a binding contract between them without any notice of allotment being given to *A.*; that even if the resolution cancelling the allotment had been passed the directors had no power, under a general authority to compromise proceedings, &c., contained in the articles of association, to sanction *A's* withdrawal; and that as between *A.* and the company the entry in the allotment book was sufficient.

Lord Justice *Mellish* says in *Davies'* case (1):

The only real question appears to me to be this: First, is there not sufficient evidence on this statement that there was an agreement that Messrs. *Templeman & Co.* should take the 250 shares between them? It appears to me that there is sufficient evidence, because he says so. Then there being that arrangement, I think that the written application having been sent in by Mr. *Templeman* for 200 shares, and by Mr. *Davies* for fifty shares, and the company having made no objection to that, there is sufficient proof that the company assented to this division of the 250 shares, which were to be taken by Messrs. *Templeman & Co.*, in the proportion of 200 shares by Mr. *Templeman* and fifty by Mr. *Davies*. If there had been no such previous arrangement I should certainly not have thought that the mere keeping the deposits would have been sufficient evidence.

But assuming that there was, as there appears to me to have been, a valid binding arrangement previous to the written application being made, that Messrs. *Templeman & Co.* should take between

(1) 41 L. J. N. S. Eq. 659.

1881

NASMITH v. MANNING.

Ritchie, C.J.

them 250 shares, and there not being any objection on the part of the directors to taking the deposit, there is sufficient evidence to show that the directors assented to the 250 shares which Messrs. *Templeman & Co.* agreed to take being divided between Mr. *Templeman* and Mr. *Davies* in the proportion contained in their written applications.

I am of opinion, therefore, that the order of the Vice-Chancellor is right, and that this appeal must be dismissed with costs.

I am of opinion that the defendant was liable in this action, and that the judgment of the Court of Queen's Bench should have been affirmed, and that the appeal should therefore be allowed, and that the judgment of the Court of Appeal reversing the judgment of the Court of Queen's Bench should be reversed with costs in all the courts.

FOURNIER, J., concurred in the judgment about to be delivered by *Henry*, J.

HENRY, J.:—

This is an appeal from the Appeal Court of *Ontario*. Three of the four learned judges who heard the appeal gave judgment for the respondent, on the ground that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to him, and that no notice whatever of such allotment had been proved. The late lamented Chief Justice of that court agreed that such proof was necessary, but he was of the opinion that from the facts in evidence such notice might be inferred. On this latter point only did he differ from the majority of the court. I do not consider it necessary to give my views at any great length, but will commence by saying that I entirely adopt the views of the learned judges who decided in favor of the respondent. The document signed by him, as I consider it, formed but an offer on his part to accept fifty shares of the company's stock when allotted to him. It being under seal makes no difference as to the legal

construction to be put on it. It was signed as an original subscription or offer to take stock in a company not then, but subsequently to be, organized. The company did not then exist, but was subsequently to be formed, or not, according to circumstances; and we must look at this document from a stand point very different from that we should occupy in the case of a subscription to the stock book of a company already in existence. A party in the latter case would, after his application for stock had been accepted, be called upon to sign the stock list in the book of the company kept for that purpose. Before a company is formed there is an offer on the part of those wishing to become stockholders to take certain shares. It is only, at the most, a unilateral contract, if one at all; and one which could not be enforced by the party subscribing. He could not by his offer oblige the provisional directors to allot any of the shares to him. A larger amount of stock than required might be subscribed for; and no one will doubt the power of the provisional directors to reject such applications as they pleased. So up to the time, at least, of the allotment, any subscriber could withdraw his offer to take the stock he subscribed for. The agreement in this case was to receive fifty shares when allotted; and that, in my opinion, threw upon the provisional directors the onus of not only allotting the stock within a reasonable time, but of giving him notice that they had done so, also within a reasonable time.

I concur with the three learned judges of the Appeal Court that there is no evidence of any notice of allotment. It is in fact not contended there was any, and there is no evidence of a waiver of it by the respondent. At the first meeting to organize the company, nearly two months after the subscription by the respondent, it was decided to call in ten per cent of the allotted shares, but it does not appear that any notice was given

1881

NASMITH v. MANNING.

Henry, J.

to the respondent of that resolution, and no notice given of the allotment. Suppose in the absence of both the respondent had been sued for the recovery of the ten per cent. of the shares, could he not have successfully resisted that claim for the want of such notice of allotment? The stock was subscribed for in April, 1869, and a meeting of the provisional directors held on the 1st of July following. At that meeting the president is reported to have stated "that on the previous evening the amount of stock required by the charter for organizing the company, viz.: $300,000, had all been subscribed, and that, therefore, it was necessary at once to devise means to collect and pay into the bank the first instalment of ten per cent. on the shares, so that the meeting for the election of directors and organizing the company could be called at as early a date as possible, &c." The minute goes on to state that "the brokers, Messrs. *Campbell & Cassels*, were instructed at once to collect the first instalment," and have the amount, $30,000, paid into the bank on the tenth of the same month, "so as to enable an advertisement calling the general meeting of the shareholders to appear in the *Ontario Gazette* of that date." The secretary was also instructed to prepare advertisements to be inserted in other papers calling the meeting—the day to be determined by the company's solicitor. The secretary was "also instructed to issue allotment certificates to each shareholder for the amount of shares held by him."

By this extract from the company's minutes it is clearly shown that when the respondent signed the document in question the company existed only by the charter. There were no stockholders or members. Even the provisional directors were not actually such, and could only become so by subscribing and paying for stock. There could be no regular stock-book until the shares had been allotted, which is generally prepared after the

company is organized, and therefore the document signed by the respondent could not be tortured into one so as to bind the respondent; but let me pursue the inquiry a little further. Suppose on the day of the meeting to organize the company and appoint directors &c., the respondent attended, but had not paid, and declined to pay the ten per cent., would he or any other similarly situated be allowed to vote or take part in the organization of the company? Sections 14, 18 and others of the act of incorporation require the 10 per cent. to be paid before any subscriber could vote or be elected a director or even called to attend the first meeting to organize the company. He would have been very delicately informed that he was not a stockholder, and denied the privileges of one. Any other course would be a violation of the statute. If the mere signing the document in April previous made him a stockholder he could have insisted upon his right to participate in the proceedings, and if the amount of stock subscribed for by him was sufficient he might have been elected a director. That would be the necessary legal result of the position he would so claim, but who would venture to assert that by his mere signature to the document in question he could acquire such a position, and yet to bind him as a shareholder it becomes necessary to admit the position I have stated.

The appellant claims that the respondent was a shareholder in the company from the time of the allotment of shares, but if the signature of the respondent to the agreement was sufficient to bind him, then no allotment was necessary to be shown. If the agreement, however, is not sufficient alone, and that the allotment was necessary, does it not legitimately follow that a notice of it became necessary? If the signature of the respondent was to the regular stock book of the company after being organized, no allotment would require to be

1881

NASMITH v. MANNING.

Henry, J.

shown, and does not the acknowledged necessity for showing the allotment at the same time characterize the document signed as an incomplete contract? If so incomplete, does it not necessarily require, to complete it, that notice should have been proved of the allotment within a reasonable time. I cannot see how the company at the time of the judgment at the suit of the appellant against the company could have enforced the contract as one fully completed against the respondent. He, in fact, never was a shareholder in the company, and the company never during the seven or eight years after he signed the document treated him as such. He never was called upon to pay any call on his shares, never had any notice to attend a meeting of the company, nor did he attend any. I am free to admit that if he at any time became a shareholder, the company could not by laches or otherwise release him from his liability to its creditors, and that nothing but the payment in full of his stock would release him; but I have been unable to realise his position as being at any period a stockholder. Once a stockholder, a subscriber to the regular stock book, which latter itself would show him to be one, I am free to admit that if he became a delinquent in the payment of subsequent calls, he might by the by-laws be incapacitated from voting at or taking part in any meeting of the company, but still be liable to the company or its judgment creditors for any balance due on his stock; but that I hold is not the case here.

The statutes make the shareholders answerable to creditors for the amount due on their stock to the company, but do not include those who merely signed a conditional agreement to take stock when allotted, and whose contract is left open for want of notice of such allotment. Sec. 80 of chapter 66 of the Consolidated Statutes, referred to in the Act of Incorporation, provides

for the liability of its shareholders thus: "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid of the stock held by him," &c. It will be observed that the only term used is 'shareholder,' and he is to be held liable "to an amount equal to the stock held by him." In either case, in order to make him liable he must be a shareholder holding stock in the company, or the right to do so. Sub-sec. 19, sec. 2 of the same act, defines the term "shareholder." "The word shareholder shall mean every subscriber to or holder of stock in the undertaking, &c." But the term subscriber to stock is one who by his own act and that of the company becomes a subscriber. No one can be a subscriber to stock so as to make him a shareholder without the concurrence of the company through its officers. I must say I think the evidence of his ever having been a shareholder is wholly insufficient.

By the charter the provisional directors were authorized to open stock books, but they could be only provisional, and it would be as monstrous in my opinion to bind the subscribers thereby absolutely as it would be to bind the provisional directors to allot shares to every one who subscribed for them. The provisional directors guarded themselves, for what reason we need not inquire, by inserting the words "when allotted," but as I look at the document, I am of opinion they had also the inherent right to reject the application of any subscriber they pleased. The true legal meaning in my opinion, of the document signed by the respondent, amounts to this and to nothing more: "I hereby undertake to take and pay for fifty shares in your company if allotted to me. I will wait a reasonable time for your acceptance of my offer, and if in the meantime I hear nothing from you I shall conclude you have not

1881

NASMITH v. MANNING.

Henry, J.

accepted my offer, and shall otherwise dispose of the funds I shall keep for that reasonable time uninvested and unemployed." What the provisional directors did after the respondent subscribed was known to them, but not to him. The charter authorized the issue of stock to the extent of a million dollars, and when he received no notice of allotment to him he might very well have presumed they had got other subscribers that they preferred to him. The fact of their raising and paying into the bank $30,000, being ten per cent. of $300,000 required by the charter to be paid before organizing, shows there must have been sufficient so ck without his to organize the company, and that being the case the directors might have considered it unnecessary, and, in view of the bad feeling existing between *Laidlaw*, the most active promoter and him, failed to notify him of the allotment. Whatever the reason, they certainly gave none, and I have no doubt that in law they were bound to have done so.

Reference has been made to the fact that the respondent went into several counties to forward the interests of the company, but that took place before he subscribed for the stock, and his doing so could not in the least affect the transaction. It is also suggested that after he subscribed as he alleges, conditionally upon his getting the contract for building the road, it was an improper act to allow his subscribed stock to form a portion of the published list of stock absolutely to be taken, which was dependent on the contingency. With that I do not think we have anything to do. If he *bonâ fide* expected to retain his subscription by obtaining the contract, I can see nothing to reprehend, or fraudulent, in his permitting his subscription to appear before the public. If he had got the contract which he says was promised him, I have no doubt he would have waived the want of notice of allotment,

but in my view of the law he would not be bound, under the document he subscribed, even in that event, to have accepted it in the absence of notice of allotment. Before closing my remarks I think it not out of place to state that I have carefully read the judgments of the seven learned judges before whom this case was argued, and no one of them suggested that the subscription of the list was binding as a complete contract, but held the opposite view, which seems not to have been contested. The judgments of four of them were based on the assumption that there was evidence to show an allotment and knowledge of it by the respondent, while three judges of the Appeal Court considered the evidence of notice of the allotment insufficient.

Chief Justice *Hagarty*, in his judgment, says :—

After the first trial, this case with that of *Newman* v. *Ginty* was argued in the Common Pleas and was sent down for another trial. The general principle was settled, that after proof of defendants subscription there should, in the language of Mr. Justice *Gwynne* (1) "be shown to be some response, either in writing or verbally, or by conduct communicating to the defendant that the company had accepted his application and himself as a shareholder."

My own language there was : I concur in thinking that our best course is to direct a new trial, so as to have it expressly found as a fact, whether tl e defendant was notified or received notice in any shape, or was made aware of the company having accepted him as a stockholder according to his sub-scription—notice in substance that the directors, or the company assented to or accepted him as a holder of the subscribed shares.

The same doctrine was held by all the other judges. The only differences between them was as to the sufficiency of the proof of notice of allotment.

Before arriving at the conclusion I have stated, I considered fully the law as applicable to the question of notice of allotment. Some would appear to think that if the respondent found out through other means than from the directors that they had accepted his application or

(1) 29 U. C. C. P. 52.

1881

NASMITH v. MANNING.

Henry, J.

agreement to take shares, it would bind him. I differ with those who say so. If a notice of allotment be necessary in any case it is necessary to come directly from the one party to the other. Whatever the directors did amongst themselves could not bind the respondent, unless by some binding act of theirs, on which he could rely, they communicated their acceptance to him of his offer to take the shares. If a party to whom an offer is made accepts it by words or in writing to the party making it, the contract is completed, but if after resolving to accept the offer a communication by words or in writing is made to other parties without any authority or request to inform the other party of the acceptance of his offer, and the party who made the offer accidentally hears from third parties that the offer was accepted, he would not be bound by such information. Nor would the other party be bound. The one party may contend that he is not bound by what he hears from third parties whose communication would bind none of the parties, and the other may as properly say: "I resolved to accept your offer, but as I did not communicate that resolution to you the bargain never was closed, because I did not communicate any acceptance to you." At the most a jury in this case might possibly find in the evidence sufficient to infer that the respondent had outside knowledge of the intention to accept, but as I view the law a judge would not be justified on the evidence in submitting such an issue to them.

I think the appeal should be dismissed, and the judgment below confirmed with costs.

TASCHEREAU, J.:—

I am also of opinion that the appeal should be dismissed. I cannot see that, by subscribing for shares as he did, *Manning* became a shareholder *in præsenti*; no company existed then as a matter of fact. The receiv-

ing of subscriptions were provisional acts towards the organization of the company. It might have been that not a sufficient number of shares would have been subscribed for, and so there would have been then no company. Then, if *Manning's* subscription was only an offer to take shares, that offer, to bind him, must have been accepted by the company and notice of such acceptance given to him within a reasonable time. Such an acceptance did take place, but no notice thereof was ever given to him. Without this notice there was nothing to bind him. I need not say that, though the principles which govern this case are the same in the province where I come from as in *Ontario*, and consequently there are no new questions for me in the case, yet I have felt great embarrassment in coming to a conclusion, and have vaccillated a good deal about it. The diversity of opinions in this court and in the *Ontario* courts demonstrates that the case is far from being free of difficulties. After the fullest consideration I have come to the conclusion to dismiss the appeal.

GWYNNE, J. :—

This appeal opens a point which, by reason of the judgment of the Court of Appeal in *Denison* v. *Lesslie* (1), was not available to the plaintiff in the courts below, namely, whether the instrument signed by the defendant constituted a completed contract, or is to be regarded as an application only for shares, requiring a response from the company signifying to the defendant the fact of his application having been acceded to and of his having been himself accepted as a shareholder.

The difficulty upon this point has arisen from the form of the certificates of allotment adopted by the provisional directors, or it may be by their secretary, at a period posterior to the subscription by the defendant

(1) 3 Ont. App. R. 536.

1881

NASMITH v. MANNING.

Gwynne, J.

of his name in the stock book of the company as a holder of fifty shares in the capital stock of the company, a certificate which, according to the defendant's own showing, could have had no operation upon his mind, for his contention is that he never saw one until at the trial of this action, and the main contention before us was that because he had not received one, he is not a shareholder.

That the defendant, in signing his name in the stock book, did not conceive that he was setting his name to an application merely for shares, calling for a response either of acceptance or of refusal from the company, but that he understood that he was executing a contract made by him, as a shareholder, and completed by his name being subscribed in the stock book for fifty shares, is to my mind abundantly apparent.

By the second section of the special act incorporating the *Toronto, Grey and Bruce Railway Co.* (1), several enumerated clauses of the General Railway Act (2), and, among those, the clauses respecting "Interpretation" and "Shareholders" are incorporated with and made part of the special Act. By the former of these clauses in sec. 7, sub-secs. 5 and 19 of the general Act, it is enacted that in the special act the word "shareholder" shall mean "every subscriber to, and holder of, stock in the undertaking," and the personal representatives of such shareholder, and by sec. 80 of the general Act, it is enacted that each "shareholder" shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the company, and until the whole amount of his stock has been paid up. Then by the 8th sec. of the special act the capital stock of the company was declared to be $3,000,000 divided into $30,000 shares of $100 each, and

(1) 31 Vic. c. 40, Ont. (2) 22 Vic. c. 66.

by the 14th section it was enacted that as soon as shares to the amount of $300,000, or one-tenth part of the capital stock, shall have been subscribed other than by municipalities, and ten per cent. thereof paid into some chartered bank having an office in *Toronto* (which on no account shall be withdrawn therefrom except for the service of the company), the directors shall call a general meeting of the subscribers to the said capital stock, who shall have so paid up ten per cent. thereof, for the purpose of electing directors of the said company.

By sec. 15, it is provided that in case the provisional directors neglect to call such meeting for the space of three months after such amount of capital stock shall have been subscribed and ten per cent. thereof so paid up, the same may be called by any five of the subscribers who shall have so paid up ten per cent., and who are subscribers among them for not less than $1,000 of the said capital stock, and who have paid up all calls thereon.

By sec. 17 it is enacted that at such general meeting the "subscribers for the capital stock" assembled who shall have paid up the ten per cent. thereof, with such proxies as may be present, shall elect the regular board of directors. By the 27th sec. it is enacted that on the subscription for shares of the said capital stock each "subscriber" shall pay forthwith to the directors, for the purposes set out in the act, ten per cent. of the amount subscribed by him, and the directors shall deposit the same in some chartered bank to the credit of the company; and by the 7th section, it is enacted that the provisional directors, who are named in the act and empowered to act as directors until the election of directors by the stockholders, shall have power to open stock books, to make a call upon the shares subscribed therein, to call a meeting of the subscribers thereto for the election of other directors.

1881

NASMITH v. MANNING.

Gwynne, J.

Now it is apparent that the opening of stock books was for the purpose of obtaining therein subscriptions for shares in the capital stock of the company, and that subscribers for shares therein—"Subscribers to," "for," or "of" the capital stock—and "shareholders" are equivalent expressions to represent what, by sec. 7, sub-secs. 5 and 19 of the general Railway Act, is declared to be the meaning of the term "shareholder," namely, "every subscriber to, and holder of, stock in the undertaking."

It has been held, and I think well held, in *Denison* v. *Lesslie* (1), that the paying of the 10 per cent. at the time of subscribing is not made by the act a condition precedent requisite to make the person subscribing a shareholder. It was competent for the provisional directors to open stock books, to obtain subscriptions for stock *therein*, and to postpone the period for the payment of the 10 per cent. by the subscribers for such stock until the $300,000 of stock necessary to be subscribed to enable the company to organize should be subscribed, when the directors might make a demand or call upon all subscribers for stock in the stock books for payment of the ten per cent.

The payment of the 10 per cent. is made a condition precedent only to the right of voting, that privilege being by the act conferred only upon those subscribers who shall have paid the 10 per cent. It is the subscription for the stock which the act makes a condition precedent to the accruing of the privilege, as well as of the liability to be called upon to pay the 10 per cent. The account given by the defendant himself in a suit similar to this of *Jaffray* v. *Manning*, the evidence in which case is part of the evidence made use of in this case, is this. He says: "*George Laidlaw* asked me to take these shares." It may be here observed that this

(1) 43 U. C. Q. B. 34 and 3 Ont. App. R. 536.

1881

NASMITH v. MANNING.

Gwynne, J.

George Laidlaw was one of the provisional directors and the chief promoter of the company and the undertaking; the defendant describes him as the moving spirit in the undertaking, without whom there would have been no *Toronto, Grey & Bruce Railway*. Defendant then says:—

I refused to take stock in the first place, then there was a verbal agreement made between *Laidlaw* and myself. I would not have taken the stock except for the inducement that *Laidlaw* offered. He asked *Ginty* and myself to take stock and I refused. He wanted to raise a large amount of stock here, so as to show to the people outside who were giving bonuses that the people here were contributing largely to the undertaking. He agreed that if we took stock we should get the contract for building the road, that we should not be called upon to pay unless we got the contract, and that if we got the contract under any circumstances we should not be called upon to pay more than ten per cent upon the stock. Upon that agreement and conversation we agreed to take the stock. I think we each took stock *separately*. We tendered for the *Nipissing* work and got it, we also tendered for the *Grey & Bruce Railway* and did not get it. *Laidlaw* was the only one who made the agreement with me. If I had got the contract I understood that my stock would be paid out of my estimates, but not more than ten per cent. I supposed that if I had got the contract I should have been in the same position as any other stockholder. I subscribed to the *Toronto* and *Nipissing* on the same terms, they were separate transactions, but *Laidlaw* was acting in both as the prime originator. We got the contract for the *Nipissing*; I paid up my stock in full in this; my stock was paid principally out of my estimates.

Then, in his evidence in the present case, he repeats:

It was *Mr. Laidlaw* who asked both of us, (that is defendant and *Ginty*,) at the corner of King and Church streets. *Mr. Laidlaw* asked me to take stock. He asked *Ginty* and me together. An agreement was made verbally, that if we did not get the contract we were not to be considered stockholders; we afterwards tendered.

Having said that he had signed the stock book on a verbal agreement between him and *Laidlaw*, that if he did not get the contract the subscription was to go for nothing, he was asked: "Why then did he want you to put your name on at all?" To which he replied:

1881

NASMITH v. MANNING.

Gwynne, J.

I supposed that he was making up his stock list to see how much he could get to enable him to comply with the charter.

The stock book was signed by the defendant and his seal set thereto as his act and deed in the presence of a Mr. *C. J. Campbell*, who signed his name thereto as subscribing witness, and who says that he went out as broker of the company, being also a provisional director, to get subscribers to the stock book. He does not appear to have had, nor is it alleged that he had, any knowledge of the verbal agreement spoken to by the defendant as having been made with him by *Laidlaw*. From this evidence it is plain that the defendant never entertained the idea that he was merely making an application for shares, to which he expected a response from the company signifying whether they would allow him to have any shares and accept him as a shareholder. The character of the whole proceeding is totally different, in fact the very reverse of this. The provisional directors, under the provisions of the act, open stock books for the purpose of obtaining therein subscriptions for stock, in order to enable the company to be organized, which could only be done after the subscriptions should be obtained therein for $300,000 stock subscribed. One of these books is placed in the hands of a broker who is himself a provisional director, and who is authorized to get persons willing to take stock to subscribe therein for as many shares as they may please to hold. The defendant, according to his own showing, instead of being an applicant for shares is canvassed and pressed by a provisional director, not to become an applicant for shares but to become a shareholder, and to take as many shares as he wished to take by subscribing therefor in the company's stock book. At length the defendant consents, being moved thereto, as he says, by a verbal agreement made with him by the provisional director who solicited him to become a shareholder.

1881

NASMITH v. MANNING.

Gwynne, J

The defendant thereupon goes and signs his name in the stock book opened by the provisional directors as a subscriber for fifty shares in the capital stock of the company. The book so signed contains a covenant signed by every one subscribing for shares, expressing the terms of their subscription, but the defendant contends that his subscription is to be affected by a collateral verbal agreement made, as he alleges, with him by one of some twenty provisional directors. The provisional director so referred to denies that any such agreement as that spoken of by the defendant ever was made. However, whether it was made or not, matters not. The principle of *Elkington's* case (1) and of *Bridgers'* case (2) is that which must govern upon this point, namely, that if the defendant's agreement was to become a shareholder *in præsenti*, with a collateral agreement as to what should be the effect of his subscription contract if he should not get a contract to build the road, which is, as it appears to me, the true light in which to view his own evidence, then the defendant is a shareholder, and is liable in this action; but if the agreement which the defendant entered into was that, if and when a contract should be given to him for building the road, he would subscribe for and become a shareholder in the undertaking to the extent of fifty shares, then he would not be liable unless nor until he should get the contract to build the road. But it is to the instrument signed in the stock book under the defendant's hand and seal (construed in the light of the surrounding circumstances), that we must look to determine what the defendant's contract was, and that cannot be qualified by any verbal agreement such as that spoken of by the defendant. Now, looking at the stock book, we find that the defendant subscribed an agreement prepared for signature, and signed

(1) L. R. 2 Ch. 511. (2) L. R. 5 Ch. 306.

1881

NASMITH v. MANNING.

Gwynne, J.

by all persons taking stock in the undertaking, under the provisions of the Act of Incorporation, which is as follows:

> We the several persons, firms and corporations, whose names and seals are hereunto subscribed, severally and respectively agree to and with the *Toronto, Grey and Bruce Railway Co.*, and bind ourselves, our executors and administrators or successors respectively to become holders of the capital stock of the *Toronto, Grey and Bruce Railway Co.* for the number of shares of one hundred dollars each and amounts set opposite to our respective names, and upon the allotment by the said company of my or our said respective shares we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively, provided always that no calls shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per centum of the amount subscribed.

Among several other persons who subscribed this covenant in the stock books was the defendant, who subscribed by himself for "50 shares, amount $5,000." Now if the body of the above agreement had stopped at the words, "for the number of shares of one hundred dollars each and amounts set opposite to our respective names" with the "50 shares," and amount $5,000 opposite the name of the defendant subscribed by himself, it is not disputed that the taking of the shares would have been complete, and the defendant beyond all doubt or question would have been a shareholder *in præsenti*, whatever agreement, if any, had been made as to the mode of payment, or as to any conditions regulating the payment of calls, but it is to be observed that what follows does not qualify what had gone before, which related to the taking and subscribing for stock. The agreement is not that if and when the company shall allot to the several parties named the number of shares set opposite to their respective names, they will accept such shares and subscribe the stock book. If that had been the intention, the agreement would not have been

entered in the stock book, which the provisional directors were by their act of incorporation empowered to open for the purpose of having shares subscribed for therein, but the agreement is that the subscribers in the stock book, of the several shares and amounts set opposite to their respective names, will pay the calls in certain events, namely, upon allotment of the said shares so subscribed for the first call of ten per centum and all future calls that may be made, provided, &c., &c. It is the subscribers for shares, who, under their hands and seals, covenant to pay the calls, and the qualification involved in the expression "and upon allotment by the said company of our said respective shares, &c., &c.," whatever may have been intended by that, is attached only to the payment of the calls upon the stock then subscribed for. The expression, in view of the fact appearing in the defendant's evidence that he was pressed to take the stock, and did so, being moved thereto by the verbal collateral agreement of which he spoke, and that he signed his name in the book for the fifty shares for the purpose of assisting in showing upon the stock book the subscription of the amount necessary to enable the company to organize under their act, is, it must, I think, be confessed, an inappropriate one; for the circumstances show that the defendant was subscribing for shares pressed upon him, and not proposing to take stock which the company might or might not afterwards allot to him. It is sufficient for the purposes of this suit to say that the nature of the transaction was not an application for shares by the defendant requiring a response to be signified to the company before his contract to become a shareholder should be complete, but an actual acceptance by him of stock offered to him and a subscription therefor by him in the stock book of the company, it was a completed contract, and taking of the stock, and a covenant by the defendant as

1881

NASMITH v. MANNING.

Gwynne, J.

a subscriber for the stock to pay the calls in certain named contingencies, and thereby the defendant brought himself within the statutory definition of a "shareholder," that is to say, "a subscriber for stock in the undertaking," and this, upon the authority of *Moss* v. *Steam Gondola Co.* (1), *Bailey* v. *The Universal Provident Life Association* (2), and *Ness* v. *Angus* (3), is all that is required to make the defendant liable to the plaintiff in a proceeding of this nature. It might be that the defendant, although a subscriber for stock in the undertaking within the meaning of the statute, might never have become liable to pay to the company any calls thereon, by reason of the contingencies, upon the happening of which the same respectively became payable under the defendant's covenant, never having happened; or it may be that the company might never have made any calls upon the stock, or might never have asked for, or required, any payment from the defendant in respect of his stock, relying, as the defendant says *Laidlaw* informed him he did, upon constructing the railway upon bonuses so as to make the stock almost free; but whether or not the contingencies happened which, in the terms of the defendant's covenant, made the calls or any of them recoverable by the company, or whether or not the company ever asked for or required from the defendant payment of the first call of 10 per cent. upon the amount subscribed for by him, or of any other call, still the defendant would be liable to the plaintiff in this proceeding if he comes, as by signing the stock book as a subscriber for fifty shares I think he does, within the statutory definition of a "shareholder." If calls had not been made, the effect in such case would only be to make the amount to be reached by a process of this

(1) 17 C. B. 180.

(2) 1 C. B. N. S. 557.

(3) 3 Exch. 305.

nature at the suit of creditors larger than it would be if some calls had been made and paid. In this case, however, it appears that the provisional directors, with the view, no doubt, of subjecting the defendant to a liability under his covenant to pay the first call of ten per centum, did go through the form of directing the secretary to issue allotment certificates to each shareholder for the amount held by him. It is the form adopted (apparently by the secretary) for this certificate which has given occasion to the discussion upon this point, for, aside from the expression in this form, there is nothing that I can see affording foundation for an argument that the subscription by the defendant in the company's stock book was merely an application for 50 shares. In my judgment the plaintiff was entitled to succeed upon the record in this action upon the ground, notwithstanding the form of the certificate, that the defendant, by subscribing his name in the stock book as a subscriber for 50 shares, amounting to $5,000 in the capital stock of the company, had brought himself within the statutory definition of a "shareholder" without any further assent by the company being necessary to his becoming a subscriber for that amount. I cannot doubt that by his subscription in the stock book the defendant acquired the right to compel the company to receive his 10 per cent. if he had pleased to tender it so as to entitle him to the privilege of voting or of selling his shares if they had risen to a premium. He was by his signature in the stock book a subscriber for the 50 shares, whatever qualification from the form of the defendant's covenant may have been imposed upon the company affecting their right to enforce against the defendant's will payment of calls.

The certificate prepared for the defendant is as follows:—

1881

NASMITH v. MANNING.

Gwynne, J.

Toronto, 1st July, 1869.

To Alexander Manning, Esq., Toronto :—

This is to certify that the *Toronto, Grey & Bruce Railway Company*, in accordance with your application for 50 shares of $100 each of their capital stock, have allotted to you 50 shares amounting to $5,000, the first instalment of 10 per cent. thereon being payable forthwith, and all future calls to be made at a rate not exceeding 10 per cent. on the amount of said shares and at intervals of not less than sixty days.

W. Sutherland Taylor,
Secretary.

The case in the court below turned upon the question whether or not in writing, verbally, or by conduct, the defendant had had notice or knowledge that the company regarded him to be a shareholder, his subscription in the stock book having, upon the authority of *Denison* v. *Lesslie* (1) been assumed to be a mere application for shares requiring some response from the company. The learned judge before whom the case was tried found as matter of fact, that the defendant subscribed for the 50 shares in the stock book ; that the 50 shares were allotted to him by the company ; that the company sent notices to him of calls ; that his name was published in the *Globe* newspaper as a shareholder, and that during the period of such publication the defendant was a subscriber to the *Globe* ; that all was done by the company to give to the defendant a claim against the company for the stock, and to have any benefits that might accrue therefrom. He added that he could not say that the defendant received actual notice of the allotment, but he found as a fact that the company by notices sent to his address gave him notice of their considering him a shareholder.

Now it appears to me that it would be highly improper and indeed mischievous that a court sitting in appeal should reverse these findings of the learned judge, upon whom devolved the special duty of endea-

(1) 43 U. C. Q. B. 34 and 3 Ont. App. Rep. 536.

voring to reconcile conflicting evidence—of observing the manner in which the several witnesses gave their evidence, although the credibility of none of them was attacked—and, with the advantage of that observation, of arriving at a just conclusion upon the question submitted. Starting with the admission by the defendant that he had subscribed for the shares upon a verbal promise that by doing so he should secure a contract to build the road, which, as he says, was promised him, and that relying upon such promise he had tendered for the contract so promised after the company had become so organized as to enable it to give a contract for building the road, to assist in reaching which point his subscription had been asked for and given; contrasting also the defendant's admission in the former case of *Jaffray* v. *Manning*, "that he may have been notified of the first call," with his denial now of having received any notice of call, it is obvious that in order to arrive at a just conclusion one way or the other, upon the question submitted, not only was great care necessary in the endeavor to reconcile conflicting evidence, but in forming his judgment the learned judge would naturally be influenced by the manner in which the respective witnesses gave their evidence, as well as by the way in which the defendant professed to explain how his view could be reconciled with matter testified to, and which appeared to the learned judge to be established by other witnesses. It is obvious that the learned judge, as well from the manner of the defendant giving his evidence as from its matter, would have to estimate the proper degree of weight to be attached to the defendant's memory when he now says that he never received any notice of calls, when the judge was satisfied from independent evidence that such notices were sent to the defendant's address, and when it appeared that in *Jaffray* v. *Manning* the defendant admitted that

1881

NASMITH v. MANNING.

Gwynne, J.

he might have been notified of the first call; so likewise, when it appeared that the list of shareholders with the defendant's name on it was published for some time in the *Globe* newspaper, to which paper at the time the defendant was a subscriber, and when it appeared that the defendant tendered for the contract to build the road in pursuance, as he says, of the promise made to him upon the faith of which he had subscribed, and that he took great umbrage at the promise not being kept, I confess it seems to me to be difficult to conceive a case in which the manner in which the several witnesses gave their evidence would form a more essential feature in enabling a jury, or a judge acting as a jury, to determine which was the most proper conclusion of fact to arrive at. A court, not having the opportunities which the judge at the trial had, assumes in such a case a grave responsibility, when it ventures to reverse the conclusions on matters of fact of the judge who had them; a responsibility which, in my judgment, should never be assumed by a Court of Appeal, unless the matter of the evidence conveys to the minds of the judges sitting in appeal a clear conviction that the conclusions of fact arrived at by the learned judge who tried the cause are erroneous. In the case before us, the Court of Queen's Bench, consisting of three judges, one of whom was the judge who tried the cause, and who had, therefore, an opportunity of conveying to his brother judges in consultation the impression made by the respective witnesses upon his mind during the progress of the trial, has concurred in his findings. One of the four judges of the Court of Appeal takes the same view. How is it possible then to say that conclusions of fact so concurred in are so clearly erroneous as to justify a Court of Appeal in reversing them? It is admitted that if a jury had found, as the learned judge who heard the witnesses, and the Court of Queen's

1881

NASMITH v. MANNING.

Gwynne, J.

Bench, of which he is a member, have found, it would not have been competent for the Court of Appeal to reverse the findings; but a distinction has been drawn between the effect of matters of fact found by a judge trying a case without a jury, and the effect of the finding of the same matters by a jury, and in support of this distinction the observations of Lord Justice *Bramwell* in *Jones* v. *Hough* (1), have been referred to, but these observations do not appear to me to go further than the rule as I have stated it above. True it is, although by the course of procedure in *Ontario* either party may have issues joined in an action at law tried by a jury, or by a judge without a jury, at their option, it is known that the full court in which the action is pending may be moved to review the judge's findings upon matters of fact upon the evidence as taken before him; but it is discretionary with the court to grant the motion or to refuse it, and if the case be clear it is not unusual to refuse it. Now, what Lord Justice *Bramwell* holds is that, when the decision of a judge of first instance, finding matters of fact without the aid of a jury, is brought before a court by way of appeal, and the judges of the court sitting in appeal see that the conclusions arrived at by the learned judge who tried the case are erroneous upon the materials before him, they should not accept his finding, but should exercise their own independent judgment. These observations do not touch the point as to the weight to be attached to the finding of a judge of first instance upon matters of fact, when such finding from the nature of the case depends upon the credibility of the witnesses examined before him, or upon the manner in which they give their evidence, or upon the balancing conflicting testimony where no imputation may be cast upon the honesty and credibility of any

(1) 5 Ex. D. 122.

1881

NASMITH v. MANNING.

Gwynne, J.

of the witnesses. They relate to cases where, from the materials before the judge, and which are brought before the Court of Appeal, the latter can clearly pronounce the finding of the judge at the trial to be erroneous. The particular question which arose in the case in which the observations occur was whether the judge at the trial was correct in finding that the defendant was guilty of conversion of goods put on board his ship, because he had sailed with his vessel without a bill of lading of the goods having been signed. The case was one as to the proper inference to be drawn from facts as to which there was no dispute. In such a case there can be no doubt that it is within the jurisdiction and the power and the duty of a Court of Appeal to interfere and to pronounce the finding of the learned judge to be erroneous, if convinced that it was so; but such language is manifestly inapplicable to a case in which the manner of the witnesses, as well as the matter of their evidence, must, or may, be an essential ingredient to enable a judge to balance conflicting evidence, for this is a species of testimony which cannot be brought before the court sitting in appeal. The same learned Lord Justice had already held in a case from the Court of Chancery tried before a Vice-Chancellor who had seen the witnesses, that a Court of Appeal ought not to reverse the finding of the Vice-Chancellor upon matters of fact, unless *satisfied* that he was wrong, and proceeded to say:—

> I feel satisfied, and I need not say I say it with perfect respect, that I can put my finger upon the error or the mistake which the Vice-Chancellor made, and I am satisfied that if he had had those materials before him which we now have [the court had allowed additional evidence to be given] he would not have made the mistake, if indeed, it can be properly said to have been a mistake of his making (1).

The general rule laid down by the Privy Council, sub-

(1) *Rigsby* v. *Dickinson*, 4 Chy. D. 30.

ject to possible exceptions, is that they will not reverse the concurrent findings of two courts upon a question of fact, and the test to be applied to determine whether there have been the judgments of two courts, is to enquire whether the first judgment, if not appealed or brought in review before the second tribunal adjudicating in the matter, would have been a conclusive judgment, or whether it required confirmation by the tribunal before becoming operative (1). But the rule of universal application in all courts is that enunciated in the House of Lords in *Gray* v. *Turnbull* (2), where Lord *Chelmsford* says :—

> Upon a question of fact an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. Different minds will, of course, draw different conclusions from the same facts.

And he comes to the conclusion, that upon an appeal from the decision of the judges of the court of first instance, it should be irresistibly established to the satisfaction of the appellate tribunal that the opinion of the judge or judges on the question of fact was not only wrong but entirely erroneous; and Lord *Westbury*, in the same case, said :—

> In the English tribunals, when a question of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the court to grant a new trial. Unquestionably I should have pressed upon your lordships to abide by that rule if it had not been that the case now brought before us has unfortunately been decided, not on evidence taken in the presence of the court, but upon the written depositions of witnesses; and it has been the practice in courts of equity, where that mode of taking evidence prevails, to allow appeals on matters of fact, although the court below has felt no hesitation in the conclusion to be arrived at on the deposition; but if we open a door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever.

(1) *Hay* v. *Gordon*, L. Rep. 4 P. C. 348.

(2) L. Rep. 2 Sc. Ap. 54.

1881

NASMITH v. MANNING.

Gwynne, J.

Now, applying the principle of these cases, it is impossible to say that the findings of the learned judge at the trial are erroneous; for my own part I cannot say that I am at all disposed to differ from them; and adopting them, as consistently with the principle of the above cases, we must, I can see no other conclusion resulting from them than that arrived at by the unanimous judgment of the Court of Queen's Bench concurred in by the Chief Justice of the Court of Appeal, the majority of which court, in my opinion, erred, in reversing that judgment; and this appeal from the judgment of that court should therefore be allowed, and the judgment of the Court of Queen's Bench restored, with costs as well upon this ground as upon the other.

Appeal dismissed with costs (1).

Attorneys for appellant: *Lauder & Proctor.*

Attorneys for respondent: *Ferguson, Bain, Gordon & Shepley.*