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*Oct. 29, 30.
*Nov. 30.

JAMES TURNER AND COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM COWAN, THOMAS DOWNS AND CHARLES HOLTON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Company law—Payment for shares—Transfer of business assets—Debt due partnership—Set-off—Counterclaim—Accord and satisfaction—Liability on subscription for shares—R. S. B. C. c. 44, ss. 50, 51.

On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid up shares, at their par value, in satisfaction of his interest in the partnership assets.

Held, reversing the judgment appealed from (9 B. C. Rep. 301) Davies J. *dubitante*, that the transaction did not amount to payment in cash for shares subscribed by the partners within the meaning of sections 50 and 51 of The Companies Act, R. S. B. C. ch. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set off nor counterclaimed by them against their individual liability upon their shares. *Fothergill's Case* (8 Ch. App. 270) followed.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco* (1), affirming the trial court judgment by which the action was dismissed with costs.

The action was brought to recover from the defendants the amounts of subscriptions by them for shares in a joint stock company under the provisions of sections 50 and 51 of the British Columbia Companies Act (2), alleged to be due and unpaid under the cir-

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 9 B. C. Rep. 301.

(2) R. S. B. C. ch. 44.

cumstances stated in the judgment of His Lordship Mr. Justice Nesbitt, now reported.

Riddell K.C. for the appellants. The questions at issue are disposed of by *In re Innes & Co.* (1), and *Spargo's Case* (2). There was no actual sale in this case but a mere form intended to change partnership interests into shares in a company with limited liability. There was no liability of the company to either of the parties individually; the debt, if any, was a liability to all of them jointly. Hence no set-off could take place and they do not come within the principles laid down in the cases cited. Compare *White's Case* (3), *per* James L. J. at page 515, and Brett L. J. at pages 516, 517; *Andress's Case* (4); and *Leeke's Case* (5), at pages 106 and 107. These cases teach that the contract with the company must be for cash payable at once, and the contract with the subscriber for cash payable to the company at once; that a mere form is of no avail, and that the cash payable by the company can only be set off against money payable to the company in the same capacity not, as here, where a several liability for shares is sought to be paid by a liability of three parties jointly. Counterclaim is not allowed by the British Columbia statute and rules.

Again, under authority of *Fothergill's Case* (6), the respondents must shew, apart from the shares received for the partnership's assets, that they have paid the shares subscribed for in the memorandum of association. Shares cannot be set off against a money demand; a joint contract cannot be set off against a separate contract. *Middleton* v. *Pollock* (7); *Bowyear* v. *Pawson* (8).

(1) 72 L. J. Ch. 305.
(2) 8 Ch. App. 407.
(3) 12 Ch. D. 511.
(4) 8 Ch. D. 126.
(5) L. R. 11 Eq. 100.
(6) 8 Ch. App. 270.
(7) L. R. 20 Eq. 29, 515.
(8) 6 Q. B. D. 540.

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Davis K.C. for the respondents. The issue is whether or not there was a payment of shares for which the three defendants subscribed within the meaning of section 50 of the British Columbia Companies Act, which corresponds with section 25 of the English Act, 1862. At the time when the company was incorporated the three defendants became indebted to the company in the sum in question, and remained indebted to it in that sum up to the 27th day of July following, when the company in turn became indebted to the defendants in a similar amount, and the respective liabilities were adjusted between them without any formal transfer of cheques. In effect, each defendant gave a cheque for the amount of his indebtedness to the company for shares; the company received this amount, which was the amount owed in the aggregate by the company to the three defendants, and the cheques received by the company were indorsed, and handed back to the defendants in settlement of the amount due for the bill of sale which had been signed that day. It is not necessary at law that this procedure should be actually gone through with. See *Spargo's Case* (1); *White's Case* (2), at page 515; *Ferrao's Case* (3); *Larocque* v. *Beauchmin* (4); *North Sydney Investment & Tramway Co.* v. *Higgins* (5).

The sale of the assets was made for cash, not for shares; the defendants could have insisted upon payment in cash for their stock in trade and refused to take shares, or the company could, at any time prior to the 27th of July and the passing of the resolution, have insisted on payment in full of the shares in cash and refused to purchase the old partnership stock.

(1) 8 Ch. App. 407.
(2) 12 Ch. D. 511.
(3) 9 Ch. App. 355.
(4) [1897] A. C. 358.
(5) [1899] A. C. 263.

The two transactions were, in law, absolutely independent and separate.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment allowing the appeal for the reasons stated by Nesbitt J.

DAVIES J.—I acquiesce in the judgment prepared in this case by my brother Nesbitt allowing the appeal. I do so, however, with much doubt, as I have had great difficulty in distinguishing this case from that of *Larocque* v. *Beauchemin* (1). This latter is a decision of the Privy Council and expressly approves of *Spargo's Case* (1) which had been somewhat discredited by having been twice disapproved of by the present Lord Chancellor. The reasoning of Lord Justice James in the latter case makes it difficult to appreciate the argument that there has been a mere evasion or trick to get rid of the 25th section of the Act in question. The present case may be distinguishable on the ground that the sale of the stock of goods in question was by the three partners to the incorporated company, and that the liability of the company was a liability to the partnership members jointly, while the liability of each of the three members of the partnership for the amounts of the stock severally subscribed by them was a separate liability. I do not, however, entertain so strong an opinion as to the binding authority of these cases as to justify my dissenting from the judgment agreed upon by my colleagues, more especially as but for these judgments I should have been in full accord with it. The section of the English Act corresponding to that of the British Columbia statute now under consideration has been repealed by 'The Companies' Act, 1900, sec. 33.

(1) [1897] A. C. 358. (2) 8 Ch. App. 407.

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NESBITT J.—This is an action brought under sections 50 and 51 of the Companies Act, chapter 44 of the Revised Statutes of British Columbia, 1897, which sections read as follows :—

50. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar at or before the issue of such shares.

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

(*a.*) Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or a director of the Company ;

(*b.*) The shareholders of the company shall not as such be held responsible for any act, default, or liability whatsoever of the Company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the Company, beyond the unpaid amount of their respective shares in the capital stock thereof.

The plaintiffs are creditors of a company named Cowan Holten Downs Company, Limited, which carried on a liquor and cigar business at Revelstoke, British Columbia for about a year. Prior to the incorporation of the Company, the defendants carried on the business (subsequently carried on by the Company) as a partnership called Cowan Holten Downs Company. The plaintiffs recovered two judgments against the company, and the executions issued thereon were returned *nulla bona*.

The evidence is very short, and the pith of it is to my mind shown by the following in the examination of the solicitor of the partnership:

106. Q. What took place before the incorporation and transfer of the Company?

A. They wished the partnership thrown into a joint stock company, and Cowan or Braithwaite asked me how they could do it, and I told them the proper way would be to incorporate the company, and the company take over the partnership business and pay for it in stock.

107. Q. Explain paying for it in stock?

A. In shares. I told them they could sign a memorandum of association, that is each one of them, after Braithwaite had figured out how each one stood. Some had taken out capital from the business. Holten, I believe, had, and that is why the Company was to be formed, to prevent this.

The statute provides a very simple method to carry this out, and I think its provisions are to be strictly adhered to, unless the door is to be opened to the evils spoken of in *Leeke's Case* (1).

The defendants subsbribed for shares as follows:—

William Cowan	800
Charles Holten.....	100
T. Downs.....	664

and some months after, at a meeting of the Company, it was moved by J. S. Lawson, seconded by C. Holten, that the Company purchase the assets and good-will, and assume the "liabilities of the Cowan Holten Downs Company, for the sum of eight thousand one hundred and eighty-seven dollars and twenty-one cents ($8,187.21).—Carried."

And thereupon the following document was executed:

EXHIBIT "J."

Memorandum of agreement made the 27th day of July, A.D. 1899, between William Cowan, Thomas Downs and Charles Holten, carrying on business in partnership under the firm name of the Cowan Holten Downs Company, hereinafter called the parties of the first part, and

(1) L. R. 11 Eq. at p. 108.

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The Cowan Holten Downs Company, Limited, a company incorporated under the laws of British Columbia, with its head office in the city of Revelstoke, in the said Province of British Columbia.

Witnesseth, that in consideration of the sum of $8,187.21 (eight thousand one hundred and eighty-seven dollars and twenty-one cents) of good and lawful money of Canada to them in hand paid, the receipt whereof is hereby by them acknowledged, they, the parties of the first part do, and each of them doth by these presents grant, bargain, sell and assign, transfer and set over under the party of the second part, its successors and assigns, all and singular, the goods, wares, chattels, effects and things, together with the stock-in-trade, and trade fixtures of or belonging to the said parties of the first part or any of them used in or pertaining to the business of the said parties of the first part as wholesale liquor merchants (said stock-in-trade consisting of a general stock of wines, liquors, cigars and aerated waters), now being in and about the building and premises now occupied and used by the said parties of the first part for the purposes of their said business in the said city of Revelstoke, said building and premises being situate on Front Street in the said city of Revelstoke: Also, all accounts, bank and other debts and securities which are now owing or payable to the parties of the first part or any of them in respect of or on account of or in connection with the said business. To have, hold, take, receive and enjoy the said goods, wares, chattels, effects, stock-in-trade, fixtures, accounts, debts and securities unto the party of the second part, its successors and assigns, to the only use and behoof of the party of the second part, its successors and assigns for ever.

And this memorandum further witnesseth that in consideration of the premises the party of the second part for itself, its successors and assigns, covenants, promises and agrees to and with the said parties of the first part, their and each of their executors, administrators and assigns, that the party of the second part, its successors or assigns shall and will well and truly pay or cause to be paid all debts now due, owing or payable or hereafter to become due, owing or payable by the parties of the first part or any of them, their or any of their executors, administrators or assigns, in respect or on account of or in connection with the said business, and shall and will indemnify and save harmless and keep indemnified and saved harmless, the said parties of the first part, and each of them, their and each of their executors, administrators and assigns, from and against all actions, suits, claims and demands for or in respect or on account of the said debts, and free from and against all costs, charges, expenses and damages which they, the parties of the first part may suffer, sustain or be put to for or on account or in respect of the said debts or any of them.

In witness whereof the parties of the first part have hereto set their hands and seals and the party of the second part has caused its corporate seal to be hereto affixed with all the formalities required by law, the day and year first above written.

W. COWAN (L. S.)
CHAS. HOLTEN (L. S.)
T. DOWNS (L. S.)

Signed, sealed and delivered in the presence of
JAMES MURPHY.

It is to be observed that there is no debt created by the Company to each partner for a specific amount, nor is the document executed by the Company, and it seems to me to fall within the very language of the Lord Chancellor Selborne in *Fothergill's case* (1).

Upon the only principle of construction which I know of as applicable to such a case, it appears to me to be quite clear that there are here two independent agreements. No connection between them is expressed on the face of any one of the documents. They take effect at different times, in different events, on different conditions, and between different parties. By the subscription for the memorandum of association under sections 7, 11 and 23 of the Companies Act, 1862 (and according, if authority were needed, to Evan's case), Mr. Fothergill not merely agreed to take, but actually did take, and immediately on the registration of the Company became the actual and legal holder of 1,000 ordinary shares, in respect of which he was thenceforth liable absolutely and unconditionally to contribute to the funds of the Company the full sum of £2,000. By agreement for the sale of the mine three persons jointly (of whom Mr. Fothergill was one), became entitled, not absolutely and immediately, but conditionally on certain events, which afterwards happened, to 5,000 shares, without liability to pay anything upon them, the land with which the vendors parted by the contract being agreed to be taken by the Company in lieu of the full amount of these shares. Shares cannot be set off against a money demand.

Any stranger proposing to give credit to the Company, who might have gone to the Registrar or Joint Stock Company, and might have there seen those agreements, must have understood (supposing to simplify the case, that the whole purchase money for the mine had been payable in paid-up shares) that the Company would have to satisfy his claims, the mine itself, free from all liability to creditors, and also the

(1) 8 Ch. App. 270.

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£2,000 either actually paid or legally payable on Mr. Fothergill's shares. The appellant says he ought, on the contrary, to have understood that one of the assets of the Company was in effect to be set off against the other. Even if the whole had been payable in money, the debt to the three could not, without more, have been set off against the liability of the one. And it appears to me to be a fallacy to speak of Mr. Fothergill's liability on his shares.

The Court below relied on *Laroque* v. *Beauchemin* (1) but that case turned on the particular facts. Lord MacNaghton says :

> The learned counsel for the appellant then contended that the understanding between the parties was that the property should be sold for so much in cash and so much in shares. It was admitted that if this had been the real arrangement it would be in contravention of the statute. But the evidence is all the other way. According to the evidence, there was an independent agreement on the part of the promoters to take so many shares presently payble in cash, and an independent agreement by the Company to purchase the property for so much money down. There was not even an attempt in cross-examination to shake the testimony on this point.

Finding here as I do that there never was any real intention to pay for the shares subscribed for in cash but to pay for them in stock, it seems quite clear that the statute has not been complied with, and I think the clearest case should always be proved before we apply the principle of the cases relied on in the court below, and dispense with the salutary provisions of the statute. I would allow the appeal with costs in all courts, and direct judgment to be entered for the amount of this subscription against each defendant.

KILLAM J. concurred with Nesbitt J.

Appeal allowed with costs.

Solicitors for the appellants: *Harvey, McCarter & Pinkham.*

Solicitors for the respondents: *Lemaistre & Scott.*

(1) [1897] A. C. 358.