F. X. COTÉ.....APPELLANT; 1881

AND

*Mar. 9.
*Nov. 15.

THE STADACONA INSURANCE CO..RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE.)

Company—Action for calls—Misrepresentation—Contract—Repudiation—Acquiescence by receipt of dividend.

The Stadacona Insurance Company incorporated in 1874 employed local agents to obtain subscriptions for stock in the district of *Quebec*, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, *F. X. C.*, intending to subscribe for five paid-up shares, paid $500 and signed his name to the subscription book, the columns for the amount of the subscription and the numbers of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without *F. X. C's* consent. Having discovered his position, one of appellant's brothers,who had also subscribed in the same way, went next day to *Quebec* and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875, the company declared a dividend of 10 per cent. on the paid-up capital (*montant versé,*) and the plaintiff received a check for $50, for which he gave a receipt. In the following year the company suffered heavy losses, and notwithstanding *F. X. C's* repeated endeavors to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of $100 each alleged to have been subscribed by *F. X. C.* in the capital stock of the company.

Held, (Sir *W. J. Ritchie,* C. J., *dubitante*) reversing the judgment of the court below, that the evidence shewed the appellant never entered into a contract to take 50 shares, that the receipt given

*PRESENT.—Sir W. J. Ritchie, Kinght, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

1881

COTÉ
v.
STADACONA
INS. CO.

for a dividend of ten per cent. on the amount actually paid (*montant versé,*) was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never in fact holder of fifty shares in the capital stock of the company.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (appeal side), affirming a judgment of the Superior Court for the District of *Quebec*, by which the appellant was condemned to pay the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of one hundred dollars each, alleged to have been subscribed by the appellant in the capital stock of the respondent company.

This action was instituted by the plaintiffs (respondents) against the defendant (appellant) to recover four several calls of 5 per cent. each upon fifty shares, of one hundred dollars each, amounting to five thousand dollars of the capital stock of the company, of which fifty shares it is alleged in the declaration that the defendant is the holder, and that he is indebted to the plaintiff in the sum of one thousand dollars for the said four calls, which sum still remains due and unpaid by the defendant to the plaintiffs. The defendant, in bar of this alleged cause of action, pleaded:

First, that he never was a holder of more than five shares in the capital stock of the said company, which he paid for in full when he subscribed for them, and that with the exception of those five shares he never took, or subscribed for, or became the holder of, any other share of such capital stock; and

Secondly, that the plaintiffs' agents, when canvassing the defendant for his subscription for the shares aforesaid, represented to him and assured him that his subscription was for five shares only, and that upon the payment of five hundred dollars, then made by the defendant, he should be completely discharged from any

further obligation, and could not be called upon to pay any further sum; and that upon these assurances and representations the defendant consented to sign a paper which plaintiffs' said agents then presented to him and which he only signed upon the said assurances that his said signature only pledged the defendant to the amount aforesaid, and the sum aforesaid; that the defendant so gave his signature upon the assurance of the said agents, without examining the contents of the said paper, and in the belief that he only subscribed for the said five shares, which he then paid in full; that after the departure of the said agents the defendant examined divers "*circulaires et livrets*," which the said agents left with him, and by these appeared the manner in which ordinary subscriptions were invited by the company, and that only one or two payments were required in ready money, but eight others would become payable at future periods; that suspecting the good faith of the said agents he immediately made complaint and protestation to the chief officers of the plaintiffs, and represented to them as above stated upon different occasions; and that the said chief officers, to this purpose authorized, acknowledged that there was a mistake in the matter, and that the defendant was only bound for the shares as verbally agreed to be subscribed for by him and which he had the intention of taking, and that they sent him away saying that he need not be uneasy; that the matter was arranged, and that he would not have to pay any further sum.

That in all the above the defendant has been cheated —that there has been on the part of the plaintiffs fraud and bad faith, and that the plaintiffs, under the pretence of procuring a subscription for the said five shares, have endeavoured to hold the defendant bound to the payment of fifty, although they will knew that the defendant had no means to meet such amount, and that if

1881

COTÉ v. STADACONA INS. CO.

such a subscription had been made by him, it could only be the result of error or of false representations of the said agents of the plaintiffs. Wherefore the defendant prayed that it should be declared that the signature of the defendant was obtained by error and by the false and fraudulent representations of the plaintiffs' said agents, and that the defendant never intended to subscribe, and never did in fact subscribe for more than five shares, which he paid for in cash, and that the plaintiffs' action be dismissed with costs.

There are two actions precisely similar as the suit of the plaintiffs, against two brothers of the defendant, the pleadings in which, and the circumstances of which are similar, but only that in one of them, namely against *Joseph Coté*, the amount claimed is $2,000 as four calls upon $10,000 in the capital stock of the company, alleged to be held by him, whereas his plea alleges that he subscribed only for $1000 or ten shares, which he paid in full at the time of subscription; and in the other, namely, against *Amédé Cotée* the claim of the plaintiffs is for $1,200, as for four calls upon $6,000 in the capital stock of the company alleged to be held by him, whereas his plea alleges that he subscribed only for $600 which he paid in full at the time of the subscription.

The oral as well as the documentary evidence is reviewed in the judgments hereinafter given.

Mr. *Languedoc* for appellant:

[The learned counsel reviewed the evidence and contended that it had been clearly proved "when the defendant subscribed for the shares mentioned in the pleadings in this cause, he did not know the nature or extent of the responsibilities he assumed."]

This has been admitted by the judgment of the Superior Court and that of the Court of Appeals, and

yet we are condemned to carry out a contract to which it is admitted we never were parties.

1st. Because we were paid and took a dividend.

2nd. Because we allowed two years to elapse without "taking legal measures to have the contract set aside."

We respectfully submit their conclusion is erroneous on both the points on which they rest.

1st. Payment to defendants of a dividend.

It is quite true they received ten per cent. on the money they handed to the local agents, but it is equally true that to use this as an argument against them, it must first be shown that it was their holding a greater number of shares than they claim, that entitled them to get the money. Now, the three brothers when they subscribed paid cash down $1,000, $600 and $500 respectively, being the full and entire sums they meant to invest in the enterprise. The company declaring a dividend of ten per cent. on the paid-up capital, entitled them to receive ten per cent. on the sums which they had actually paid. When they had received this money they simply carried out the contract as they had from the first understood it to be, and their conduct and their declarations are thoroughly consistent throughout.

It is upon the sum paid, not the sum subscribed, that the dividend was declared, and it always is so, and therefore it is impossible to say that the defendants must be held to have subscribed $21,000, because they took that to which they were entitled by the fact of having paid $2,100, as the full price of twenty-one shares.

The defendants having allowed two years to lapse, without taking legal measures to have the contract set aside, are held to have acquiesced in a contract to which they constantly and persistently declare they never became parties. With all possible respect, we submit

1881

COTÉ v. STADACONA INS. CO.

this results from a confusion of ideas which we will endeavor to clear. Contracts are either null or voidable. When they are tainted with causes of nullity they exist none the less, till such causes of nullity are revealed and made to operate rescission. In such cases, the laches of the parties may estop them from setting up such nullities, nay more, the doctrine that a party to a voidable contract is bound to take active steps to rescind it with reasonable diligence, after he becomes aware of the causes of nullity, is well established. But the very foundation of the doctrine is the existence of a contract.

The main feature which distinguishes the present case is that the contract alleged by the company never existed at all. The doctrine of acquiescence resulting from lapse of time or laches on the part of the defendants can therefore have no application.

But supposing for a moment the contract to have existed, and all the essential elements to be found in it, and that it was merely voidable, has there been on the part of the defendants such conduct as to justify the assumption that they ratified it?

It is in evidence that immediately upon discovering that the agents had deceived them, the defendants, through *Joseph* one of them, came expressly to *Quebec*, saw the head agent, the secretary of the company; tried to see the president; did what they could to have the matter cleared up, and subsequently called on several different occasions on Mr. *Belleau* for the same purpose.

Now what is the law on this subject. We find it in abundance of authority, for it is the same in *France* and *England*, and of so elementary a character as to leave no room for controversy: see *Dalloz'* Répertoire de Jurisprudence (1); *Swan* v. *The North British*

(1) Vo. Acquiescement No. 307.

Australasian Company, limited (1); *in re Russian (Vyksounsky) Iron Works Company, Kincaid's case* (2); *Taite's case* (3); *Oakes* v. *Turquand* (4); *The Bank of Hindustan, &c.*, v. *Alison* (5); *Carr* v. *The London and North-Western Railway* (6); *Sharpley* v. *The Louth and East Coast Company* (7); *Ashbury Railway, Carriage and Iron Company* v. *Riché* (8); *ex parte Adamson, in re Collie* (9); *Ætna Insurance Co. in re Shiels* (10); *The Brolch-y-Plwm Lead Mining Company* v. *Baynes* (11).

Mr. *Bédard* for respondents:

[The learned counsel commented at length on the evidence to show that the contract alleged by plaintiffs was satisfactorily established.]

Besides, it must be remembered that the contract in this cause is in writing, and that by law no parol evidence can be adduced to contradict or vary the terms of a written document. *See* Civil Code of L. C. art. 1234; *Abbot's* Digest, On Corporations (12). The appellant has ratified his contract after having found out his error; and his plea cannot be admitted, because it comes too late, and because the parties are no longer in the same position.

To have a contract annulled on account of an error, it is not sufficient that a party should allege or prove an error, whatever it may be.

Error, says *Larombière* (13) must be certain: *In dubio nocet error erranti.* If the error is a gross one, no one will believe it. *Solere succurri non stultis, sed errantibus.*

The error set forth by the appellant, if proved, does

(1) 7 H. & N. 603.
(2) L. R. 2 Ch. App. 412.
(3) L. R. 3 Eq. 795.
(4) L. R. 2 H. L. 325.
(5) L. R. 6 C. P. 54 & 222.
(6) L. R. 10 C. P. 307.
(7) 2 Ch. D. 663.
(8) L. R. 7 H. L. 653.
(9) 8 Ch. D. 807.
(10) 7 Ir. R. Eq. 264.
(11) L. R. 2 Ex. 324.
(12) Page 796, Nos. 113 and 114.
(13) Obligations, vol. 1, p. 47.

1881

COTÉ v. STADACONA INS. CO.

not prevent the existence of the contract, which subsists till annulled.

The last reason of the appellant is to the effect that he understood that his contract was but for five shares, and he says that, for the amount beyond that, the contract is null, has in fact no existence, and was therefore never susceptible of ratification.

The law enacts that the contract will be the one implied by the terms which express the agreement, and not that which either of the parties might have understood it to be. No matter what they may have had in their minds when contracting, they will have to abide by the terms they employed, because there is no other means to know their respective intentions at the time. In a word, the law of convention is made to rule not the acts of will, but, using the words of *Savigny*, the manifestations of will (1).

There is no article of the code to declare that consent is necessary to the existence of a contract, because contract implies consent, and it would be, to say the least, useless to enact that where there is no consent, there is no contract. The law declares only that the convention is valid when the consent is legally expressed. It looks not to the consent, but to its manifestation; from the latter it implies the existence of the consent and determines its effect.

Art. 991 enacts that error, violence and fraud are causes of nullity in contracts. Art. 992 declares that error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the contract, or in the substance of the thing which is the object of the contract. And lastly, art. 1000 goes on to say that error, fraud and violence are not causes of absolute nullity in contracts, and only give a right of action or exception to annul or rescind them.

Mr. *Languedoc* in reply.

(1) See article 984 C. C. L. C.

1881

COTÉ v. STADACONA INS. CO.

RITCHIE, C. J.:—

I am not sorry that my learned brethren have been enabled to arrive on this evidence at the conclusion which is so satisfactory to their own minds, because I think a judgment in opposition to the conclusions which they have expressed would operate with extreme hardship on these unfortunate men. I am not prepared to differ from the conclusions at which they have arrived, and I do not intend to dissent from the judgment which they have given; but I must confess that the inclination of my mind has been, in the consideration of this case, that those parties were aware of the number of shares that they signed for. But I also think that they did not fully appreciate the large liability they thereby incurred, and they were influenced in subscribing for this number of shares by the influence and representations of an agent whose interest it was to induce these unfortunate men to take these large amounts of shares, as it has been shown that they went abroad to get subscriptions to this stock, and for every share they were able to get subscribed they were to receive a certain amount of money. Therefore, it was their interest, in dealing with these ignorant people, to induce them to put down their names for as many shares as they could, and they represented, I am inclined to think from the evidence, much more strongly than they should have done, that no larger amount than they had paid at the time of subscription would be required by the company; and that the subscribers only realized the extent of the obligation they had entered into and the risk they were running, on a careful examination of the prospectus and charter of the company and on consultation with their friends on the evening on which the subscription was made. I think there was very considerable force in the

1881

COTÉ v. STADACONA INS. CO.

Ritchie, C.J.

observation made by Mr. Justice *Ramsay* on this point, in which he says the proof that *Coté* knew the figures were $10,000 for 100 shares appears clearly from this: that he found out the difficulty and the extent of his liability without reference to the share list, simply in conversation with his friends and from the statute. Also, I was very much impressed with the fact that the appellant and his brothers, after they discovered the extent to which they would be liable, appear to have consulted counsel, and they appear to have called upon the directors, and the directors seem to have repudiated any idea of the correctness of what they then put forward, and they remained quiescent, except the writing of the letters, taking no steps whatever to have the matter set right. I think they were aware of the fact that the company held them for the fifty shares. That was clearly brought home to them. They must have been aware that they were held for the fifty shares, and that the company absolutely refused to permit them to stand as shareholders for five paid up shares; and it would have been at variance with the prospectus and with the act, with which it is evident these parties made themselves acquainted, by their own statement, to have stood as shareholders fully paid up for five shares alone, and knowing they were registered by the company as the holders of 100 shares. Here, I must say, I cannot agree with my learned brother, who says it was necessary that there should be an allotment of shares, or that there was no proof of allotment in this case. I think, under this statute, there was no necessity for an allotment.

When the company sent out their books for subscriptions, and the parties subscribed for fifty shares, they became shareholders of the company, not by any subsequent allotment, but by operation of law under the statute. Therefore, when they sub-

scribed, and when they paid their five per cent. down upon that subscription, they became, by force of this act, and without any act done by the company or by the parties themselves, shareholders and subscribers, and liable under this act to all the obligations the statute imposed upon them. When a dividend was declared, they must have known, from the knowledge they had of the act, that the dividend was not declared upon paid-up shares, because section three does not recognize that the whole amount is to be called in at once, but can only be called in and accepted by the company in a certain way, 5 per cent. in the first instance, a further call of 5 per cent., and so on. Therefore, when he received the dividend, I find it difficult to believe that the appellant did not know it had been delivered by the company on the fifty shares he held and subscribed for. Having received his share of the earnings, I also find it difficult to see that he is not a shareholder, and that he did not accept his position as shareholder, as he stood on the books of the company, and therefore would not be liable; because it must be borne in mind that while he remained and continued a shareholder for these two years the company was doing a prosperous business. It had paid a 10 per cent. dividend; and it must be borne in mind also that conflagrations more extensive almost than ever known before—exceptional conflagrations—took place in the city of *St. John* and in other portions of *Quebec*, by which this company, from a very prosperous state of business, was reduced to insolvency. Had this company had a number of years of prosperity and yearly declared large dividends, I do not see my way very clearly to the conclusion that this man could, from time to time, have been allowed to receive these dividends, and when ultimately the company may have experienced any losses, he could then repudiate

1881

COTÉ v. STADACONA INS. CO.

Ritchie, C.J.

and claim not to be a shareholder, and accept the gains and refuse to bear his share of the liabilities. In other words, to use an expression which is to be found in the books with reference to cases of this kind, that he should not be allowed to play fast and loose, that having received the benefits he should be liable to the loss he sustained.

However, as I said before, as the judgment of my learned brothers on the facts of this case differs from the conclusions on the facts that I have stated now, and as there is a conflict of evidence in the case, I do not intend to set up my judgment on the facts against theirs, and differ from the conclusions they have arrived at on the case, and which conclusions I am very gratified, on account of these people being poor, they have been enabled to arrive at with satisfaction to themselves. At the same time, having these doubts on my mind, I thought it proper to give expression to them, because if it had not been for the very strong and forcible judgment delivered by my brethren, if I had been left alone I should have come to a different conclusion, but I am happy to say that on the whole I shall not dissent from their judgment.

STRONG, J. :—

The first question to be determined is one of fact. What was the contract which the appellant intended to make with the agents of the company who came to him to solicit his subscription for shares? Did he intend to take fifty shares and to pay ten per cent. on the amount of those shares, or did he intend to become a subscriber for five shares only, paid up in full?

It appears to me that the evidence of *Genest*, who is the only witness called by the respondents to prove what took place at the time of the subscription, is sufficiently contradicted by the evidence of the witnesses for the

defendant, his brothers, the circumstances attending the transaction, and the probabilities. All depends on the testimony of witnesses,—oral evidence; the writing itself does not assist us in solving this question. When the appellant signed his name to the subscription book, the columns for the amount of the subscription and the number of shares were left in blank. These columns were afterwards filled in with the number of shares (fifty shares) and the amount of the subscription by *Genest* himself, in the presence of the appellant, or at least of his brother *Joseph*. This is a fact of considerable importance in my view of the case, for had the number of shares and the amount of subscription been written by the appellant himself, or filled up before the signature, the legal consequences might have been different. As it is, according to *Genest's* own evidence, it must be taken to have been done by him acting as the mandatory or agent of the appellant, and it follows therefore that, if the appellant only intended to subscribe for five shares and not for fifty, *Genest* had no authority to make the entry he did, and his unauthorized act can therefore in no way bind the appellant, who did not assent to it. It is therefore assuming in favor of the company the very question in dispute, to say that the appellant signed his name to a subscription for fifty shares.

Then, I think, *Genest's* evidence is extremely vague and unsatisfactory; in answer to very important questions in cross-examination, he says he is unable to remember what passed. Next, the conduct of the three brothers is altogether inconsistent with the supposition that they understood they were contracting for shares to a greater amount than the sums they actually paid in cash. They appear to have discovered their true position the same evening, and the elder of them went to *Quebec* the next morn-

1881

COTÉ v. STADACONA INS. CO.

Strong, J.

ing, and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. On the whole, all the surrounding circumstances are confirmatory of the evidence of the three brothers, and I agree with Mr. Justice *Tessier* in the Court of Queen's Bench, in holding that the appellant never entered into the contract to take the fifty shares in respect of which he is sued on this action.

Had the courts below taken a different view of the facts, it might have been a reason why this court should have hesitated before acting on a different view of the evidence. It does not appear, however, that the judges of the court below did come to a different conclusion in this respect. The Chief Justice of the Queen's Bench, in his notes of judgment, expresses himself very decidedly to the effect that there was no contract, and from the first "*considerant*" of the judgment of the court of first instance, I am led to the conclusion that that was also the view taken by the Chief Justice of the Superior Court.

Both the learned Chief Justices, however, attached much importance to the subsequent receipt by the appellant and his brothers of the dividend declared upon the paid-up capital. I was much impressed with this view at the hearing of the appeal, but subsequent consideration has convinced me it ought not to affect our judgment. According to the view I have taken of the evidence, the appellant never entered into any contract to take fifty shares, such a contract never existed, there was therefore never anything susceptible of ratification. Again, even if there had been a contract, but one voidable for error, the receipt of the 10 per cent. dividend on the amounts which the appellant and his brothers had actually paid in cash to the company would not have been such an unequivocal act of recognition and confirmation as

would have been requisite to ratify a contract which might have been set aside in an action brought to establish its nullity. It was quite consistent with what they had always contended, viz: that they were holders of shares for an amount equivalent to the cash they had paid, but for no more, that they should have received the 10 per cent. declared on shares actually paid up in cash. I cannot, therefore, see that their receipt was any admission of their liability, or a renunciation of the right they had always claimed to have their shares limited to the amount they had paid.

On both these grounds I think the company's contention, that there was a ratification, fails.

I think the appeal should be allowed, with costs to the appellant in this court and in both the courts below.

FOURNIER, J.:

L'appelant, *F. X. Coté*, est poursuivi en cette cause pour mille piastres ($1000) montant de quatre versements dus sur cinquante actions qu'il aurait souscrites dans le fonds social de la compagnie d'assurance, intimée en cette cause. Sa réponse à cette demande est qu'il n'a souscrit que cinq parts et qu'il les a payées comptant, que si son nom est inscrit au livre de stock pour cinquante actions, il l'a été ainsi par les agents de la compagnie frauduleusement et sans son consentement.

Après son incorporation, en 1874, par acte du Parlement du *Canada*, la compagnie intimée nomma comme un de ses agents pour solliciter des souscriptions à son fonds social, M. *J. N. Belleau*, de *Québec*. Celui-ci à son tour délégua ses pouvoirs à deux sous-agents, *Genest* et *Delisle*, pour recueillir des souscriptions dans l'*Isle d'Orléans* qui faisait partie de la circonscription dans laquelle l'agent principal, *Belleau*, était autorisé à agir pour la compagnie.

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

Le 29 octobre de la même année, *Genest* et *Delisle* se présentèrent au moulin de *Joseph Coté*, à *St. Pierre*, *Isle d'Orléans*, pour remplir leur mission. L'entrevue qu'ils eurent avec l'appelant et ses frères, qui sont comme lui poursuivis pour quartre versements sur le montant des parts qu'ils auraient ainsi souscrites dans cette circonstance, est racontée comme suit par *Joseph Coté :*

Dans la nuit du vingt-neuf octobre, mil huit cent soixante-quatorze, les deux agents que je viens de mentionner, sont venus au moulin me trouver, accompagnés de deux de mes frères, *Amédée* et *François-Xavier*, les deux autres défendeurs.

Ils m'ont demandé de souscrire au fonds social de la compagnie *Stadacona*, et demandant dix pour cent.

J'ai refusé, ne voulant pas souscrire les dix pour cent ; et j'ai passé dans un autre appartement ; alors ils sont venus me trouver là et m'ont dit.....

Objecté à cette preuve.

Objection réservée.

Eh bien ! souscrivez mille piastres, votre frère *Amédée* six cents piastres, et votre frère *François-Xavier* cinq cents piastres, et cela sera tout ce que vous aurez à payer et vous aurez dix pour cent de dividende sur ces montants-là.

Amédée Coté, l'un des frères présents dans cette occasion, donne la version suivante de ce qui s'y est passé :

R.—Ils sont arrivés à la maison chez moi et m'ont fait des propositions très-avantageuses à propos de la souscription à la *Stadacona* ; ils m'ont demandé de prendre des parts, que c'était un grand avantage. Là-dessus je n'ai rien voulu faire sans voir mes frères qui étaient au moulin à farine.

R. Là ils ont raconté à mes frères la même histoire qu'ils m'avaient contée à moi-même ; ils l'ont contée devant moi et mes frères qu'on a trouvés là au moulin, disant que c'était très avantageux de prendre des parts.

Q. Votre frère *Joseph* a-t-il dit quelque chose ?—R. Il dit que tant que pour payer dix pour cent il comprenait que ça ne pouvait se faire, qu'il préférait prendre un montant qui ne donnerait aucun trouble, aucune responsabilité par la suite.

Q. Votre frère *Joseph* a-t-il consenti à souscrire dix pour cent ?—R. Eh ! non, quand ils nous ont parlé de dix pour cent, il (*Joseph*) nous a laissé, disant qu'il ne voulait pas de ça. Les agents ne nous

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

ont pas laissés et nous les avons conduits dans le bateau où mon frère *Joseph* était, et là ils ont dit à mon frère qu'il pouvait prendre un montant comme ça, puisqu'il ne voulait pas souscrire dix pour cent seulement, qu'ils feraient comme ça puisqu'il ne voulait pas souscrire autrement.

Q. Les agents ont-ils dit qu'ils prendraient les souscriptions de vos frères et la vôtre dans les mêmes conditions?—R. Oui.

Q. Ensuite?—R. Là-dessus on a mis le montant qu'on voulait souscrire.

Q. Combien votre frère *Joseph* a-t-il mis?—R. Mille piastres ($1000).

Q. Votre frère *François Xavier*?—R. Cinq cents piastres ($500) et moi-même six cents piastres ($600).

Q. Ces montants-là vous les avez payés?—R. Aux agents; on est retourné à la maison et on a signé des chèques pour payer ces montants-là?

Q. Vos frères à eux deux combien?—R. Quinze cents piastres.

Q. Etes-vous positif là-dessus?—R. Oui, mon frère *Joseph* mille piastres ($1000) et mon frère *François Xavier*, cinq cents piastres ($500).

Les trois frères mirent leur signature sur le livre de stock, sans spécifier ni le nombre d'actions qu'ils souscrivaient, ni le total auquel se montait leur souscription, croyant, comme ils le disent, ne souscrire que pour les montants qu'ils avaient payés comptant. Les entrées du nombre de parts et de leur total ont été faites par les agents eux-mêmes, hors la présence des *Côté*, d'après la version de ceux-ci, et sans qu'on leur eût déclaré que les montants ainsi entrés étaient différents de ceux payés. Cette version est contredite par *Genest*, qui déclare avoir obtenu cette souscription de la manière ordinaire, comme il avait fait avec *tous ceux qui* avaient déjà souscrit. Il dit qu'il a donné toutes les explications nécessaires qu'il avait coutume de donner en pareil cas. Il ajoute qu'il avait pour s'aider un prospectus de la compagnie, qu'il leur a expliqué,—qu'il leur a dit qu'il n'était pas probable que tout le montant serait appelé, que ce n'était pas l'intention de la compagnie de demander plus qu'ils ne payaient; mais que cepen-

1881
COTÉ
v.
STADACONA INS. CO.
Fournier, J.

dant, ils étaient responsables pour tout le montant de parts qu'ils souscriraient, et qu'il ne leur a pas dit cela rien qu'une fois. Il dit aussi avoir mentionné le nombre de parts, le montant souscrit et le montant payé pour le premier et le deuxième versements. Ce témoignage avec la production du livre de stock constitue la preuve sur laquelle la compagnie se fonde pour demander l'exécution du contrat qu'elle prétend avoir été fait par l'appelant. Ainsi qu'on le voit, il y a deux versions diamètralement opposées. Si celle de *Genest* est la véritable, il est évident que l'appelant doit succomber. Il doit au contraire réussir, si celle donnée par ses deux frères, *Joseph* et *Amédée*, est acceptée. Il s'agit donc en grande partie d'une appréciation de témoignages.

Il faut d'abord remarquer que la déposition de *Genest* n'est aucunement corroborée. Il était au pouvoir de la compagnie de le faire puisqu'elle avait un autre agent présent à cette entrevue, le nommé *Delisle*. Pourquoi n'a-t-il pas été examiné ? Est-ce que l'on a redouté son témoignage, est-ce que par hasard les quelques mots qu'il a dits auraient été une confirmation du récit des *Coté*? Quoi qu'il en soit, on ne peut pas tirer de l'absence de *Delisle* d'autre conclusion contre la compagnie que celle qu'elle n'a pu corroborer le témoignage de *Genest*. Ainsi, on se trouve d'une part, en présence d'un version donnée par un seul témoin, et de l'autre, celle donnée par deux témoins. Il est vrai que l'on peut dire que ceux-ci sont intéressés, puisqu'ils ont un procès semblable, reposant sur les mêmes preuves ; mais à part cela rien ne fait voir que leur témoignage ne soit pas digne de foi. *Genest* lui-même est aussi intéressé, car il avait une assez forte commission sur le nombre de parts qu'il faisait souscrire. Il était payé tant par part ; il était intéressé à en rapporter le plus grand nombre possible. Si l'intérêt se contrebalance, la version des deux *Coté* devrait être reçue. Il y a de plus dans la déposi-

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

tion de *Genest*, l'affirmation d'un fait important sur lequel il est contredit par des témoins étrangers et désintéressés. Cette circonstance est de nature à affecter considérablement son témoignage. Il dit: "J'ai donné toutes les explications nécessaires *et que j'avais coutume* de donner en pareil cas,"—plus loin : "J'ai voulu les mettre en état de connaître la chose aussi clairement qu'il y avait moyen, non-seulement avec eux, *mais avec toutes les personnes* que j'ai fait souscrire"; "J'ai donné les mêmes explications *à tout le monde.*" Cette assertion positive est répétée encore sous d'autres formes. Sur ce point cependant il est formellement contredit par trois témoins tout-à-fait désintéressés.

Basile Marquis raconte ainsi sa rencontre avec les sous-agents *Genest* et *Delisle :*

> Ils m'ont demandé de prendre des actions pour au moins $10.00; que si je souscrivais une part ça ne serait que $10.00, les actions étant de dix piastres chacune, que je ne m'engageais pas pour plus que cela. Je leur dis que je n'avais que $5.00, sur quoi ils me répondirent qu'ils accepteraient ces cinq piastres-là et me donneraient deux ou trois mois pour payer la balance. Sous ces circonstances, j'ai pris une part que je croyais de dix piastres, ayant seulement souscrit pour cette somme. Ce n'est que dans l'après-midi du même jour ou le lendemain que je me suis aperçu que les parts étaient de cent piastres et non pas dix piastres.

Il est admis par les parties que les deux témoins *Phydime Ferland* et *Léon Aubin* prouveraient les mêmes faits. Comment après cela ajouter foi à la déclaration de *Genest* qu'il a donné à l'appelant les mêmes explications qu'il a données à tout le monde? N'est-il pas évident qu'il *n'a pas dit la vérité sur* ce sujet, et ne peut-on pas raisonnablement en conclure qu'il a employé pour obtenir la souscription des *Coté* le stratagème qui lui avait réussi avec d'autres. En acceptant les montants payés par les *Coté*, il a sans doute fait avec eux ce qu'il avait fait avec *Marquis*—il a réparti les sommes payées par eux pour les premier et

1881

COTÉ
v.
STADACONA INS. CO.

Fournier, J.

deuxième versements sur les parts qu'il leur attribue sans leur en avoir déclaré le montant, au lieu d'entrer leurs actions comme payées en plein. Cette conclusion est d'autant mieux fondée qu'il est en preuve que les *Coté* ont payé tout ce qu'ils avaient d'argent; que l'un d'eux a même été obligé d'emprunter $50.00 pour parfaire son montant. Est-il à présumer que ces trois individus qui paraissent des gens honnêtes et respectables, mais dont la fortune totale s'élève à peine à $3,000 auraient engagé leur responsabilité pour le montant de $21,000? Je crois au contraire que la seule mention de ce chiffre les eût tellement effrayés qu'ils auraient absolument refusé de n'avoir rien à faire avec la compagnie et qu'ils se seraient ainsi épargnés les procès qu'ils ont à soutenir.

D'après l'exposé ci-dessus, il paraît certain que dans ses démarches auprès de *Côté*, *Genest* voulait leur faire prendre un montant plus considérable de parts que ceux-ci n'étaient disposés à le faire; il prétend avoir fait souscrire à l'appelant 50 parts. Celui-ci au contraire déclare n'en avoir souscrit que cinq qu'il a payées en plein. Il est évident d'après le témoignage, que chacune des deux parties voulait une chose différente que leur consentement n'a pas porté sur une même chose, faisant l'objet du contrat dont il est question. Le concours de volontés, condition essentielle de l'existence du contrat, n'a donc pas eu lieu,—conséquemment il n'y a pas eu de contrat, faute d'accord entre les parties. C'est le point de vue que j'adopte. Cette appréciation ne m'éloigne guère des opinions exprimées à ce sujet par les deux honorables juges en chef de la cour supérieure et du Banc de la Reine. L'honorable juge en chef *Meredith* dit dans son jugement:

When the Defendant subscribed for the shares mentioned in the pleadings in this cause, he did not know the nature or extent of the responsibilities he assumed.

1881

COTÉ
v.
STADACONA INS. Co.

Fournier, J.

Sir *A. A. Dorion* donne ainsi son appréciation du même fait :

Il n'y a aucun doute que l'appelant a été induit à souscrire des actions dans la compagnie d'assurance *Stadacona*, sans trop comprendre la responsabilité qu'il assumait.

Et plus loin il ajoute :

Je conclus donc d'après cette preuve, que le contrat allégué par la compagnie n'est pas prouvé.

Aussi, l'appelant sans l'acceptation qu'il a faite d'un dividende, et le délai qu'il a laissé écouler sans prendre des mesures judiciaires pour faire rescinder cette souscription, aurait-il eu gain de cause auprès des deux honorables juges en chef. Ces deux circonstances constituent dans l'opinion des deux honorables juges une ratification ou confirmation du contrat allégué, laquelle a l'effet, suivant eux, de le rendre responsable.

En effet, il est établi que l'appelant a reçu un dividende de 10 pour cent qui lui a été payé par un chèque dans la forme suivante :

Compagnie d'Assurance Stadacona contre le Feu et sur la Vie.—Premier Dividende.—Québec, 25 janvier 1876.—Au caissier de la Banque d'Union du Bas-Canada ; payez à.....ou ordre .....piastres, étant pour dividende sur capital versé au trente et un décembre 1875.

Mais ce dividende avait-il été calculé sur cinquante actions, dont dix pour cent avaient été payées, ou bien sur cinq actions payées en entier ? Rien ne le fait voir. Le chèque ne fait mention ni du nombre de parts ni de leur total ; il y est seulement fait mention que le dividende est réparti sur le montant versé. On ne peut donc de ce fait tirer aucune conclusion contre la prétention de l'appelant qu'il n'a souscrit que cinq parts payées en plein. Il n'a, dans ce cas, touché que ce qu'il devait recevoir conformément à ce chèque. Si, au contraire, il avait souscrit, comme le prétend la compagnie, cinquantes parts sur lesquelles

1881

COTÉ
v.
STADACONA INS. CO.

Fournier, J.

dix pour cent seulement aurait été payé, il est vrai qu'il n'aurait encore touché que le même montant. De sorte que si, d'un côté la compagnie peut dire que l'appelant a accepté le nombre de parts qu'elle lui a attribué, en acceptant ce dividende; de l'autre, celui-ci peut répondre que la compagnie a au contraire acquiescé à sa prétention qu'il n'avait souscrit que cinq actions entièrement payées en lui payant, comme le comporte le chèque, un dividende sur le montant par lui versé. Ce fait pouvant être, avec autant de raison, invoqué par chacune des parties à l'appui de ses prétentions, ne peut en conséquence servir ni l'une ni l'autre, ni affecter en aucune manière leurs positions. Mais si le chèque, au lieu d'être conçu comme il l'est, avait comporté que le dividende payé et reçu était sur cinquante actions dont dix pour cent avait été payé, c'eût été indubitablement une confirmation du contrat allégué, et la nullité dont il était était entaché aurait été couverte. C'eût été alors donner valablement, quoique tacitement, le consentement nécessaire à la formation du contrat; et de ce moment-là seulement le contrat eût existé. Puisqu'avant l'acceptation du dividende il n'y avait pas de contrat, il faut que le fait opposé à l'appelant soit suffisant pour en former un, et certes, l'acceptation de ce dividende auquel il avait droit suivant ses prétentions ne constitue pas un consentement d'accepter les 50 parts qu'il avait déjà répudiées.

Si le juge ne doit, comme le dit l'autorité de *Dalloz* citée par l'hon. juge *Tessier*, "prononcer qu'avec la plus "grande réserve et ne déclarer qu'il y a acquiesement "que lorsque les faits ou actes démontrent l'intention "formelle de la partie de se soumettre," il est évident que l'acceptation du dividende dans les circonstances où elle a été faite n'implique aucunement l'intention de la part de l'appelant de se départir de sa prétention qu'il n'avait souscrit que cinq parts. Cette acceptation n'est nulle-

ment en contradiction avec sa prétention ; elle en est plutôt une confirmation si elle a quelque signification, et ne peut par conséquent lui être opposée.

D'ailleurs le prétendu contrat invoqué par la compagnie n'ayant jamais existé, faute de consentement, n'était pas susceptible de confirmation. Il en pourrait être autrement s'il y avait eu un consentement, quoique vicié par le dol, l'erreur ou par quelque autre cause.

Laurent (1) s'exprime ainsi au sujet de la confirmation des actes :

> Confirmer une obligation c'est renoncer au droit que l'on a d'en demander la nullité à raison du vice dont elle est atteinte. La confirmation a pour but et pour effet d'effacer ce vice, de sorte que l'obligation quoique nulle dans son principe est considérée comme n'ayant jamais été viciée.

Le même auteur, au No. 531, faisant la distinction entre les obligations annulables et les obligations inexistantes, dit :

> Il ne faut pas confondre les obligations annulables avec les obligations inexistantes. Nous avons établi ailleurs la différence qui existe entre les actes nuls, c'est-à-dire annulables, et les actes que la doctrine appelle inexistants, parce qu'ils n'ont pas d'existence aux yeux de la loi, en ce sens que la loi ne leur reconnaît aucun effet. Les actes nuls donnent seuls lieu à une action en nullité. Quant aux actes inexistants, on ne peut logiquement en demander l'annulation, car on ne demande pas la nullité du néant. Si l'on m'oppose un contrat auquel je n'ai pas consenti, j'ai sans doute le droit de le repousser, mais je ne demande pas au juge de l'annuler, car ce contrat n'existe pas puisqu'il n'y a pas de contrat sans consentement. Je demanderai que le juge déclare qu'il n'y a jamais eu de contrat Je puis prendre l'initiative en agissant en justice pour qu'il soit décidé que le contrat, que l'on pourrait un jour m'opposer à moi, ou à mes héritiers, n'a pas d'existence légale. Le jugement ne l'annulera pas, il déclarera qu'il manque de l'une des conditions requises pour son existence et que par suite il ne peut produire aucun effet."

Le deuxième motif du jugement attaqué, consistant à dire que l'appelant ne peut plus opposer les vices

(1) T. 18, au No. 559.

1881

COTÉ
v.
STADACONA INS. Co.

Fournier, J.

dont on admet que son contrat est entaché, parce qu'il a laissé écouler un délai de près de deux ans, sans prendre aucune mesure judiciaire pour faire rescinder sa souscription, ne me paraît pas fondé en loi. Pour lui opposer ce moyen avec succès, il faudrait établir par quelque texte de droit qu'il était obligé d'agir dans le délai de deux ans. Je n'en connais pas. Si l'on adopte l'opinion qu'il n'y a pas eu contrat, faute de consentement, dans ce cas l'appelant avait trente ans pour agir s'il le jugeait à propos. Il aurait pu, comme le dit l'autorité citée ci-dessous, prendre l'initiative, mais ce n'est qu'une faculté qu'il était libre d'exercer ou non, à son gré. Le défaut de le faire ne pouvait pas le priver de son droit d'invoquer pendant trente ans l'inexistence du contrat quand il lui serait opposé. Dans le cas où l'on considérerait qu'il y a eu contrat, mais que le consentement à ce contrat a été vicié par le dol ou l'erreur, le contrat étant annulable seulement, l'appelant avait encore en vertu de l'art. 2258 C.C. de *Québec*, dix ans pour prendre son action en nullité. Ces deux propositions sont clairement établies par l'autorité suivante (1) :

> La différence est grande entre la nullité prononcée par le juge ou le jugement par lequel il déclare qu'il n'y a pas eu de contrat. Dans le premier cas la partie doit agir dans les dix ans, sinon le contrat est valide par son silence en vertu d'une confirmation tacite, et elle ne pourra même plus, dans notre opinion, opposer l'exception de nullité. Tandis que, s'il n'y a point de contrat, le prétendu débiteur pourra toujours demander par voie d'action ou d'exception, que le juge le délie du lien apparent d'une obligation qui ne'xiste point ; aucune confirmation, ni expresse, ni tacite, ne peut être opposé, car on ne confirme pas le néant.

Voir encore le même auteur aux Nos. 559 et 560.

La doctrine contenue dans les citations ci-dessus est confirmée par les nombreuses autorités citées dans le factum de l'appelant.

(1) Laurent T. 15, p, 536, No. 465.

1881

COTÉ v. STADACONA INS. CO.

Fournier, J.

Si, comme je le pense, il n'y a pas eu contrat, l'appelant avait trente ans pour agir, et dans le cas où le contrat ne serait qu'annulable à cause du consentement vicié, l'appelant avait dix ans pour en demander ou opposer la nullité. Ainsi l'on ne peut lui opposer son défaut d'action judiciaire pendant deux ans comme une preuve qu'il a acquiescé au contrat, puisque dans un cas, il avait trente ans et dans l'autre dix ans pour agir.

Cependant l'appelant, quoiqu'il ne fut pas obligé, pour se maintenir dans ses droits, de prendre l'initiative d'aucunes démarches, s'est empressé, après la découverte de l'erreur dont il se plaint, d'en donner information à la compagnie. En effet, aussitôt que les trois frères *Coté* se sont aperçus qu'ils pouvaient être inscrits comme actionnaires pour de plus forts montants que ceux qu'ils avaient payés, ils ont envoyé leur frère *Joseph* pour informer la compagnie des faits tels qu'ils s'étaient passés. *Joseph Coté* s'adressa à M. *Lindsay*, le secrétaire de la compagnie, et à M. *Belleau*, l'agent principal pour les souscriptions du stock. M. *Lindsay* comprit la justice des représentations faites par *Joseph Coté*, mais M. *Belleau* refusa d'intervenir pour faire rectifier la souscription. *Coté* fit aussi des démarches pour rencontrer M. *J. B. Renaud*, le président de la compagnie, mais n'ayant pu réussir à le voir, il retourna chez lui découragé et à peu près convaincu qu'il n'y avait pas moyen d'obtenir justice, mais sans avoir fait aucun acte, ni prononcé une parole que l'on puisse considérer comme un acquiescement à la souscription qu'on voulait lui imposer. L'appelant et ses frères s'en tinrent là, jusqu'à la réception du dividende dont il a été parlé plus haut. Etaient-ils obligés de faire plus ? Certainement non, d'après les autorités ci-haut citées. Mais la compagnie elle-même, informée comme elle dût l'être par son secrétaire et par l'agent *Belleau*, n'était-elle pas obligée d'intervenir immédiatement et de régler le diffé-

1881

COTÉ
v.
STADACONA INS. CO.

Fournier, J.

rend. On oppose de la négligence à l'appelant qui, en loi, n'était pas obligé d'agir, et l'on perd de vue que d'après son prétendu contrat, l'initiative était obligatoire pour la compagnie. Quel est en effet le prétendu contrat dont il s'agit? En voici la teneur, telle qu'on la trouve dans les papiers qui ont été, à la demande de la cour, transmis par les parties, depuis l'audition de la cause :

The undersigned do hereby agree to take, and they hereby do take and subscribe to the number of shares in the said company set opposite to their respective signature, or any portion thereof 'as may be allotted' by the provincial board of directors, the whole subject to such conditions contained in the Act incorporating the said company.

Le contrat entre les actionnaires et la compagnie est conditionnel, comme on le voit par le fait que celle-ci se réserve d'accorder le nombre ou seulement une partie du nombre des parts souscrites, tel que son bureau de direction pourra en faire la répartition. Cette répartition a-t-elle été faite? On n'en sait rien, le fait n'est pas prouvé. Avis en a-t-il été donné à l'appelant? On ne le sait pas davantage. Cependant il est clair qu'il était du devoir de la compagnie de se conformer à la condition qu'elle a jugé à propos d'introduire dans son contrat. Elle eut pu se dispenser de l'y insérer comme on le verra par la 2me section de son acte d'incorporation, 37 Vic., ch. 94, sec. 2 :

Books of subscription shall be opened in the City of Quebec and elsewhere at the discretion of the directors, and shall remain open so long as and in the manner that they shall deem it proper, after giving due public notice thereof, which said shares shall be and are *hereby vested* in the several persons, firm or corporations who shall subscribe for the same, their legal representatives and assigns subject to the provisions of this Act.

D'après cette section la seule souscription au livre de stock eut été suffisante pour former un contrat parfait. Mais exerçant les pouvoirs que leur donne la sec.

24, les directeurs ont sagement pensé qu'il devait se réserver le droit de contrôler la souscription, et pour cela ils se sont réservés le droit d'en faire la répartition comme bon leur semblerait. Après avoir été informés de la manière dont la souscription des *Coté* avait été obtenue, et surtout, connaissant que cette souscription était tout-à-fait hors de proportion avec leurs moyens, n'était-t-il pas du devoir des directeurs de ne leur accorder qu'un montant de parts en rapport avec leur fortune? En ne le faisant pas, ils ont manqué d'accomplir une condition de leur contrat et commis une injustice envers leurs assurés, en laissant sur leur livre de stock des actions qui ne valaient rien. Si la répartition eût été faite et qu'avis en eût été donné à l'appelant, la réception du dividende après cela, eût pu, sans doute leur être opposée. D'après ce qui précède je crois que c'était à l'Intimé à prendre l'initiative en faisant la répartition du stock et non pas à l'appelant, comme je crois l'avoir démontré par les autorités citées plus haut.

Pour ces considérations je suis d'avis que l'appel devrait être alloué avec dépens.

HENRY, J.:—

The respondent company claims in this action that the appellant is a stockholder in it to the extent of fifty shares, while he alleges himself as such only to the extent of five shares. The right of the respondents to recover depends on their showing him to be a stockholder beyond the number of five shares. The appellant, whose statement is sustained by other witnesses, alleges that he only agreed with the canvassing agent to take five shares, and that for them he paid the whole amount, and was entitled to have received a certificate for them as fully paid up. The agent (*Genest*) who dealt with him alleges he agreed to take, and with full knowlege of what he was doing, signed the stock

1881

COTÉ v. STADACONA INS. CO.

Henry, J.

list for, the fifty shares. His testimony is not corroborated, although it appears another agent of the company was present at the transaction, and might have been called for that purpose, if he would have done so. The stock book, when produced, corroborates *Genest's* statement, but the appellant swears that he did not know it had been filled up for more than the five shares, and that his signature was fraudulently obtained. He is a comparatively uneducated farmer, and one shown to have been in no circumstances to have taken so large an amount of stock. The learned judge who tried the cause found in favor of the appellant's evidence, and, after carefully considering it, I feel bound to say that, so far from differing with his conclusions, were I in his place I would have decided as he did. This view of the result of the evidence seems to have been subsequently adopted in the two courts below. How, then, does the case stand? The appellant agreed to take five shares, but was fraudulently got to put his name to a stock list for fifty. Did the respondents case rest here it would be a plain one against them. The fraud would render the contract, not necessarily void, but voidable by the appellant. Under the evidence, however, I consider it was a good contract for five shares. Taking the testimony of the appellant and his witnesses there was a verbal agreement for five shares, and the money for them paid in full. The fraud or mistake in inserting fifty in the stock list could have been corrected, and the agreement for the five enforced. But, although it was not so corrected, it does not therefore follow either that there was no contract, or that there was one for fifty shares. Immediately on the discovery of it he appealed to the manager of the company, with whom he had several interviews, informed him of the circumstances in evidence, and repudiated the contract beyond five shares. Amongst other things, he was told by the

manager to keep himself quiet, that the sum paid was all he would have to pay. It appears that this satisfied the appellant and his two brothers, who were similarly situated, and they became quiet as desired, no doubt, in my mind, thinking the error would be corrected, and the contracts they had really made carried out. We should construe the acts and dealings of those illiterate men very differently from those of persons of legal or technical acquirements, and from a totally different standpoint. I make this remark in view of another question affecting the decision of the case I intend hereafter to refer to.

There was, then, no binding contract on the appellant for more than five shares. Has he by his subsequent conduct adopted the contract for the fifty? It is alleged that he has done so by the acceptance of a cheque for a 10 per cent. dividend the following year. A counterpart of the cheque (with a blank for the name of the payee and the amount) is in evidence, and it states the payment to have been for a dividend upon paid up capital to the 31st December, 1875. The amount in the cheque was the dividend on the sum he had actually paid. It might have been intended by the manager or officer of the company who sent it as a dividend on the paid up capital on the fifty shares, for the amount would be the same in either case, but there is no evidence to show how it was intended. There is no reference in the cheque to the number of shares for which it was sent, nor was there anything to bring to the mind or notice of the appellant that it was for a dividend on the fifty shares, nor does it show whether it was *intended* as a dividend on the fifty shares or on the five. The amount was calculated on the capital *paid up*, and in the absence of any proof, why are we to assume that it was intended for the one any more than the other; and still further, how can we be called

1881

COTÉ v. STADACONA INS. CO.

Henry, J.

upon to assume that the appellant so received or understood it. The cheque told him that it was a dividend on paid-up capital. He had paid in an amount sufficient to entitle him to a dividend, and had no reason to presume it was intended to have reference at all to fifty shares. Whether he was to be held for fifty or five shares was not a subject then necessarily brought to his mind by the words of the cheque. Besides, neither the rate of the dividend nor the time for which it was made up was stated, so that he was in no position to make any calculations as to the amount sent him, or the purpose for which it was sent. The receipt by him of the cheque is, however, relied on to prove that he acquiesced in his remaining as a subscriber of fifty shares. I cannot so receive it. To amount to an estoppel, the language or conduct of the acting party sought to be affected must be pointed and unequivocal, and must leave no reasonable doubt. Here, I think, no such evidence is furnished by the cheque or otherwise. The doctrine of estoppel is necessarily applicable in cases like the present, and if with full knowledge a party accepts a position tendered by another, he is estopped from taking one inconsistent with it. If the appellant was shown with his eyes open to have accepted the cheque on fifty shares, he would not be permitted afterwards to repudiate it, but the evidence before us falls far short of establishing that position. If the filling up the fifty shares was a fraud, the appellant, of course, could have repudiated the whole transaction, and obliged the company to repay the money paid them. He, in that case, should not, however, have received any dividend, but ought to receive back his money. His receipt of the dividend for the money he paid in does not, however, estop him from contending that his contract was but for five shares. When he applied to the manager shortly

after subscribing for the stock, he was lulled into security, and when he subsequently received the cheque, he might very properly conclude that if the company intended to hold him for fifty shares, no dividend would be paid him until the dispute was adjusted, he having so forcibly protested against holding any stock beyond five shares, and informed the manager the signature for more was a fraud. I think the company with greater propriety, by sending him the cheque on his paid-up capital, might, under the circumstances, be held estopped from claiming him to have been a holder beyond the five shares. I don't agree with the proposition that there was no contract existing, for, if it had been *ab initio* void for fraud, there must have been a new one entered into between the parties, before an action could have been maintained at all. It was, in my opinion, binding on the company, and the appellant might have adopted it had he so elected to do, but instead of that he repudiated any thing beyond five shares, and for those five shares I think there was an enforcible contract. It seems to have been admitted throughout, that but for the receipt of the dividend by the appellant, the respondents would have no claim to recover. I am decidedly of the opinion that the receipt of the dividend by the cheque, under the circumstances, is *per se* no evidence of acquiescence in, or ratification of, the contract sued on. It is objected that the appellant should have within two years, taken action to set aside the agreement, as it appears by the stock list. Article 2,258, C.C. however, provides, that in cases of fraud, there is a prescription of ten years from the time it is discovered.

I am of opinion that the appeal should be allowed, the judgments below reversed, and judgment given for the appellant, with costs.

1881

COTÉ
v.
STADACONA INS. CO.

GWYNNE, J.:—

This action is by the company to enforce a contract alleged to have been entered into by the defendant, whereby, as is alleged, he became the holder of fifty shares, amounting to $5,000 in the capital stock of the company; we have no occasion therefore to refer to the numerous cases decided under the Companies' Clauses Act in *England*, which lay down the broad distinction which exists between the rights of the creditors of a company against a subscriber for shares in the company and the rights of the company against such a person disputing his liability to the company upon the ground of the fraud and misrepresentations of the agents of the company by which his subscription was obtained. In *Oakes* v. *Turquand* (1), the Lord Chancellor, Lord *Chelmsford*, alluding to this distinction, says:

> If this had been a case between *Oakes* and the company in which he sought to be relieved from his contract, as in the *Venezuela Railway Company* v. *Kisch* (2), or the company had been suing him for calls as in *Bwlch-y-plwm Lead Mining Company* v. *Baynes* (3), he would have succeeded in the one case and the company would have failed in the other, on the ground which I venture to think was correctly laid down in the recent case of the *Western Bank of Scotland* v. *Addie* (4), in this House that when a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations, and I would add by a fraudulent concealment of the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent.

The equitable rights of creditors against shareholders have nothing whatever to do with the present action, which rests upon the allegations of contract contained in the declaration, and must be determined by the ordinary principles of common law as applied

(1) L. R. 2 H. L. 325.
(2) L. R. 2 H. L. 99.
(3) L. R. 2 Ex. 324.
(4) L. Rep. 1 Sc. Ap. 145.

to matters of contract. As was said by *Bramwell*, B., in the *Bwlch-y-plwm Lead Mining Company* v. *Baynes* (1), if the defendant is liable "it is because he has undertaken to fulfil the duties of a shareholder in consideration of the plaintiffs giving him the benefits of one." The action rests upon the allegation that the defendant is the holder of fifty shares in the capital stock of the company, upon which certain calls have been made which are due and unpaid by the defendant; the defendant by his plea denies that he ever became the holder of more than five shares in such capital stock, which he alleges he paid up in full at the time of taking them. To entitle the plaintiffs to maintain this action, they must clearly establish it to be true that the defendant is the holder of the fifty shares, as alleged in the declaration, or at least that the defendant is the holder of more shares in the capital stock of the company than the five which the defendant alleges he paid up in full. That the defendant paid to the plaintiff a sum of money equal to the full amount of five shares, which is equal to 10 per cent. upon fifty shares is not disputed, but the question raised is, as in the *Bank of Hindustan* vs. *Alison* (2), is the defendant in point of fact the holder of the fifty shares as alleged by the plaintiffs, or of any greater number than the five paid up in full as denied by the defendant, *or* has he estopped himself from saying that he is not?

Now, if the evidence of the defendant's brothers is to be taken as representing truly what passed between the defendant and the company's agent (the brothers each give evidence for the others in the three several actions), there can be no doubt that they were all grossly deceived and entrapped into the appearance of having signed what they never contemplated signing,

(1) L. R. 2 Ex. 376.
(2) L. R. 6 C.P. 54 and 222.

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

and what in point of fact they never did sign or agree to. They say most distinctly that when applied to by Mr. *Genest* as agent of the company to take shares in the company, and to pay 10 per cent. thereon, they absolutely refused to do so, saying that for what they should take, if they should take any shares, they would pay in full once and for all, and that the agent of the company, finding them resolved upon this point, at length said to Joseph (the eldest of the brothers, who spoke for the others), in presence of the others:

Eh bien, souscrivez mille piastres, votre frère *Amédée* six cents piastres et votre frère *François Xavier* cinq cents piastres, et cela sera tout ce que vous aurez à payer et vous aurez dix par cent de dividende sur ces montants là.

That this was eventually agreed upon, and thereupon they each signed their respective names in a book presented to them by the agent and paid the above several sums as in full for all the amounts they respectively desired to take in the capital stock of the company. They say, also, that they never wrote in this book the matter which now appears in it set opposite to their respective names, namely:

Opposite the name *Joseph Coté*, "*St. Piere Isle d'Orleans*, $10,000; 100 shares—167."

Opposite the name of *Amédée Coté*, "*St. Pierre Ile d'Orleans*, $6,000; 60 shares—168."

Opposite the name of *F. X. Coté*, "*St. Piere Ile d'Orleans*, $5,000; 50 shares—168."

That these must have been all written by the agent of the defendant afterwards, and without their authority, knowledge or consent.

Mr. *Genest*, agent of the plaintiffs, while admitting that this additional matter is in his handwriting, written after the parties had signed their names, says that it was done by him in their presence; and to carry out what he says he clearly understood to be the intention of the parties to whom, as he says, he fully

explained the amounts and numbers of shares so written down, and although he admits that he told them it was not the intention of the company to call in more than they had paid, he says he explained to them that they would nevertheless be responsible to the above amounts.

Against the interest which it is urged the brothers have to support the contention of each other, as affecting the weight of their evidence, is to be set the interest which Mr. *Genest* admits he had in getting subscriptions for as many shares as possible in the books in his hands, for that he was paid 25 cents per share upon all the shares so appearing in such book, and the further interest that he has to free himself from the charge of fraud imputed to him by the brothers *Coté*. It sufficiently appears by evidence, which is not attempted to be impeached by any contradictory evidence, that the total amounts above set opposite the names of the brothers *Coté* is six or seven times in excess of the united property of all three combined; and that the now defendant *F. X. Coté*, when he paid the $500 paid by him, paid more than the whole of what he was worth, and that he had to borrow $50 from his brother *Joseph* to make up the amount. We start therefore with a strong presumption, in support of the assertion of these poor farmers, that they never contemplated taking, and absolutely refused to take, any greater amount in the capital stock of the plaintiff's company than they paid for in full at the time. The learned Chief Justice *Meredith*, before whom the case was tried in the court of first instance, was satisfied by the evidence, that however much Mr. *Genest* may have thought he had explained to the defendant the nature of the transaction to which he had set his name, he wholly failed to make the defendant understand it, for in the judgment of the learned Chief Justice when the de-

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

fendant and his brothers signed their names in the book presented to them by *Genest*, they did not know the nature or intent of what they had signed, nor the nature, amount, or extent, of the responsibility which, by so doing, they were assuming, that in fact the matter was not fairly put before the defendant nor understood by him. The Court of Queen's Bench, in appeal, was of opinion that without any doubt the defendant, the now appellant, had been induced to sign his name for the shares as appearing in the book produced in evidence without understanding the responsibility which, by so doing, he was assuming; and the court concludes that the contract alleged by the company in the declaration is not proved, and that in this point of view (if that in the judgment of the court were sufficient to decide the action) the action should be dismissed.

I must say that with this view so expressed by two courts, the presiding judge in one of which himself heard the witnesses, I should not, sitting as a judge in appeal, feel myself justified in differing, even though the evidence should not present itself to my mind precisely in the same light; but the true result of the evidence, as it appears to my mind also, clearly is that the defendant never contemplated taking any greater interest in, or any greater amount of, the capital stock of the company than what was covered by the $500, which he paid at the time as, and intending it to be, in full of all his interest in the company, that is to say, in full of five shares, and that he did not comprehend, if he had at the time heard, what the company's agent set opposite to his name, consequently there never was that concurrence of minds which is essential to the making of a contract *inter partes*, and that, therefore, the first branch of the question which we have to decide, if the evidence relating thereto be received, must be answered

in favor of the defendant, namely: That, *in point of fact*, he never was the holder of fifty shares in the capital stock of the company, as alleged by the plaintiff, nor of any shares, unless the plaintiff should be willing to accept, and should accept, his $500 paid to them as payment in full for five shares.

It only, therefore, remains to be considered whether the defendant is estopped from saying that he is not the holder of the fifty shares as alleged by the plaintiffs in their declaration? In considering this question, it becomes important to enquire, and we are justified (in a case of this nature having regard to the humble condition and want of experience in business of the defendant) in criticising minutely what was the true legal nature, purport and effect of the document which the defendant, without understanding what he was doing, did in fact sign. The attention of the courts below was not, as it appears to me, drawn to the true nature of that document, the book itself having been withdrawn and only a partial extract, and that of the least important part, taken from it, nor has the character or effect of the defendant's prompt repudiation of that document, as soon as he suspected what it did purport to represent, been sufficiently appreciated.

The page in the book where the defendant's signature appears had not, nor had any page in it, except the first, any heading to indicate what it was the parties signing their names in the book set their names unto. The evidence on the part of the defendant is that he did not see the heading or know that there was one. The evidence of Mr. *Genest* is, that he read and fully explained to the defendant what appears at the head of the first page. Now, what is it that is there and that he so explained, if indeed he did so? It is in French and English, and in English is as follows:—

1881

COTÉ
v.
STADACONA INS. CO.

Gwynne, J.

The undersigned hereby agree to take and they do hereby take and subscribe to the number of shares in the said company set opposite to their respective signatures, *or any portion thereof as may be allotted by the Provisional Board of Directors*, the whole subject to such conditions contained in the Act incorporating the said company.

Now, leaving out of consideration for the present the fact that, when the defendant signed his name in the book, there were no shares or amounts set opposite to his name, and that the words and figures now appearing there were added afterwards by Mr. *Genest* without the knowledge or consent of the defendant (as the defendant's evidence says, although, as Mr. *Genest* alleges, with his knowledge), and assuming these words and figures to have been added with defendant's knowledge and consent, what is the legal effect and purport of this document, and what is the explanation of it which should have been given by Mr. *Genest*, if it be true, as he says, that he read it and explained it to the defendant.

This document differs from what appeared to me to be expressed in the document of a like nature which was before us in *Nasmyth* v. *Manning* (1), lately decided in this court, in which case, although the language of the document there was not so strong as the language of that now before us in support of the conclusion at which a majority of the court arrived, the court held that no liability arose until some subsequent act in the nature of an allotment of shares by the provisional directors should take place and be communicated to the party subscribing the document. The judgment of this court in that case, until reversed, I must consider as binding upon me, and upon the point now under consideration I must regard it as a conclusive authority.

The document, then, now before us involved no obligation upon the part of the provisional board of directors

(1) 5 Can. S. C. R. 417.

to allot to the defendant any portion of the shares set opposite to his name. Mr. *Genest* did not and could not represent the provisional board for that purpose. The document as appearing now signed in the book produced, the nature of which, *as it is found*, was not fully explained to or understood by the defendant, is simply a proposition upon his part, with an undertaking, as yet unilateral, to take and pay for such portion of the shares set opposite to his name, if any, as the provisional board of directors should allot to him. Until this board should exercise their judgment upon that proposition and signify to the defendant in some manner what they had resolved upon doing and had done in the matter, there was not, and, *by the terms of the document so signed by the defendant*, there does not profess to be any, contract perfected between him and the plaintiffs, and the defendant was not and did not become, by his mere signature in the book, the holder of any number of shares in the capital stock of the company.

Now, before the provisional board of directors ever assumed to act in the discharge of the function and duty devolved upon them by the defendant's proposition, and which could be discharged by that board only, the defendant became aware that, or had reason to suspect that, the fraud and misrepresentation which he now sets up as his defence to this action had been committed, whereby he was induced to sign a document purporting to represent his intentions and design to be totally different from what he intended and understood it to represent, and thereupon without delay, and before any action is taken by the provisional board of directors upon the document, he wholly repudiates the matter as erroneously represented in the book by the plaintiffs' agent, and informs the company, through their secretary, that all the defendant intended or proposed to do was to take shares to the amount of $500 paid up in full;

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

that it was for this purpose he had given his cheque for $500. There was no legal necessity that such information should be communicated in writing; oral communication was as good as in writing. Now, the effect of this notice and repudiation by the defendant of what the book represented was clearly, as it appears to me, to give to the plaintiffs ample notice to require them, in the discharge of the duty which they owed alike to him as to the company, which latter was to allot shares only to solvent persons, having regard to the amount allotted, that unless they should be willing to accept the defendant as the holder merely of shares to the amount of $500 all paid up, he would have no shares. If they should not be willing so to accept him, their duty was to erase his name from the book in which it was and to refund him his money, which, to say the least, they had so become possessed of by manifest error, of which, after such notice and information given to them, they must be taken to be aware.

The board, it appears now, never did allot to the defendant any shares, but they retained his money of which they had so become possessed, with full notice from the defendant that he had only paid it as, and that under the circumstances communicated to the plaintiff by the defendant, they could only justify their retention of it by accepting it, for the purpose for which it was given by the defendant, as payment in full of so many shares fully paid up in the capital stock of the company as $500 represented. The defendant, then, as it appears to me, effectually withdrew from the provisional board of directors all right to regard him as a subscriber for, or as assenting to become a subscriber for, any greater number than five shares, and those as fully paid up; the Board, however, never did, in fact, communicate to the defendant their acceptance of him as the holder of five fully paid up shares, under

the notice given by him in repudiation of the proposition as appearing in the book. They simply retained his money, with the knowledge communicated to them by the defendant that he had paid the $500 as and for payment in full of shares to that amount, viz., five shares; there having been no completed contract at this time, there was no necessity for the defendant to take any proceedings in any court to annul a contract not entered into.

While things still remained in this condition, the plaintiffs having had sufficient notice that what the book signed by the defendant represented was utterly erroneous, and that the defendant was not an applicant for any shares in the capital stock of the company, unless it should be for five shares, for which, as payment in full, he had given his cheque for $500 to the company, the plaintiffs in the year 1876 sent to the defendant a cheque in the following terms :

Compagnie d'Assurance *Stadacona* contre le feu et sur la vie.
Premier dividende—*Québec* 25 janvier 1876.
Au caissier de la banque d'Union du *Bas-Canada*.
Payez à *F. X. Coté* ou ordre cent piastres étant pour dividende sur capital versé au trente et un décembre 1875.

The money made payable by this cheque was received by the defendant. Now, can the acceptance of this money operate as estopping the defendant from now alleging that he never was the holder of more than five shares in the capital stock of the company, and these as fully paid up? Clearly not, as it appears to me, for, firstly, the amount so paid was calculated upon the paid-up capital, that is to say, in so far as the defendant is concerned upon his $500, whether that $500 was payment in full of five shares, or as 10 per cent. upon fifty shares, and, secondly, because, after the notice given by the defendant to the plaintiffs in repudiation of what appeared in the book signed by him, and inform-

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

ing the plaintiffs that he had only paid $500 as and for payment of that amount of fully paid up shares, the board of directors had no right to allot, and in point of fact did not allot, to the defendant any shares under the proposition as appearing in such book. They had, in fact, no right to hold him liable for any shares, unless they were willing to accept his version of the erroneous character of what appeared in the book, and of his purpose and intention in paying the $500, and to accept him as the holder of five shares paid up in full.

When, then, the directors sent to the defendant the above cheque he would have been rather, as it seems to me, justified in regarding it as evidence of the adoption by the plaintiffs of the defendant's statement, as communicated to them through their secretary in repudiation of the proposition as appearing in the book which the defendant was ignorantly, if not fraudulently, induced to sign, and of his version of the purpose for which he paid his $500.

If there be any estoppel arising out of this cheque it is not against the defendant that it should operate, but against the plaintiffs, who, under the above circumstances, and affected with knowledge of the defendant's contention, and of his intention in paying the $500 being as payment in full of five shares, issued the cheque. As to the defendant, *his acceptance* of the money made payable by the cheque cannot in reason be regarded as acquiescence in anything further than that he is a holder of five fully paid up shares, which is what he has always contended was the utmost he ever contemplated being the holder of.

The doctrine of estoppel can only operate to prevent the defendant from showing the truth, if, by any act or declaration acquiesced in by him, the plaintiffs were misled to their prejudice to believe the defendant to be the holder of fifty shares in the capital stock of the

company. A party is only estopped from showing the truth when he has by some act or declaration acquiesced in an assumed state of things, *and by such acquiescence* the situation *of the other party* has been altered to his prejudice. *Bank of Hindustan* vs. *Alison* (1).

Now the terms of the document bearing the defendant's signature, already commented upon, could not have had that effect, for that document was not only not acquiesced in by the defendant, but was immediately, and before having been acted upon, repudiated by the defendant, to the knowledge of the plaintiffs. The plaintiffs, therefore, could not, by reason of the defendant's signature appearing in that document, have been prejudiced or have believed the defendant to be in truth the holder of the fifty shares for which they now seek to make him liable. The act of the defendant in receiving the money made payable by the cheque for dividend cannot, as I have already stated my opinion to be, be construed to be an acquiescence in anything more than that the defendant admitted (as he had contended and as he does now, was the true state of the case,) that he had paid his $500, intending it to be and as payment in full of five paid-up shares.

It appears that *Joseph Coté*, having learned in 1877 that the plaintiffs still contemplated holding him and his brothers for the amounts wrongly entered by the plaintiffs' agent in the plaintiffs' book, again remonstrated to Mr. *Lemoine*, one of the directors, who suggested to him to write a letter to the board of directors which he would lay before them. *Joseph* thereupon, or I should say from the mistakes apparent in the letter, somebody for him, wrote a letter in French, of the 28th February, 1877, to the directors of the company, of which the following is a translation:

(1) L. R. 6 C. P. 227.

1881

COTÉ
v.
STADACONA INS. CO.

Gwynne, J.

The object of this is to make you understand my actual position towards your company. I am still full of confidence as to the administration of the affairs of the company, and I hope we shall not have reason to regret having placed there all the money we possessed. I address you in the name of four brothers who are in the same position as myself. The amount of our subscription has been $2,600, or 260 shares.

Here are the reasons for our having taken so great a number of shares. The agents sent to make known to us the rules of the company, and the conditions of subscription concealed from us almost altogether the risks and responsibilities which we should incur by such subscription. Observe, if you please, Messieurs, that not being able to obtain anything in the Parish of *St. Pierre*, the agents struggled to show to us the advantages which the company offered without suggesting, save in a vague manner, the dangers that we should run. We yielded to a confidence which we regret to this day. The influence which we have in our locality has been the cause that our mistake has procured many more subscriptions than there would have been without us. If we had had an extract from the act of incorporation, as that which was left with Mr. *François Fortin*, we should have understood as he did that we should not with our means risk so much. He only paid $125. Your secretary even expressed his astonishment, and admitted how irrational it was in our position (one of my brothers having borrowed $50 to make his payment), to have paid so large a sum. Upon this subject one of your agents at the office, and in the presence of Mr. *Lindsay*, said that we had made our payment and that we should not be troubled any more about it. By reason of his reassuring words we surrendered *ourselves to your good faith*. For these reasons we take occasion to ask to sell our shares without confiscation, so that after this year we may have still the sum of $2,600 in the same manner as if we had paid this sum in three instalments instead of two.

Your humble servant,

JOSEPH COTE.

And on the 4th of August, 1877, *Joseph* and his brother *Amédée* and the above defendant, all three signed a letter of that date, addressed to the the directors, in French, of which the following is a translation:

4th August, 1877.

TO THE DIRECTORS, &c.,

GENTLEMEN,—From the different notices, circulars, &c., which you have sent us we see that you have not paid any attention to our

observations and demands. This is very unfortunate, for we ventured to hope different treatment on the part of persons so agreeable and intelligent as you appear to be. We repeat, then, the observations which we addressed to you in writing last winter, in the hope that you will pay attention to it. Three brothers, *Joseph*, *Amédée* and *François Xavier Coté*, deposited in your office $2,100 as shareholders, upon the express condition, and well explained, that they understood that they paid thereby the full amount of their shares. Then your agents wrote that they paid only two instalments of 5 per cent. which constituted a responsibility of $21,000. Can we, gentlemen, in the name of common sense, believe that you will exact that which your agents have written, our whole properties are not worth the sixth part of that amount. You would thus deprive us of all means of subsistence, and you would still be at a great loss. At present is it true that we have undertaken to pay all the amount of our shares? Well, we have paid almost every farthing we possess, and *François Xavier* had to borrow even a part of his to make his payment. Moreover, we have witnesses, if it be necessary, that your agents are mistaken. That our deposit is spent we suspect is true, but as to paying anew we will not, for we are unable to do so. We beg of you, therefore, once for all, to arrange with your agents, that we have taken 'wenty-one shares instead of 210.

We respectfully solicit an answer.

Your three humble servants,

JOSEPH COTE,
AMEDEE COTE,
FRANCOIS X. COTE.

Now that this last letter cannot operate as estopping the defendant from showing the truth is clear, for it is a reassertion of the repudiation of what the plaintiffs' agent had written in the book, involved in the remonstrance and complaint made by the defendant immediately after he first had reason to believe or suspect that it falsely represented him to have taken $5,000 instead of $500 paid up in full.

Then, as to the other letter, its contents show how slow we should be to give the effect of an estoppel to anything over the signature of this poor ignorant man. The letter speaks of his having four brothers, whereas there were only two, and of the amount of their sub-

1881

COTÉ v. STADACONA INS. CO.

Gwynne, J.

scriptions being $2,600 or 260 shares, when we know that even in the plaintiff's book they were put down for $21,000 and 210 shares. Then the last sentence in the letter is utterly insensible and unintelligible. It was written at the suggestion of one of the directors to whom *Joseph Coté* was repeating his original complaint. From what we now know of the nature of that complaint, the letter must be read as having reference to that old complaint, and to the position which, by the alleged wrongful conduct of plaintiffs' agent, *Joseph* was given to understand that he and his brothers occupied on the books of the company, although it presses other considerations for the board yielding to his demands.

Now, it is to be observed that no obligation is pretended to have been incurred by the company since the writing of that letter, or upon the faith of any admission contained in it; but there is a further and an insuperable reason why that letter should not operate to estop the defendant from showing the truth in this action.

The general doctrine laid down in *Heane* vs. *Rogers* (1), approved and followed in *Newton* vs. *Belcher* and *Newton* vs. *Liddiard* (2), that a party is at liberty to prove that his admissions were mistaken or untrue, and that he is not estopped or concluded by them, unless the opposite party has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability, as well as in respect of fact. In all cases, therefore, of this nature, a jury, or judges acting as jurors, with the view of estimating the effect due to an admission, are justified in considering the circumstances under which it is made, and if it should appear to have been made under an erroneous notion of legal

(1) 9 B. & C. 577. (2) 12 Q. B. 921-927.

liability, they may qualify its effect accordingly (1). Acting, then, as a juror in this case, and assuming the defendant to be affected by the contents of this letter, and that it is the one referred to in the letter of August, signed by the three brothers as having been addressed by them last winter to the directors, of which, however, there was no evidence, and which it would seem not to be from a passage in the letter of August, viz : "We repeat, then, the observations which we addressed to you in writing last winter," I cannot read it as an abandonment by the defendant of the position taken and asserted by him as involved in his original remonstrance and repudiation of what the plaintiffs' agent, contrary to the truth as the defendant alleged, entered in the book opposite to his name, and which contention is repeated in the letter of August, 1877. But now that we see what the nature of the document which the defendant so signed was, the circumstance under which his signature was procured, the fraud or error committed in setting opposite to his signature the amount and number of shares now appearing there, and when we consider that it was the duty of the plaintiffs, upon the first remonstrance and repudiation of its contents made by the defendant, either to have erased his name altogether and to have refunded him his money or to have adopted his version of the purpose he had in paying them his $500, we see that they never were justified in incurring any obligation based upon the faith of the defendant being the holder of shares to the amount of $5,000 ; and when we see that the letter under consideration was written under a mistaken idea entertained by the defendant of what he had in fact signed, as well as of his legal liability and rights in

(1) Taylor on evidence, 743.

1881

COTÉ
v.
STADACONA
INS. CO.

Gwynne, J.

respect thereof, the plaintiffs cannot be heard to say that the defendant is estopped from showing the truth. He was led by the plaintiffs to believe that he had by a perfected contract become the holder of shares to the amount of $5000.00 in the capital stock of the company which he was legally bound to pay, whereas it now appears that as matter of fact the paper which he signed did not contain such a contract, and that his signature to what was in the book did not subject him to the legal obligation which was insisted upon.

The fact that the defendant, immediately after setting his name to the book produced, communicated to the plaintiffs the true state of the case, before the plaintiffs had taken any action upon the faith of the defendant's signature having been obtained, and that, in fact, at a time when, as now appears, no completed contract between the defendant and the plaintiffs had been entered into, distinguishes this case from that class of cases which was relied upon by the courts below.

For the above reasons, I am of opinion that nothing has taken place which can, in law, estop the defendant from showing the truth in this action in relation to the matter which the plaintiffs make the foundation of their claim, and that the truth being shown establishes that the defendant never was in fact the holder of fifty shares, nor of any number of shares, in the capital stock of the company, unless he be holder of five shares fully paid up.

The appeal, in my judgment, should be allowed with costs, and judgment should be entered for the defendant in the court below, with costs.

Appeal allowed with costs.

Attorneys for appellant: *Bossé & Languedoc.*

Attorneys for respondents: *Pelletier, Bédard, Rouleau & Lemoine.*