1899

*Mar. 25,26.

*Nov. 16.

W. D. MORRIS (DEFENDANT).....APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFF)..... } RESPONDENT;

R. G. CODE (DEFENDANT)..... APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFF)..... } RESPONDENT;

UNION BANK OF CANADA (PLAINTIFF)..... } APPELLANT;

AND

MARY A. MORRIS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint stock company—Payment for shares—Equivalent for cash—Written contract.

M. and C. each agreed to take shares in a Joint Stock Company paying a portion of the price in cash and receiving receipts for the full amount the balance to be paid for in future services. The company afterwards failed.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396) that as there was no agreement in writing for the payment of the difference by money's worth instead of cash under sec. 27 of The Companies Act M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company.

* PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick and Girouard JJ.

(Mr. Justice King was present at the argument but died before judgment was delivered.)

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial against the defendant Code, reversing that in favour of the defendant W. D. Morris and affirming that in favour of the defendant Mary A. Morris.

The plaintiff bank, as a creditor of the Anderson Trading Co. in liquidation under The Winding-up Act, brought action against the defendants to recover from them respectively the amount alleged to be unpaid on shares of the company purchased by the defendants W. D. Morris and Code. Mary A. Morris was sued with her husband as liable in case it should be held that the latter's shares had been validly transferred to her.

The facts respecting the purchase of the shares were stated by Mr. Justice MacMahon at the trial as follows:

W. D. Morris was in Toronto about the last of April or the first of May, 1894, and had a conversation with Mr. Barr, who was then connected with the company as one of its officers. Barr wanted Morris to purchase fifty-two shares of the Anderson Trading Company's stock, which, at its par value, would represent $5,200. Morris, according to his own evidence and that of Barr, made an offer of $3,000 for the stock representing the sum named. The transaction was not then carried out, and Barr visited Ottawa, where Morris was residing and carrying on business, and, according to Morris's statement, he had consulted with his solicitor, Mr. Code, and from the opinion received from him he found that the offer made by Morris to Barr, of the payment of $3,000 for $5,200 of stock might not be regarded as a legal transaction, that is, if carried out Morris might still be liable to pay the difference between the $3,000 and the $5,200. The difficulty which was to be overcome was stated by Morris quite

(1) 27 Ont. App. R. 396.

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openly, for he says he told Barr that he was to have paid-up shares, and it was then agreed that Morris should purchase thirty-four shares, the par value of which was $3,400 and for this he was to pay $3,400 and he was to be repaid by the company the sum of $1,400 for services to be rendered in connection with the Merchants' Supply Company, which was being formed by the directors of the Anderson Company to supply merchants with cash registers at a rental, and designed to assist the Anderson Company, whose business was the manufacture of such registers. Barr said he was to give his services towards securing financial aid in Ottawa for the Merchants' Supply Company, but he was not called upon to perform any services in connection with it, because the Anderson Trading Company had failed to make cash registers that could be guaranteed, or would be accepted by merchants.

The eighteen shares, to make up the whole of the fifty-two shares which Barr had offered to sell Morris, were taken by Mr. Code, who is a barrister and solicitor in Ottawa, and at the interview at which Barr, Morris and himself were present, the matter was discussed, and Morris's services were spoken of, and also the services that Mr. Code could render to the company, by obtaining from the Customs Department some modifications in the customs regulations so as to protect the Canadian company, against a company in Cleveland that had the whole of the market in Canada to itself.

Morris says that it was arranged that he should pay for the thirty-four shares by his cheque for $3,400 and that he was to get back from the company $1,400, for the services to which I have referred. Mr Code says he was to pay the $1,800 for his shares, and that the arrangement that had been made with Barr as to the payment for the services was that he should

receive $800, and that was to be immediately upon payment by Code of the $1,800.

The agreement so made was carried out in its entirety, as evidenced by the cheques which were filed, and which appear to have been on blank cheques supplied at Ottawa during Barr's visit on the agreement as to the purchase of the shares being concluded. Now the way that the return of the $800 to Code and the $1,400 to Morris was arranged was this: the company passed a resolution granting to Mr. Anderson, the president of the company, a sum of $2,300, purporting to be for services rendered by him to the company. That amount was credited in Anderson's account. Mr. Barr, as one of the officers of the company drew cheques on the bank at which the Anderson company kept its account for these two several amounts. Anderson derived no benefit whatever from the moneys voted by the company, except to the extent of about $100, and he was an assenting party to the money being so paid to Code and Morris. In fact, what Code and Morris received back was part of the moneys derived from their cheques which had been deposited to the credit of the company in the Union Bank.

Between May and August, Morris, having possession of his stock certificate, put it in an envelope and handed it to his wife, saying that he was giving it to her because he thought she was entitled to it, she having lent him money at the time of their marriage in 1882. The certificate so handed to her she says she looked at but did not read. She returned it to the envelope and handed it back to her husband, just after looking at it to see what it was; she did not know perhaps its value, and did not certainly know, unless her husband told her, what the nature of the certificate was. After it was handed back by Mrs. Morris to

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her husband, he instructed Mr. Code to deliver up the certificate to be cancelled, and to obtain new certificates in his wife's name, who, he then told Mr. Code, was the owner of the stock. In compliance with these instructions, Mr. Code procured from the company the issue of the seven certificates in the name of the defendant, Mary A. Morris, representing the thirty-four shares that had originally belonged to her husband.

I find as a fact that Mrs. Morris had lent to her husband in 1882 the sum of $700. There were some other items which she claimed formed an indebtedness by her husband to her, but I consider that no valid claim could be found to exist as to those. The legal liability as to the $700 would have been barred by the statute. Mr. Morris regarded it as a moral obligation to return to his wife that which he had received from her some twelve years before, with interest thereon which I understand he said he had not made up.

In the action against Code judgment was given for the plaintiff bank. In the other action both defendants succeeded, the learned judge holding that W. D. Morris had transferred the shares to his wife and that she was a purchaser for value without notice and so not liable. Code appealed from the judgment against him and the bank also appealed in the other case. The Court of Appeal dismissed Code's appeal and allowed that of the bank against W. D. Morris holding that there was no legal transfer to his wife. As against the latter the judgment at the trial was affirmed. Code and W. D. Morris then appealed to the Supreme Court and the bank as a precaution in case the latter should succeed appealed from the judgment in favour of Mrs. Morris.

Watson K.C. for the appellants, Morris and Code and respondent Mrs. Morris. The stock held by Morris was part of the new issue and the first issue was never

fully paid. His stock therefore was illegally issued and he cannot be liable on it. *Page* v. *Austin* (1); *In re Ontario Express and Transportation Co.* (2).

The shares of both appellants were fully paid for in cash and the payment cannot be affected by other transactions. *In re Harmony and Montague Tin and Copper Mining Co.; Spargo's Case* (3); *In re Paraguassu Steam Tram-Road Co.; Ferrao's Case* (4); and the contract for fully paid-up shares can only be rescinded by putting the appellants in their original positions. *North West Electric Co.* v. *Walsh* (5); *In re Johannesburgh Hotel Co.* (6).

As to the effect of sec. 27 of the Companies Act see *In re Almada and Tirito Co.* (7) approved by House of Lords in *Oregum Gold Mining Co.* v. *Roper* (8); *Welton* v. *Saffery* (9).

Hellmuth and *Saunders* for the respondent, the Union Bank. *Page* v. *Austin* (1); was decided under a statute passed in 1864 containing very different provisions from those in the present Companies Act, R. S. C. ch. 119.

The learned counsel referred to *Re Government Security Fire Ins. Co.; White's Case* (10); *In re London Celluloid Co.* (11).

THE CHIEF JUSTICE.—It is impossible in the teeth of the statute which requires that when shares are contracted to be paid for, not in money, but in money's worth, there must be an agreement in writing, to do otherwise than to dismiss these appeals. I may add however, that I have no doubt whatever on the

(1) 10 Can. S. C. R. 132.
(2) 21 Ont. App. R. 646.
(3) 8 Ch. App. 407.
(4) 9 Ch. App. 355.
(5) 29 Can. S. C. R. 33.
(6) [1891] 1 Ch. 119.
(7) 38 Ch. D. 415.
(8) [1892] A. C. 136.
(9) [1897] A. C. 299.
(10) 12 Ch. D. 511.
(11) 39 Ch. D. 190.

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evidence that, as the appellants have claimed, these shares were honestly paid for by the services rendered to the full amount of their value at least.

Since the case of *McCraken* v. *McIntyre* (1) there have been great changes in the statute law affecting shareholders' liability. At the time *McCraken* v. *McIntyre* (1) was decided, companies incorporated, as that company was, were corporations pure and simple. They were not (to use the expression of Lord Justice Lindley) like that statutory hybrid between a partnership and a corporation, a joint stock company. They did not partake in any way of the character of a partnership. There was no winding up process. Therefore creditors of the company had nothing to do *ab initio* with the agreements between the company and its shareholders. The only remedy afforded to creditors as regards unpaid shares was that an execution creditor who got a return of *nulla bona* was subrogated to the rights of the company in respect of unpaid liabilities for shares. Now all is different; the Winding Up Acts entitle the creditors to insist on payment for shares in cash, or (subject to the statute requiring an agreement in writing) for money's worth, and the companies can no longer, as they could when mere corporations, make special agreements with shareholders respecting the payment for their shares. Even if the first statute mentioned above had not been passed the change wrought by the Winding Up Act would by itself have been a difficulty in the appellants' way, but as it is we cannot, however honest and upright the intention of the appellants was, and I believe it to have been, avoid giving effect to the peremptory language of the statute.

The appeals must be dismissed with costs.

(1) 1 Can. S. C. R. 479.

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Gwynne J.

In the case of *The Union Bank* v. *Morris* the appeal is dismissed with costs for the reasons given by the Court of Appeal.

GWYNNE J.—In all of these cases I am of opinion that the judgments in the courts below should be affirmed and the appeals be dismissed with costs for the reasons given in the judgments in the courts below, which in my opinion are conclusive upon the points in issue.

SEDGEWICK and GIROUARD JJ. concurred in the dismissal of the appeals.

Appeals dismissed with costs.

Solicitors for W. D. Morris and Mary A. Morris: *Code & Burritt.*

Solicitor for R. G. Code: *E. F. Burritt.*

Solicitors for the Union Bank: *Kingsmill, Hellmuth Saunders & Torrance*