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*Dec. 1, 2.
*Dec. 23.

THE SOVEREIGN BANK OF CANADA (PLAINTIFF) ..... } APPELLANT;

AND

DANIEL McINTYRE (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Burden of proof—Sale of bank stock—Allotment to shareholders—Shares refused or relinquished—Sale to public—Authority—R.S.C. [1906] *c.* 29, *s.* 34.

M. was sued by a bank on a promissory note alleged to have been given in payment for a portion of an issue of increased stock. He pleaded want of consideration and non-receipt of the stock. On the trial evidence was given of a resolution by the bank directors authorizing the allotment of the new issue to the then shareholders of whom M. was not one, and counsel for the bank admitted that there was no resolution alloting it to anybody else. A verdict in favour of the bank was set aside by the Court of Appeal.

Held, Idington and Duff JJ. dissenting, that the onus was on M. to prove that the stock was issued to the public without authority and such onus was not satisfied.

Held, per Idington and Duff JJ., that such onus was originally on M. but the evidence produced, and the said admission of counsel had shifted it to the bank, which did not furnish the requisite proof.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of a Divisional Court by which the verdict for the plaintiff at the trial was maintained.

The facts will be found in the opinions of the judges on this appeal.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davis, Idington and Duff JJ.

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Claude Macdonell K.C. for the appellant.
J. M. McEvoy K.C. for the respondent.

THE CHIEF JUSTICE and GIROUARD J. agreed in the opinion stated by Davies J.

DAVIES J.—This was an action brought upon a promissory note given by the defendant to the bank for $1,380 payable on demand.

The defendant pleaded amongst other defences want of consideration and that if any such note was given by him

it was given conditionally for stock in the bank which he had never received, and that he was not to pay the said note.

The defence that he was not to pay the note arose out of a conversation, at the time of the giving of the note, between defendant and one Karn, a local manager of the bank, who had induced defendant to purchase the stock for which the note was given. Some general statements were made by Karn to McIntyre at the time he signed the note to the effect that he never would be called upon to pay it, but the bank was no party to any such promise directly or indirectly, and knew nothing of it.

As a matter of fact, it appears that Karn and McIntyre agreed to go into the purchase of this stock as a speculation, and Karn, who was urging McIntyre to go into it, gave the assurance, which is not unusual in such cases, that if he gave the note he would never be called upon to pay. Both parties expected the stock to rise in price, in which case they intended to sell and take the profits. I only mention this defence and these facts because the impression made upon my mind from the reading of the evidence was

that they constituted in McIntyre's mind the real and only defence he had.

The defence relied upon in this appeal was that the necessary evidence to shew a right in the bank to sell these shares was wanting, and that under the circumstances the onus of such proof lay upon the bank.

I am of the opinion, concurring with the trial judge, the Divisional Court and Mr. Justice Meredith of the Court of Appeal, that the onus of such proof lay entirely upon McIntyre and that nothing transpired to change that onus.

It seems clear to me that these shares sold to McIntyre formed part of certain shares which had been allotted by the bank to its shareholders and not taken up by them. They were then held by the bank and might be at any time

> offered for subscription to the public in such manner and on such terms as the directors prescribed.
>
> Sub-sec. 2 of sec. 34 of "Bank Act."

I think it a fair inference from the correspondence and documents put in evidence that Karn had, acting on behalf of certain applicants in London for such shares, amongst them the defendant for ten shares, applied to the bank for them. The application itself is not forthcoming, but on the 19th April, 1906, Mr. Snyder, the inspector of the bank, wrote to Karn, the local manager at London, saying:

> We are in receipt of yours of the 13th and have drawn on you to-day for $9,300 in payment of 67 shares at $140, distributed as follows.

Then follow nine names with the number of shares stated for each name, amongst them D. McIntyre, defendant, ten shares.

The evidence leaves no doubt upon my mind whatever that McIntyre had agreed with Karn to pur-

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chase these ten shares; that Karn had, acting as his agent, applied to the bank for them at the rate of $140; that the application had been granted, the certificates for the shares forwarded, and that McIntyre had, after such certificate had been received, signed a note of hand for the amount of the purchase price of the stock which was afterwards renewed by the demand note for $1,380 sued on. A statement of McIntyre's current account with the bank from May, 1906, to September, 1908, was put in evidence by McIntyre and made part of his case. It shewed amongst other things that on 1st June, 1906, McIntyre was charged with $1,400 *presumably,* from his admission that he had no other dealings with the bank to which this debit could be attributed, the price of this stock, ten shares at $140, and that on July 14th, he was credited with $1,365.30 under the head of discount which it was shewn was the discount of the $1,380 note sued on. McIntyre had, on June 30th, $1,365.30 standing to his debit, he having been previously charged with the $1,400, and this discount exactly squared the account to that date.

I mention these details and use the word "presumably" because it was impossible to get any clear definite answer to any material question from Karn adverse to McIntyre's interest. In almost every case where he was asked questions as to facts which it seemed he should, as former local manager, have remembered, he fell back upon the time-honoured answer, "I don't remember." It is needless to say that he has long since ceased to be an official of the bank and that he admitted being a friend of McIntyre's.

Notwithstanding the sad loss of memory alike by Karn as by McIntyre, there is sufficient evidence of record in the books and correspondence to prove the

material facts relating to the actual purchase of these shares.

Subsequently to giving his note for the shares, the bank from time to time forwarded to the London agency cheques for the quarterly dividends declared on its stock. McIntyre received his dividend cheques, payable to his order, indorsed them, paid some into the agency of the bank in London where they were placed to his credit, and cashed others elsewhere, using the moneys for his own purposes. No less than five of these quarterly dividends were so received and disposed of by McIntyre. In the end, closing up this bank account of his which he himself put in evidence, he on September 28th, 1908, withdrew by cheque the small balance of $20.30 then standing to his credit.

His own evidence and admissions, coupled with the evidence reluctantly given by Karn, together with the bank books, convince me beyond any doubt that McIntyre did agree to purchase these ten shares for 140; that Karn as his agent applied to the head office of the bank to purchase them; that McIntyre knew of the receipt at the London agency of his scrip or certificate for such shares, that he gave his note in payment of the cost of the shares and for five successive quarters subsequently received his dividend cheques for the dividends payable in respect of the shares.

I think the facts as proved and admitted on all these points quite inconsistent with the assumed ignorance of McIntyre respecting them, and that the real facts are that he bought the shares with full knowledge, hoping for a rise in their price and depending upon his friend Karn's assurance that he never would be called upon to pay his note.

There remains only the legal question as to which

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party the onus rested upon of proving that the bank did not hold any stock available for sale to McIntyre.

On this question I think the onus rested upon the defendant as the maker of the promissory note sued on given for the stock, and that he has not discharged it. He has not called any of the bank directors or given any evidence to shew that the shares purchased by him were not shares which were available for subscription by the public. The onus lay upon him of shewing that there were no such shares and that the directors had not prescribed the manner and terms on which they should be offered to the public. The certificate of the issue of the stock to the plaintiff, the evidence of Snyder, the inspector, the correspondence between the head office and the branch at London, all combine to shew that there was such available stock. If he wished to rely upon the absence of authority on the part of the directors for its sale to the public, surely the duty lay upon him of giving some evidence on the point.

Then it is contended that the admission of the counsel for the bank at the trial that there was no resolution in the books specifically allotting these ten shares to McIntyre and that the allotment resolution was confined to shareholders, changed the onus of proof to the shoulders of the bank.

I do not agree to any such proposition. Sub-section 2 of section 34 of the "Bank Act" provides that

> any of such allotted stock not taken up by the shareholders to whom the allotment has been made within six months from time when notice of allotment was mailed to his address or which he declines to accept, may be offered for subscription to the public in such manner and on such terms as the directors prescribe.

It was not necessary under this section, in offering stock to the public, to go through the formal methods provided for in the Act for allotting new stock which

the bank may issue *pro ratâ* amongst the shareholders. It was only necessary that the directors should prescribe generally the "manner and terms" on which the stock not taken up by shareholders might be sold to the public. Once that was done and communicated to the proper officer of the bank a legal sale could be made.

No "allotment," in the sense in which the Act uses the term, was necessary to be made to the public purchasers of such stock and when the counsel used the language he did admitting there was no resolution allotting the ten shares to McIntyre, he did not admit that there had not been a *bonâ fide* sale of such shares made by the bank on the terms prescribed by the directors, and was evidently not so understood by the trial judge.

Everything was done by the bank in its books, its stock ledger, its certificate of the issue of the stock, its enclosure of the same to the purchaser, its continuous payment of dividends to the purchasers, to shew that there had been a *bonâ fide* sale of ten shares of stock to him.

If McIntyre wished to shew that the directors had not given the necessary authority for such sale, the onus lay upon him of shewing it, and in my opinion that onus he has not discharged.

IDINGTON J. (dissenting).—The only consideration pretended to have been given for the note sued on was the sale of ten shares of stock in the appellant bank.

There had been a written application made by respondent for that number of shares on terms rejected by appellant and thereby everything relative to that

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proposal is, so far as the present issue is concerned, eliminated.

When we find that application had been so altered in the bank as to substitute in pencil the price now claimed for that entered originally and other evident irregularities existing relative to the dealings now in question we may suspect much as to the conduct and purposes of all concerned therein, but in the view I take all that may be put aside.

It is admitted that all the stock the appellant had to dispose of was, at a meeting of the directors on the 31st March, 1906, allotted to the shareholders of record on the books of the bank and to others in such a way that we have to consider all the provisions of section 34, but especially here sub-section 2 of section 34 of the "Bank Act," to see how a sale of stock could become effectual to respondent who was not a shareholder. That sub-section is as follows:

> 2. Any of such allotted stock which is not taken up by the shareholder to whom the allotment has been made, within six months from the time when notice of the allotment was mailed to his address, or which he declines to accept, may be offered for subscription to the public, in such manner and on such terms as the directors prescribe.

In the minutes of the directors' meetings we have a number of resolutions passed on the said date. But we have nothing passed by the directors then or at any time dealing with the question of stock not taken up by the shareholders to whom allotted, unless in what I will hereafter refer to.

We are told, and it is not contradicted, that the minute book was in court at the trial and resolutions extracted therefrom which I will hereafter refer to.

During respondent's examination as a witness the following admission was made:

> Q. Did you ever get any notice that there was any stock allotted to you? A. No.

Mr. McEvoy:—I ask you now, Mr. McKillop, under the notice to produce, to let me have the resolution of the directors allotting this stock to Mr. McIntyre, if you have it; I asked you to produce it on the examination for discovery?

Mr. McKillop:—There is a general resolution allotting it to the shareholders in proportion.

His Lordship:—That you produce?

Mr. McKillop:—Yes, my Lord.

His Lordship:—It is admitted that there is no resolution allotting it to McIntyre?

Mr. McKillop:—Yes, my Lord.

Mr. McEvoy:—It is admitted there was no resolution allotting it to anybody but shareholders; that is the admission, Mr. McKillop?

Mr. McKillop:—Yes.

To Mr. McEvoy:—Q. You had nothing to do with that Sovereign Bank stock before this? A. No, I had not.

Mr. McEvoy:—I ask you now to produce, under the notice to produce served, the acceptance book, shewing where Mr. McIntyre signed to accept those ten shares of Sovereign Bank stock; let me see the book, please, in which he signed?

Mr. McKillop:—We cannot find either the power of attorney to accept, or the book.

Counsel for appellant must be taken to have been as usual quite candid with the court. I at least am quite sure he was. His statements imply not only that there was no record of any allotment of stocks to respondent, either in the narrowest sense or in the wide sense in which the learned trial judge, the Divisional Court and the Court of Appeal each refer to the possible transaction upon which to found the alleged consideration for the note in question.

It seems to me, therefore, quite clear that there never was anything done by the directors that would or could have supported a binding sale of the stock in question to the respondent.

It is as plainly enacted as words can make it, in the sub-section quoted, that any such sales as could have taken place of shares failing to be taken up by any of those to whom allotted could only have been made

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Not only is there the admission of counsel for appellants as to the non-existence of any such record of allotment, in the sense used by all concerned, but there appears on the stock register produced this entry of particulars relative to this very stock: "New stock allotted March 31, 1906."

Respondent's title was thus made to appear on the stock register as that of an allotment on that date. This is not merely descriptive, for it is as it were the root of his title.

But besides this we have the allotment made by a resolution that fixed the prices to be paid at $130 for each share and the time given to pay the premium of thirty per cent. up to the tenth of April.

And the letter of the 19th of April purporting to enclose certificates of stock of that date (of which that said to cover respondent's ten shares was one) refers to one of the 13th of April, as what is being answered.

The directors must, on the hypothesis of a valid foundation for this stock certificate, have prescribed sometime between the 31st of March and the date of the certificate "the manner and terms" upon which it was to issue.

And we are asked to presume not only that it was so done, but the improbable thing that it was done (if it could legally so be done, which I much doubt) before the tenth of April when the option to others had expired.

And we are asked further to presume either that the bank directors transacted such important business without putting it in the minute book, or that such a record which must have been on the minute book (close after that extracted and put in this case)

escaped the attention of all those engaged in the trial of this case. In other words, we are asked to presume that the very thing needed in law to maintain a contention, struggled for in many curious ways by appellants' counsel, was not resorted to though there at his hand.

For it is to be observed respondent's case was not left severely alone at the close thereof, when in its weakest state, as it might well have been, but appellants strove to shew its officers had done everything needed in law.

Nor does the story end here. The resolutions of the 31st March recite that the capital stock of two million dollars had been increased to four million dollars, that 16,250 shares had been issued and allotted, leaving 23,750 shares for allotment, of which 8,125 shares were then allotted to shareholders.

And that business having been, in order to comply with the law, disposed of, it was resolved that the remaining 15,625 shares of the unissued shares should be allotted to the shareholders

> at the rate of one hundred and thirty ($130) per share, and further that any of said shares so allotted, which have been or shall hereafter be relinquished or refused by the shareholders entitled thereto, shall be issued and allotted to the Dresden Bank of Berlin, Germany, or its nominees, at the said price of one hundred and thirty ($130) dollars per share

payable as specified.

What does all this mean? This last clause seems to be a specific dealing with the shares relinquished and may be taken as an express prescribing within sub-section 2 above quoted.

I am not concerned with the regularity or legality of the mode adopted for disposing of the business, or conclusively holding that the relinquished shares

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lastly dealt with related to all the allotments of that date.

I am merely concerned with the creation thereby of a state of facts that rendered it unnecessary for respondent or his counsel to look further for evidence shifting the onus resting on his client.

It seems to me in the highest degree improbable in face of such a course of conduct and policy of the directors in relation to the business in hand, that it could all be reversed and another course of conduct and policy in accordance with the statute, have been so taken as to render the issue of share certificates on the 19th of April, to any but shareholders, legal.

The presumed celerity of action and reaction involved therein is too great even for stock gamblers, much less staid bank directors, as these must be presumed in absence of evidence to the contrary to have been.

It is, in face of this, rather absurd to rely on a bit of evidence given by the inspector of appellants as to shares having been relinquished at some time not specified, but possibly and probably months or so later than the 19th of April. It is absolutely inconceivable (if the statement was intended to refer to a date anterior to the 19th of April) that it was not so put and demonstrated. It is idle to say the demonstration did not rest on him, for it was what he was in fact attempting to do.

The conclusion I reach is not only that there is left no ground for such presumption as the learned trial judge proceeded upon, but that in fact no such foundation as the law requires ever existed for transferring to respondent any title to the shares alleged

to have been sold, and hence the whole ground for the alleged consideration for the note in question fails.

One cannot have much sympathy with the respondent, but it is of the highest importance that bank directors should discharge their duty according to law and in a satisfactory manner.

So far as I can see there never was legal foundation for the certificate issued in respondent's name, and there was an issuing of certificates of stock at one hundred and forty dollars ($140), concurrently with a pending proposition to another party to take all such at one hundred and thirty ($130).

Of course this concurrent disparity or inequality did not necessarily exist if we assume everything in the business involved was all despatched within three days, *i.e.*, between the 10th and the 13th of April. We must proceed upon the ordinary and not the miraculous when driven to draw inferences or rely on presumptions.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I think this appeal should be dismissed. The onus is of course upon the respondent to establish the defence of want or failure of consideration. On this the controversy at once narrows itself to the point whether the professed allotment of shares evidenced by the entries of the 19th April in the stock register and the certificate of the same date was the act of the bank or merely that of some person acting without authority.

To summarize briefly in chronological order the admitted facts. There was an application by McIntyre for shares at $130 in January. In March the capital stock of the bank was increased to $4,000,000.

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On the 31st of that month there was an allotment to the shareholders of the whole of the unissued shares under section 34 of the "Bank Act." On the 19th of April McIntyre's name was entered on the share register as the holder of ten shares; and a certificate was issued of the same date declaring him to be the holder of that number of fully paid-up shares, which, with others, was forwarded to Karn, the bank's agent at London, on the same day. Karn then debited the London branch in account with the head office with $1,400 as the price of these shares at $140 a share, and on the 1st of June this sum was charged against McIntyre in the books of the bank. On the 14th of July or thereabouts McIntyre gave his note for $1,400; and, as I think the evidence sufficiently shews, he both understood and intended it to be for the price of these shares.

The application of January was admittedly not acted on. The view of the facts put forward by the bank is that the letter of the 19th of April forwarding the share certificate to London was in response to an application made by Karn on behalf and with the authority of McIntyre for ten shares at $140; that this application was accepted and that McIntyre had notice of the acceptance and of the entry and certificate in his favour at the time he gave his note on the 14th of July. That, as I understand, was the case primarily made by Mr. Macdonell, with, however, the alternative, that in any event McIntyre had notice at the time of giving his note that these shares had been allotted to him and stood in his name and that the note was given for the purchase price of them. In either view if the officers of the bank acted without authority in accepting Mc-

Intyre's offer on the one hand, or in appropriating shares to him by entry in the share ledger and by issue of the certificate, McIntyre's note was given without consideration and the appeal must fail. Upon this issue of authority or want of authority I agree with the majority of the Court of Appeal in thinking that, though the onus was originally on McIntyre the evidence and the facts admitted at the trial was sufficient to shift the burden of evidence to the shoulders of the bank and that burden has not been sustained.

The nominal capital of the bank was originally $2,000,000 divided into shares of $100. Before the 31st of March, 1906, 16,250 of these shares had been allotted to shareholders and on that day resolutions were passed by the directors under the authority of section 34 of the "Bank Act" allotting the residue (23,750 shares) of the bank's capital to the existing shareholders at $130 per share. McIntyre was not a shareholder and consequently could not participate in the benefit of this general allotment. Section 34, however, sub-section 2, contains a provision authorizing the directors to offer for public subscription any shares offered to shareholders under the authority of the section which may be refused or not accepted; and it is under the authority of this provision that the sale to McIntyre is said to have taken place.

It is said, and it may be conceded, that on the 19th of April, when McIntyre's name was entered in the share register as a holder of shares, there were some shares available for disposal under this provision. The directors, and the directors alone, however, had authority to offer these shares to the public. They and they alone had authority to fix the "terms" and the "manner" of subscription. In the absence of

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measures taken by them prescribing the manner and terms of such disposal any attempt to sell them must be a mere nullity—however regular in form and though evidenced by never so many certificates and entries in the stock registrar and payments of dividends; for the authority conferred upon the directors by section 34, sub-section 2, is one of that class of powers the exercise of which cannot be delegated. *Howard's Case*(1); *Cartmell's Case*(2); *Re Pakenham Pork Packing Co.*(3). The evidence bearing upon the point was, of course, entirely in the hands of the bank; and in view of the following passage extracted from the record I do not think it is open to the bank to contend that the authority of the directors had ever been given:

Mr. McEvoy:—I ask you now, Mr. McKillop, under the notice to produce, to let me have the resolution of the directors allotting this stock to Mr. McIntyre, if you have it; I asked you to produce it on the examination for discovery?

Mr. McKillop:—There is a general resolution allotting it to the shareholders in proportion.

His Lordship:—That you produce?

Mr. McKillop:—Yes, my Lord.

His Lordship:—It is admitted that there is no resolution allotting it to McIntyre?

Mr. McKillop:—Yes, my Lord.

Mr. McEvoy:—It is admitted there was no resolution allotting it to anybody but shareholders; that is the admission, Mr. McKillop?

Mr. McKillop:—Yes.

To Mr. McEvoy:—Q. You had nothing to do with that Sovereign Bank stock before this? A. No, I had not.

Mr. Macdonell in his ingenious argument found it necessary to minimize the effect of this conversation, and his suggestion was that the whole sense of the passage is limited to this—that the shares received by McIntyre were part of the totality of shares allotted

(1) 1 Ch. App. 561. (2) 9 Ch. App. 691.
(3) 12 Ont. L.R. 100.

to the shareholders by the resolutions of the 31st of March. In support of this view he mainly relies upon the suggestion that the words "allot" and "allotment" when applied to the disposal of its share capital by a bank subject to the "Bank Act" are words of technical import which signify the operation of appropriating or offering shares to shareholders under the first part of section 34. These terms, it is argued, are meaningless as applied to the disposal of shares refused or not accepted by existing shareholders after such an appropriation or offer to them under section 34, and consequently could have no application to a transaction between the bank and McIntyre touching the acquisition by him of any shares returned or not accepted by shareholders to whom they had been allotted by the resolutions of the 31st of March.

There is here, I think, some error as to the common meaning of the terms in question as well as the sense in which they are employed in the "Bank Act." The terms "allot" and "allotment" are not technical terms. "An allotment of shares," says Stirling L.J. (then Stirling J.) in *Spitzel* v. *The Chinese Corporation* (1),

> Broadly speaking, is an appropriation by the directors or the managing body of the company of shares to a particular person. The legal effect of the appropriation depends on circumstances. Thus it may be an offer of shares to the allottee, or it may be an acceptance of an application for shares by the allottee; but of itself an allotment does not necessarily create the status of membership. The allotment may be, and probably generally is, such as to give a title to the shares the moment the allottee communicates his acceptance of it to the company whose directors make the allotment, but it seems to me that the allotment may be subject to a condition—as, for example, that the allottee should not only indicate acceptance, but perform some other act, such as payment of a sum of money. In other words, I think that a company may offer specified shares to A.B. on

(1) 80 L.T. 347, at p. 351, in 1899.

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the terms that the title of A.B. should not arise until he had paid a sum of money to the company, and, this being so, a contract may provide, as I think, that the allotment shall be subject to conditions.

It is in the sense indicated by the first sentence of this passage that the term "allot" is used in the Dominion "Companies Act," R.S.C. (1906) ch. 79, sec. 46, in articles 5974, sub-sec. 1, and 5976, R.S.Q.(1), and in the same sense it was used in section 26 of the Ontario "Companies Act," p. 10, R.S.O., 1897, ch. 191 (since repealed); that is also the meaning attached to the term when used in reference to the disposal of the shares of provincial companies governed by statutes modelled upon the English "Companies Act, 1862."

It does not appear to be open to doubt that this is the signification of the term in section 34 of the "Bank Act." That section directs that when it is proposed to dispose of any of the

original unsubscribed capital stock or of the increased stock of the bank

the shares shall first be offered to the shareholders. The existing shareholders are to have a pre-emption; the first step in the operation is to "allot" or appropriate the shares to the shareholders, but it is plain that this is only a conditional appropriation and that no title passes until the offer has been accepted. The operation in other words is precisely the second of the two kinds to which Stirling L.J. refers. It does not, of course, follow that the term "allot" is not equally to be applied to the act of the proper authority in accepting an application or in appropriating shares in response to a subscription. Parliament has applied the word to a transaction to which according to well understood usage among those conversant with the

(1) See *Common* v. *Matthews*, Q.R. 8 Q.B. 138, at p. 141.

management of incorporated companies, it is properly applicable; but I should think it very far-fetched to infer from the language of this section that there is anything unusual in employing the term — in speaking of bank shares — according to the whole of its commonly understood purport.

Indeed, the record in this action affords us conclusive evidence that those responsible for the management of the bank in question understood the term to be applicable to the appropriation of shares to a purchaser or subscriber under the second sub-section. The second of the resolutions of the 31st of March expressly authorizes the disposition of shares under the second sub-section—shares that is to say which should be "refused" or "not accepted" by shareholders to whom they were allotted by that resolution—in this phraseology:

> and further that any of said shares *so allotted* which have been or shall hereafter be relinquished or refused by the shareholders entitled thereto, shall be issued and *allotted to* the Dresden Bank of Berlin, Germany, *or its nominees*, at the said price of one hundred and thirty ($130) dollars per share, payable as follows.

There can be no question in face of this resolution that the advisers of this bank did not use the word "allot" in the restricted sense it is now proposed to place upon it. Indeed, it is obvious from this document that in their view the apt word for describing the operation of appropriating surrendered shares under that sub-section was that very word.

Such then being the sense of this term in its ordinary signification and according to the usage of this bank what meaning is to be attributed in the passage from the record quoted above? In what sense was it used by counsel for McIntyre? In what sense was it understood by counsel for the bank? There

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can, of course, be no question that when counsel asked for the resolution allotting shares to McIntyre he had not in mind the resolution of the 31st of March which affected only existing shareholders of whom McIntyre to everybody's knowledge was not one; there can be as little doubt that counsel for the bank could not have so understood him; but the point is put beyond question by the last question and answer in which it is agreed that there is no resolution *allotting* shares to *anybody but shareholders*. We may put aside as pure subtlety the distinction between an allotment specifically made by the directors and one made under the authority of a general resolution passed by the Board; no such distinction was in anybody's mind. There was then no resolution giving authority for the entry of McIntyre's name in the register or the issue of the certificate of shares; none authorizing the acceptance of Karn's application on behalf of McIntyre if we proceed on the assumption that there was such an application. Mr. Justice Maclaren says, and with him the Chief Justice of Ontario agreed, that

> it was admitted at the trial that the only resolutions of the directors regarding the stock now in question were the two resolutions of the 31st March.

This, I think, is palpably involved unless we are to reduce the whole of this episode to mere fatuous trifling.

The bank's case appears also to have been put upon the ground that having accepted dividends McIntyre is estopped from disputing his status as a shareholder.

Estoppel, where there is no record and no deed, which is the case here, is a rule of evidence by which a person whose words or conduct have misled another

into acting to his prejudice upon the assumption of the existence of a non-existing state of facts is prevented in a court of justice from disputing the actuality of that state of facts. What conduct of McIntyre misled the bank? The bank knew the facts. McIntyre did not know them. McIntyre acted upon the representation that he was a shareholder and on that basis of fact accepted the dividends. I can only say that the contention is one which I do not understand.

Then it is said that the bank could not dispute the status of McIntyre as a shareholder and consequently McIntyre must also be bound. I am not satisfied in view of section 34 that the bank could not set up the absence of authority from the directors. But conceding it could not, that could only be upon the ground that the bank had estopped itself from denying authority in fact. As the discretion of the directors under section 34(2) could not be delegated, the act of any officer assuming to perform the function of the directors would be incapable of ratification; *Gibson* v. *Barton*(1); and there is indeed no suggestion of ratification in fact by any proved act of the board. Since estoppel is the only ground upon which the bank could be held notwithstanding want of authority in fact, one does not see how that can help the bank against McIntyre. The effect of the estoppel is simply to preclude the bank from proving the facts. That cannot prevent McIntyre from proving the facts. There is, of course, the widest possible distinction between a void contract or a nominal contract which for want of assent on one side is no contract, but the validity of which one of the parties is estopped from disputing and a contract

(1) L.R. 10 Q.B. 329, at p. 337.

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which is voidable in the sense of being rescindable but valid until rescinded. Such transactions as those last mentioned may cease to be impeachable by a change of circumstances alone. Change of circumstances alone not involving a true consent could not produce a contract out of that which never was a contract because of want of consent by one of the nominal parties.

Appeal allowed with costs.

Solicitors for the appellant: *McKillop & Murphy.*
Solicitor for the respondent: *J. M. McEvoy.*