THE MONTREAL TRUST COMPANY (PLAINTIFF)..... APPELLANT;

AND

JAMES RICHARDSON, EXECUTOR OF GEORGE T. RICHARDSON DECEASED (DEFENDANT)..... RESPONDENT.

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*Nov. 2, 3.
*Dec. 9.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Subscription for stock—"Underwriting"—Assignment of subscription agreement—Rights of assignee.

In a letter sent to R. requesting him to take stock in a newly formed company and enclosing a form of subscription the writer, who not long after became president of the company, stated that M. & Co., financial agents, had undertaken to sell $150,000 worth of the stock. R. signed the form thereby agreeing to purchase from M. & Co. 100 shares and that "this underwriting may be pledged or hypothecated with any banking institution as security for advances." He never paid for the stock which eventually was pledged by M. and Co. with the appellant as security for advances. In an action by appellant to recover the price of the 100 shares:—

Held, affirming the judgment of the Appellate Division (48 Ont. L. R. 61) which reversed that rendered at the trial (46 Ont. L.R. 598) that R.'s contract was an underwriting of the undertaking of M. & Co. and a purchase of stock only if the latter failed to dispose of the whole 1,500 shares; as these were all sold the obligation of R. no longer existed.

Held, also, that the contract signed by R. was, *ex facie*, such as to put the appellant on inquiry; the contract was not negotiable and the agreement that it could be pledged or hypothecated could not give the assignee any rights higher than those of its assignor.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment on the trial (2), in favour of the appellant.

The point in issue on the appeal is whether or not the respondent Richardson was a subscriber for shares in a newly formed company, The Canadian Jewellers, Ltd., unconditionally and without limitation. The material facts are sufficiently stated in the head-note.

Hellmuth K.C. and *Chipman K.C.* for the appellant. The provision in the contract that it could be pledged or hypothecated intimated to the appellant that it could safely be accepted as security and estopped respondent from alleging that the writing did not contain the whole agreement. *Carlill* v. *Carbolic Smoke Ball Co.* (3).

It was assigned without being subject to the equities between Richardson and Mackay & Co. *In re Agra and Masterman's Bank* (4).

Tilley K.C. and *Cunningham K.C.* for the respondent, referred to *Re Schwabacher* (5); *Hutchinson* v. *London and Provincial Exchange* (6).

THE CHIEF JUSTICE.—I am, after much consideration, of the opinion that the document or agreement on which the action is based was not an absolute and unconditional agreement to purchase and pay for the one hundred shares subscribed for by Richardson but was an underwriting or a conditional agreement to do so if the $150,000 worth of the shares of Canadian Jewellers, Limited, which Mackay & Co.,

(1) 48 Ont. L.R. 61.
(2) 46 Ont. L. R. 598.
(3) [1893] 1 Q. B. 256.
(4) [1867] 2 Ch. App. 391.
(5) [1908] 98 L. T. 127.
(6) [1910] 45 L. J. 238.

Ltd., had subscribed for and were about to put on the market were not taken up by the public, and only to the extent that they were not so taken up.

The contentions of the appellant Trust Company with which the agreement or underwriting was pledged or hypothecated by Mackay & Co., Ltd., for advances made, were that it was not limited to the $150,000 worth of the stock of Canadian Jewellers, Ltd., which Mackay & Co. had subscribed for and were putting on the market, and further that even if defendant respondent's contention as to the limited construction of the agreement was correct, and it was so limited, they as pledgees or hypothecatees nevertheless are entitled to recover because they had no notice or knowledge of the conditional nature of the agreement which contained the express provision that the

underwriting may be pledged or hypothecated with any banking institution as security for advances.

I am of the opinion that the Trust Company appellants may fairly be said to come within the phrase "Banking Institution" in the underwriting agreement mentioned.

I am also of the opinion that the document was merely an underwriting. It is on its face expressly called so and the Trust Company must be taken, when making advances upon it when it was pledged with them, to have so understood it. The duty of inquiring and finding out what extent and what amount of shares the "underwriting" covered devolved upon them. If they had discharged that duty they must have learned that the underwriting agreement was a conditional one binding upon Richardson only to the extent that Mackay & Company's subscription to the shares of Canadian Jewellers, Ltd., which they were offering to the public for sale, were not taken up by the public.

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The letter which Timmis, the co-promoter with Mackay & Company, of the Canadian Jewellers, Ltd., sent to Richardson, a letter enclosing the "underwriting form" to be signed by him in case he decided to take any shares, expressly stated that $150,000 worth of stock was the amount which MacKay & Co. had "undertaken to sell to their clients." The appellant Trust Company would have learned by further prosecuting their inquiries that the underwriting had reference to and only covered that amount of stock. They would thus have found the limited nature of the underwriting and have only themselves to blame if they, neglecting their duty, failed to make the inquiries which they should have made.

It appears by the evidence that Mackay & Co. had sold to the public the full amount of their undertaking of $150,000 and that Richardson's obligation under his indemnity was at an end.

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

IDINGTON J—The Canadian Jewellers, Limited, was incorporated by letters patent dated the 11th August, 1911, according to a minute of the first meeting of the provisional directors, on 30th of said month of August, under and by virtue of the Companies Act, c. 79 of R. S. C. 1906.

There would seem to have been only five subscribers, each subscribing for a single share, and they were declared provisional directors who met as such on said 30th August and elected themselves directors, and passed by-laws of which No. 18 provided as follows:—

> 25,000 shares of the unsubscribed and unissued capital stock of the Company, of the par value of $100 each share, are hereby created and shall be issued as preference shares having priority both as to capital and as to dividends over the ordinary shares, which dividends shall be at the rate of 7 per cent per annum, and shall be cumulative.

It was moved by Mr. O'Brien, seconded by Mr. Gilmor and resolved: That the Montreal Trust Company be and is hereby appointed transfer agent of the shares of the company for such considerations and upon such terms and conditions as may be arranged by the president of the company; and that the president and secretary of the company be and they are hereby authorized to sign and execute in the name of the company the necessary agreement with the said trust company.

This helps to shew the business relation of the appellant to said company and is suggestive that the appellant probably had a better chance than deceased Richardson of knowing a good deal he should have been told and thus it was put on the inquiry.

One Timmis and the firm of J. A. Mackay & Co. both being brokers in Montreal which was to be the business home of said new company, had an agreement between them whereby they undertook the promotion of the company and sales of its stock and to divide the profits between them on a stated basis. Each took a large part of the stock—Timmis to the amount of $100,000.00 and J. A. Mackay & Co. to the amount of $150,000.00 intending, of course, to resell same to the public.

The scheme promoted was the merger of certain named companies engaged in the jewellery business and the business of others likewise so engaged.

Timmis wrote the late George T. Richardson as follows:—

Montreal, 8th Sept. 1911.

George T. Richardson, Esq.,

Messrs. James Richardson & Sons, Ltd., Kingston.

Dear Mr. Richardson:—I enclose herewith an outline of the Canadian Jewellers, Limited, an amalgamation which has been originated by myself, and which is being financed by J. A. Mackay & Co., Ltd., financial agents of this city. I also enclose an underwriting form. Mr. J. W. McConnell, Mr. R. J. Dale and Mr. James Playfair have taken $15,000 each. The money which we will receive from the sale of surplus merchandise when the different factories have been concentrated, with the $150,000 of stock which Messrs. Mackay & Co. have

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undertaken to sell to their clients, will give the new concern ample cash capital, so that it is exceedingly improbable that any payment whatever will ever be called on the underwriting. The underwriters will get 50 per cent of common stock as compensation for their underwriting services. It was my intention to have offered this to Mr. H. W. Richardson, but as he is now in the west, I am submitting it to you. We do not desire to have names for less than $10,000 or more than $15,000. I shall be very glad indeed to have you in on it if you care to come, but feel perfectly free to decline if it is not entirely acceptable to you. I only wish to give you the same opportunity as my other "Missisquoi" friends.

With kind regards, yours faithfully.

(Sgd.) Henry Timmis.

The outline enclosed, so referred to, set forth in the first part thereof, as follows:—

Canadian Jewellers, Limited.

To be incorporated under the Companies Act of the Dominion of Canada.

Capital.....$5,000,000.00
Consisting of: 25,000 shares of seven per cent (7 per cent) Cumulative Stock, and 25,000 shares of Common Stock

The Company is being organized for the purpose of acquiring, coordinating and extending the business at present carried on by a number of the leading and most successful wholesale manufacturing and import jewellery houses of Montreal, Toronto and elsewhere, among others being:

William Bramley,
The Hemming Mfg. Company,
The Hemsley Mfg. Company,
J. E. Brown & Company,
Caron Bros. and others.

These concerns have gross assets approximating one million of dollars, all of which has been practically acquired from the profits of the respective businesses.

It then proceeded to set forth the rosy future to be expected from such an amalgamation.

The late Mr. Richardson replied by letter of the 12th Sept., 1911, enclosing the underwriting agreement asked for which is said to have been identical in all its terms save the date of payment with the following:—

Subscription for Stock.

Canadian Jewellers, Limited.

Authorized Capital:	To be issued:
Preferred shares.....$2,500,000	$600,000
Common shares.....$2,500,000	$450,000 Approx.

All shares of the par value of $100 each.

We, the undersigned, severally subscribe for and agree to purchase from J. A. Mackay & Co., Limited, preferred shares of the above company to the number and amounts set opposite our respective names. The price to be paid for said shares is 95 per cent of the par value thereof with 50 per cent of the par value thereof in bonus common stock of the company. The purchase price to be paid on the 15th day of January, 1913.

This underwriting may be pledged or hypothecated with any banking institution as security for advances.

This agreement may be signed in counterpart, and all counterparts taken together shall be deemed to be one original instrument.

Name of subscriber.	Address.	No. of shares subscribed.	Total amount of subscription.
G. T. Richardson,	Kingston, Ont.	100.	$10,000.

Witness A. W. Brown.

This is called a renewal of the original and substitutes 25th January, 1913, for the date of payment therein which was 15th September, 1912.

On the 30th October, 1914, by an agreement in writing between the appellant and the said J. A. Mackay & Company, Limited, the latter acknowledged an indebtedness to the former of $138,141.15 and interest at 7 per cent from 1st October, 1914, payable monthly and then assigns as follows:—

2. As collateral security for the payment of the said indebtedness and any interest which may accrue thereon the borrower hereby acknowledges to have assigned, transferred and made over to the lender all its right, title, claim and interest in and to the subscription made by G. Richardson, of Kingston, Ontario, for one hundred (100) shares of the preferred capital stock of Canadian Jewellers, Limited, at a price of ninety-five per cent (95%) of the par value thereof, with fifty per cent (50%) of the par value of such subscription in bonus common stock of the company, the purchase price of which stock was to be paid on the fifteenth day of January, one thousand nine hundred and thirteen (1913), as more fully appears from the copy of the said subscription hereto annexed to form part of these presents.

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Then followed an acknowledgement by appellant of the borrower having theretofore delivered to it stock certificates of the Canadian Jewellers to be delivered to the subscriber at the time of payment of the said subscription.

The appellant never tendered such certificates of stock to said Richardson who had enlisted in one of the first Canadian Expeditionary Forces and gone to Valcartier, and thence overseas to France where he was killed in the late war in 1916.

Indeed any correspondence, on the subject of what is in question herein, had with him before his departure was either with Timmis or Mackay or latter's firm.

The appellant claims to have sent the late Mr. Richardson at Kingston something in the end of December, 1914, but no proof given of his having got it or heard of it and the appellant must have known he was not there.

Prior to bringing this action there was a demand made on the executor of deceased's estate in Winnipeg for payment. This action is brought against said executor to recover the sum of $9,500.00 with interest thereon at 7 per cent and is founded upon the foregoing subscription, not, it is to be observed, to take stock in the company, but to buy from J. A. Mackay & Company shares thereof held by them.

The court appealed from held, and I think rightly, having regard to all the surrounding facts and circumstances which must be considered to interpret and construe what is a most ambiguously worded contract, that the condition of his so contracting had been fulfilled by the sale of stock to the public by Mackay.

Indeed, the whole of the contract as finally developed and executed is not before us but only one part which, if justice is to be done, should have been supplemented by whatever is included in the cryptic term at the end thereof, as follows:—

> This agreement may be signed in counterpart and all counterparts taken together shall be deemed to be one original instrument.

What does that mean? Where are these counterparts? How much has been realized from them by J. A. Mackay & Co. or the appellant?

Preceding that we have the following:—

> This underwriting may be pledged or hypothecated with any banking institution as security for advances.

What is meant by "this underwriting?"

I find assistance in the case of *In re Licensed Victuallers' Mutual Trading Association; Ex parte Audain* (1), at page 7. Such an able court as there seized of that case and such an authoritative expert, if I may be permitted the term, as Lindley L. J., relative to the branch of the law in question, found it necessary to bring in evidence to help to the meaning of the term "underwriter."

I think that example might well have been followed by those conducting this case instead of leaving us to guess which of the variety of meanings the term may have is to be applied in the peculiar connection in which it was used herein.

Let us never forget this is not the common case of an issue of stock by a company in which men calling themselves for the moment underwriters do in fact undertake the management of the floating on the market a particular issue of stock or debentures by a company desiring their services.

(1) [1889] 42 Ch. D. 1.

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It seems to have been in regard to what is herein in question a device copied therefrom by two men who owned a certain amount of stock in a company.

Indeed the term as used herein has given rise to several different interpretations according to the side counsel happened to be on and even these not always consistently adhered to.

I think I have said enough to shew in what sense I think this contract is most ambiguous and why the surrounding facts and circumstances must be looked at.

And I repeat that when so looked at and considered it was not a flotation of the entire preferred stock issued and offered by the company, but that held by J. A. Mackay & Co., and so issued and offered.

Clearly they disposed of more than they then had or offered and the obligation arising from signing such a counterpart as this now in question ended.

There is, however, another and graver point raised and that is the charge that the contract was induced by fraud or by unjustifiable misrepresentation of fact.

The learned trial judge found expressly that there was fraud so inducing the contract and going to the very root of the matter as would have rendered it void in the hands of J. A. Mackay & Co.

He did not give effect thereto for the reasons he gave, resting upon the decision of the case of *In re Agra and Masterman's Bank* (1), to which I will presently refer.

The learned trial judge's statement of fact upon which he rested his finding is challenged in appellant's factum before us.

(1) 2 Ch. App. 391.

The statement the learned trial judge made is verified by the evidence given in answer to the questions 75 to 85 referred to by him.

The full import thereof did not in his view of the law call for an expanded argument and we are not to take his reference as more than an indication of much else.

The actual facts are that of the five companies set forth in the outline above quoted from, one known as the Caron Company, never had agreed as represented to come into the merger, and of the four others one was in the hands of a receiver.

And the company was induced, by means I need not enlarge upon, to accept the representation of Timmis and, in September, almost concurrently with the signing by the late Mr. Richardson of the first subscription by him now in question, to take over some of these others from Timmis at such a gross over estimate of the value of their assets that later on, under threat of a lawsuit, he was induced to reduce their valuation to an aggregate of less than one-third of that he had induced the company to agree to.

His representations to the late Mr. Richardson were not, however, revised but, on the contrary, long after he had been so compelled by the company to accept that reduction, he continued in his correspondence with him, in answering his inquiries, to maintain the rosy side of things instead of telling him the truth.

Mackay was appealed to and responded in like fashion.

If he had told Richardson the actual facts of the disastrous change I venture to think he never would have got the renewal subscription now sued upon.

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Either Timmis knew that the representations he was making to Richardson were false, or he made them recklessly not caring whether true or false, and thus the contract was founded on fraud, and null.

Or there may have been in law an alternative view of possibly mere misrepresentation which entitled Richardson, on its coming to his knowledge, to repudiate the contract.

I am of the opinion that in law the appellant has no higher right than J. A. Mackay & Co., with whom the contract was made. And I have no doubt that the learned trial judge, while having ample ground in the evidence that was before him in the whole case, and not confined to one or more sentences thereof, to say and hold that the contract had been induced by fraud, erred in holding that the *Agra Case* (1), above cited, prevented his applying the facts as against appellant.

That case seems to me quite distinguishable. It proceeded on a promise, as in principle the court found, to honour drafts provided for in a letter of credit there in question.

Here there is nothing but a contract, non-assignable in law, to buy from J. A. Mackay & Co. a number of shares. And there is added thereto a consent to its being used in a specified manner without any promise express or implied that there was or could not be anything vitiating it.

Moreover there was nothing involved in the *Agra Case* (1), but the liability to answer for a recognized breach of contract to the creditors of the bank in liquidation, no charge of fraud or the like being involved.

(1) 2 Ch. App. 391.

I have looked at all the cases cited in appellant's factum and fail to find in any of them anything to support appellant's contention on this point.

Indeed most of them relate to transfers of negotiable bonds or debentures. One other case cited seems to rest upon estoppel which does not help here.

The point taken by the respondent that the appellant is not a banking institution within the meaning of the term as used in this contract is, I think, well founded.

In view of section 156 of the Bank Act, R.S.C. 1906, c. 29, prohibiting appellant from calling itself a banking institution, I prefer that to the Century Dictionary as my guide to the meaning of such a term when used in such a document as in question herein.

Indeed the objection seems fatal to the right asserted by appellant that it has any higher title than J. A. Mackay & Co. would have if suing.

And the case of *Crouch* v. *The Crédit Foncier of England* (1), is much more in point than any of the bond and debenture cases cited by appellant, for it shews how little may take away from these usually negotiable instruments the quality of negotiability.

In quitting this branch of the case I may say I have endeavoured to find something on the curious question of what exact meaning may be attached to the words "this underwriting" but found nothing more instructive than the *Ex parte Audain Case* (2) cited above.

And I presume industrious counsel on either side citing so many decisions have failed also or we should have had some results worth while.

I, for the foregoing reasons, have come to the conclusion that this appeal should be dismissed with costs.

(1) [1873] L.R. 8 Q.B. 374. (2) 42 Ch. D. 1.

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Duff J.

DUFF J.—The agreement sued upon is an underwriting agreement. This is sufficiently clear from the form of the document. It is true that there is an undertaking to accept and pay for shares but the undertaking is declared in explicit terms to be of the nature of an underwriting. In essence, therefore, the obligation is an obligation to indemnify J. A. Mackay & Co. against failure to dispose of the underwritten shares. In any action to enforce this undertaking the onus is of course on the plaintiff to shew that the circumstances have arisen making absolute the conditional obligation to accept the shares and pay for them and this proof is lacking.

Mr. Hellmuth's principal contention was that the clause

> this undertaking may be pledged or hypothecated with any banking institution as security for advances

constituted an authority to the lender to make advances as upon the security of an absolute obligation to pay. I cannot find any evidence of such authority in this document; on the contrary the obligation upon which the lender is invited to advance is described in express words as "this underwriting."

Mr. Hellmuth relies upon the judgment of Lord Cairns in *In re Agra and Masterman's Bank* (1), at pp. 396 and 397. The substance of Lord Cairns' judgment in this case, in so far as now pertinent, is that the letter there in question was an invitation to bankers to advance money upon the faith of a promise contained in that letter to accept bills drawn upon the writers of it and that this virtually constituted an undertaking to pay such bills irrespective of the equities between the writers and the persons to whom the letter was

(1) 2 Ch. App. 391.

addressed *propriis nominibus*. The letter contained an unqualified promise to honour the drafts of the addressees and was expressed in terms plainly constituting an invitation to third persons to negotiate such drafts in reliance upon that promise. The letter was either a promise to pay such drafts in disregard of equities or it was a mere trap, which of course the writers of it could not be allowed to aver. I find at most only a superficial resemblance between that letter and the document now under consideration. Here there is no unqualified undertaking and indeed no undertaking of any description by the subscribers to repay advances made upon a pledge or hypothecation of the agreement.

The appeal should be dismissed with costs.

ANGLIN J.—After giving to all the circumstances of this case most careful consideration I have reached the conclusion that the plaintiff's appeal should not succeed.

I have no doubt that the Trust Company took the obligation of the late G. T. Richardson subject to whatever equities and conditions affected it in the hands of J. A. Mackay & Co., of which its *ex facie* designation as an "underwriting" in my opinion gave them constructive notice. I cannot accept the view that the mere statement that the non-negotiable document signed by Richardson might be pledged or hypothecated as security for advances enables the assignee of it to assert rights higher than those held by its assignor.

I think it is also reasonably clear that the liability assumed by Richardson towards J. A. Mackay & Co. was not absolute but conditional and in the nature of

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an underwriting. I am not so well satisfied however as to the terms of the condition on the happening of which Richardson's liability on the document sued upon was intended to cease. In view of the facts that this document is an underwriting of J. A. Mackay & Co. and that Mackay himself tells us that "the amount to be underwritten (by his firm) was to be $150,000," I am not convinced that the conclusion of the learned Chief Justice of Ontario that Richardson

> was to pay only in the event of the $150,000 (to be underwritten by J. A. Mackay & Co.) not being taken up by the public.

is wrong. The evidence taken as a whole leaves little room for doubt that J. A. Mackay & Co. did in fact dispose to the public of more than the original $150,000 worth of preferred stock for which they undertook to obtain purchasers. Therefore, while not entirely satisfied that the condition of the underwriting sued upon was what the Appellate Divisional Court has found it to be, since the evidence, oral and documentary, does not enable me to say that it was something different and was unfulfilled, a reversal of the judgment *a quo* would not, in my opinion, be justified.

MIGNAULT J.—The document on which the appellant's action is based is an undertaking signed by the late George T. Richardson, represented by the respondent, his executor, to subscribe for and purchase from J. A. Mackay & Co., one hundred preferred shares of Canadian Jewellers, Limited, at the price of 95 per cent of the par value thereof, with 50 per cent of the par value thereof in bonus common stock of the company, the purchase price to be paid on the 15th day of January, 1913. This undertaking replaced a former one not produced, but said to have been similar in tenor and states:—

This underwriting may be pledged or hypothecated with any banking institution as security for advances.

It is very important to observe that this document is not a negotiable instrument. And I fear that many of the appellant's contentions are based upon a negotiability which it certainly does not possess.

The appellant however relies upon the clause stating that this *underwriting* may be pledged or hypothecated with any banking institution as security for advances, and the learned trial judge, on the authority of the judgment of Lord Cairns (then Sir H. M. Cairns L. J.) in *In re Agra and Masterman's Bank, ex parte Asiatic Banking Corporation* (1), at page 397, decided that under this clause the appellant took Richardson's undertaking free from any equities it might have in the hands of J. A. Mackay & Co., Limited.

In my opinion the case cited does not help the appellant. It was the case of a letter of credit issued by a bank in favour of one of its clients, authorizing the client to draw upon the bank to the extent of £15,000, and undertaking to honour on presentation drafts drawn thereunder. Lord Cairns said:

> The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor and without reference to any collateral or cross claims.

There is nothing similar here. The stipulation that the "underwriting" might be pledged or hypothecated did not add anything to it as a contract,

(1) 2 Ch. App. 391.

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nor did it, in my opinion, give the assignee any greater right than is conferred by the assignment of a contract or chose in action, the more so as the very clause permitting its pledge or hypothecation gave notice to the pledgee that it was an "underwriting," that is to say, as I will show, a conditional contract. And surely a conditional contract can only be assigned subject to the condition expressed in it or consequent on its nature.

The other cases referred to by the learned trial judge are bond cases to which very different principles apply.

I have said that Richardson's undertaking, being an "underwriting", is a conditional contract.

Bouvier, Law Dictionary, Vol. 3, p. 3352, defines "underwriting" and "underwriting contract" as follows:—

> *Underwriting.* An agreement, made in forming a company and offering its stocks or bonds to the public, that if they are not all taken up the underwriter will take what remains. An underwriter is held liable in England on the stock subscribed by him. See 42 Ch. D. 1.
>
> *Underwriting contract.* An agreement to take shares in a company forming, so far as the same are not subscribed to by the public.

An underwriting is therefore essentially a conditional contract, and whatever rights J. A. Mackay & Co., Limited, or the appellant as its assignee, had were subject to this condition.

It follows that the appellant took this undertaking subject to any equities and conditions which affected it in the hands of J. A. Mackay & Co., Limited. In other words it acquired no higher rights than J. A. Mackay & Co., Limited, itself had to exact performance of Richardson's undertaking.

There is some difficulty in determining here what was the preferred stock which had to be taken up to free Richardson from liability under his contract.

The heading of the document signed by Richardson represents the preferred shares as being $2,500,000, of which shares to the amount of $600,000.00 were to be issued. Is the amount of shares underwritten by Richardson the whole $600,000.00, or, as found by the Appellate Division, only the $150,000.00 which J. A. Mackay & Co., Limited, had undertaken to sell to its clients?

It is to be observed that Richardson's contract to underwrite shares was made with J. A. Mackay & Co., Limited. The form signed by Richardson, or a similar form, was enclosed in the letter which one Henry Timmis, promoter of the company, wrote to Richardson on the 8th of September, 1911, whereby he sought to induce Richardson to enter into an underwriting contract with Mackay & Co. This letter represented that Mackay & Co., who were financing the company, had undertaken to sell $150,000 worth of stock to their clients, and the document signed by Richardson being an underwriting contract made with Mackay & Co., this letter would shew that the stock to be underwritten was the $150,000 worth of stock which Mackay & Co. had undertaken to sell to their clients. There is no suggestion in this letter that Mackay & Co. were seeking subscriptions for a greater amount of the preferred stock.

Timmis, in his evidence, stated that Mackay & Co. and he himself had sold to the public 4,760 shares. I do not think therefore that there can be any serious doubt that the whole $150,000 of stock had been sold by Mackay & Co. to the public.

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Mignault J.

This being the case Richardson's obligation to subscribe the stock underwritten by him came to an end, and Mackay & Co. would have no action against Richardson to force him to take the stock. The appellant, not being in a better position than Mackay & Co., cannot therefore assert any rights under Richardson's contract.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Walkem.*

Solicitors for the respondent: *Cunningham & Smith.*