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*May 17, 18.
*Nov. 6.

EWAN MACKENZIE (PLAINTIFF) ....APPELLANT;

AND

THE MONARCH LIFE ASSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Issue of shares—Authority to sign certificate—Estoppel —Evidence.

Held, per Fitzpatrick C.J. and Duff J., that where by statute and the by-laws of a joint-stock company certain of its officers are empowered to sign stock certificates, and they sign a certificate under seal in favour of a person who has agreed to change his position on receipt of the shares it represents and who is declared therein to be the holder of such shares the company is estopped from denying that it was issued by its authority, even if one of the officers signing it was acting fraudulently for his own purposes in doing so.

Held, per Anglin J., that the certificate is only *primâ facie* evidence of the statements therein and such evidence may be rebutted by shewing that it was issued without authority. In this case, however, Davies and Idington JJ. contra, the company failed to make such proof.

Judgment of the Court of Appeal (23 Ont. L.R. 342) reversed, Davies and Idington JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment at the trial in favour of the defendants.

In the year 1905 the appellant was part owner with one Ostrom of certain interim copyrights for six forms of insurance policies. The Monarch Life As-

PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 23 Ont. L.R. 342.

surance Company advertised that they were the exclusive owners of these forms. On the 7th September, 1905, the Assurance Company not having paid for the said copyrights, the appellant instituted proceedings against the said Ostrom and the Assurance Company claiming an injunction restraining the company from publishing the said advertisements, and the sum of $5,000 damages. This action came on for trial before the Hon. Mr. Justice Clute, and after the case had been partially tried was adjourned to enable the parties to effect a settlement. After considerable negotiations and correspondence it was agreed that Mackenzie should receive twenty-five fully paid up shares of the capital stock of the Monarch Life Assurance Company, and should transfer his interests in the copyrights to Ostrom, the manager of the company, and the action against both parties should be dismissed without costs. This settlement was arranged by Senator J. K. Kerr, apparently acting for the company, and by Mr. D. C. Ross, apparently acting for T. Marshall Ostrom, the managing director of the company. A certificate representing the stock issued under the corporate seal of the company and signed by its proper officers was handed over and the action was dismissed.

The company then repudiated the certificate and denied that the plaintiff was the owner of any shares and this action was brought to compel the company to register the plaintiff as owner of the twenty-five shares. The case came on for trial before the Honourable Mr. Justice Riddell at Toronto, who after the conclusion of the evidence, stated that the facts appeared to be as follows:—

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1. That Senator J. K. Kerr represented that he was acting for the company.

2. Every one acted in good faith.

3. Mr. Wilson, the company's solicitor, knew the terms of the proposed settlement.

4. The company received consideration for the shares.

5. That there was no resolution approving of the settlement of the action or the issue of these shares.

His Lordship subsequently dismissed the action upon the ground that the settlement was made with Ostrom acting on his own behalf and that the company were not bound by his actions in so doing. An appeal was taken from the said judgment to the Court of Appeal for Ontario and was dismissed with costs upon the same grounds, the Honourable Mr. Justice Magee dissenting. From this judgment the appellant appeals to the Supreme Court of Canada.

Bain K.C. and *Gordon* for the appellant. The authorized officers having signed the certificates bearing the company's seal the company is bound by their act. Halsbury's Laws of England, vol. 5, page 294. *Royal British Bank* v. *Turquand*(1); *In re Land Credit Co. of Ireland*(2).

In *Ruben* v. *Great Fingall Consolidated*(3) the certificate was not signed by the proper officers, but were forged, and the company were held not liable. The remarks of their Lordships, however, support the position of the appellant in this case. And see also *Bloomenthal* v. *Ford*(4); *Duck* v. *Tower Galvanizing*

(1) 5 E. & B. 248.
(2) 4 Ch. App. 460.
(3) [1904] 2 K.B. 712.
(4) [1897] A.C. 156.

Co.(1); *In re Coasters, Limited*(2); *McKain and Canadian Birkbeck Co., in re*(3).

The onus was on the company to prove facts sufficient to defeat plaintiff's claim; *D'Arcy* v. *Tamar, Kid Hill and Callington Railway Co.*(4); *County of Gloucester Bank* v. *Ruddy, Merthyr Steam, etc., Colliery Co.*(5); *In re Hampshire Land Co.*(6); and they have not done so.

Matthew Wilson K.C. for the respondents. Ostrom, the managing director, had no shares of his own to transfer to the plaintiff and no authority to issue the certificate. *George Whitechurch, Limited* v. *Cavanagh*(7); *Ruben* v. *Great Fingall Consolidated* (8).

The company never, by resolution, by-law or otherwise, authorized the issue of this certificate and cannot, even as a trading corporation, be estopped from denying its validity. *Longman* v. *Bath Electric Tramways*(9); *Mayor, etc., and Company of Merchants of the Staple of England* v. *Bank of England*(10).

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Duff.

DAVIES J. (dissenting).—For the reasons given by the Chief Justice of Ontario, in dismissing the appeal in this case to the Appeal Court of Ontario from the judgment of the trial judge, Riddell J., in which reasons Garrow and Maclaren JJ.A. concurred, and also

(1) [1901] 2 K.B. 314.
(2) [1911] 1 Ch. 86.
(3) 7 Ont. L.R. 247.
(4) L.R. 2 Ex. 158.
(5) [1895] 1 Ch. 629.
(6) [1896] 2 Ch. 743.
(7) [1902] A.C. 117.
(8) [1906] A.C. 439.
(9) [1905] 1 Ch. 646.
(10) 21 Q.B.D. 160.

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for the reasons stated by Meredith J.A., which substantially agree with those given by the Chief Justice, and to which I do not desire to add anything, I would dismiss this appeal with costs.

IDINGTON J. (dissenting).—The appellant sues for a declaration that he is the holder of twenty-five fully paid-up shares in respondent company and to have it ordered to register him as such.

On the facts set out by the learned trial judge and again more fully by the Chief Justice of Ontario in the Court of Appeal, which are not disputed, it is clear that in law there never was any subscription for such shares, or allotment or other issue thereof by the only authority competent to so direct.

It is admitted by the appellant he never paid the company anything nor had any contract with the company which would enable its board of directors to issue paid up stock even if we could assume it competent for the company to so contract.

He contends such a bargain is possible and that in course of executing it the managing director and the vice-president of the company would be the proper officers, by force of the Act of Incorporation and the parts of the "Companies' Clauses Act" included thereby in such Act, and of the by-laws made thereunder, to issue such certificate as this action is founded upon.

The certificate is as follows:—

> This certifies that Ewan Mackenzie is the owner of twenty-five fully paid-up shares of the capital stock of the Monarch Life Assurance Company (upon which shares $2,500 has been paid, together with $625 on premium), transferrable only on the books of the corporation by the holder thereof in person or by the attorney upon surrender of this certificate properly indorsed *and with the consent of the directors.*
>
> In witness whereof the said corporation has caused this certi-

ficate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this 3rd day of May, A.D. 1906.

(Seal)

T. H. GRAHAM, *First Vice-President.*

T. MARSHALL OSTROM, *Managing Director.*

He says this was issued to him under such facts and circumstances as to induce him to rely thereupon and accept it in settlement of an action brought against the man Ostrom, who signed, and the company, and that he so induced, and so relying, consented to the dismissal of his action and therefore the company is estopped from denying the validity of the certificate.

I will assume that his present action is so constituted that even if there were no shares available either existent or within the power of the company to create to answer his demand, he, if entitled to recover at all, might recover alternatively damages for the failure to do so.

I desire his claim should be presented in the broadest possible way it can be put, in order to give effect to this alleged estoppel, if it can exist and then examine the facts on which it is alleged to rest. But presently therewith I must also examine the power of the company to issue such shares and consider the bearing thereof on said facts.

The action (of which the dismissal is the basis of any right appellant can have herein) was brought to enforce as against Ostrom a contract one Stevenson had made with him to sell some copyrights to him for a large consideration of which shares in the company formed a part, and to have the company restrained from using the copyrights. The one-fourth of the rights acquired by Stevenson, the vendor of said copyrights, had passed to appellant. The purpose of both was to have the company acquire said copyrights.

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In his statement of claim therein, appellant alleged that the company by virtue of the contract with Ostrom and the latter's dealings with his company, had used said copyrights but had not implemented the bargain.

This was answered by the company denying the allegations, and amongst other things pointing out that it had never become organized and hence such a bargain was in law impossible for provisional directors to make.

The company had in fact, up to the trial, never been organized, and its provisional directors clearly had no power to do aught but get shareholders to subscribe upon a basis that could not extend to include as part of the considerations moving to subscription a contract binding it to acquire and use such copyrights, or anything of that nature.

As against the company, save possibly the right to enjoin it from using or bargaining for use of such copyrights, the action seemed as hopeless a thing as ever was presented to any court.

And there is no evidence that at any time after said action was entered for trial the company ever did anything that would have touched appellant's rights in that regard, if he had any.

The trial was postponed from February, when first opened, to be taken up some later day if not settled.

The company got itself organized on the 21st of March, following this.

The appellant must have known from the company's pleadings and due consideration thereof, that the foundation in law for any bargain of which the fruits were to be shares in the company, did not exist. He must, therefore, when thus put upon inquiry, be held

bound to act cautiously and reasonably in relation to any proffered arrangement that implied carrying out what was illegal and improper for this man Ostrom to have attempted. He ought to have realized that before he could reckon upon shares in the company coming through such a channel, he must see that they were duly and regularly issued.

But it has been assumed by appellant that even conceding the power of the provisional board doubtful, once the company became organized, it could issue paid-up shares as result of a bargain such as in question. It seemed also to be assumed in appellant's argument that the directors could make such a bargain and validly issue such shares. It seems to me that is a fundamental error. And as the duty of appellant, and his correlative right to set up an estoppel on the facts, about to be adverted to, must to a certain extent depend upon, or be influenced by, a correct view of the legal position in this regard, of the powers of the company or its board, let us here consider that.

To appreciate the appellant's position and contentions, and especially that dependent upon his claim of estoppel, we must bear in mind that this is not a trading company, but an insurance company, incorporated by an Act of Parliament which embraces in the Act the provisions of the "Companies' Act" so far as not excepted in the incorporating Act, but only so far as not inconsistent with the incorporating Act or the "Insurance Act."

I think we must also bear in mind the nature of the business to be embarked in, and the policy of the then existent legislation relative to such insurance companies.

Let us turn to the provisions of the incorporating

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statute and its auxilliary, the "Companies' Act," and see if there is any warrant for assuming that anything but money can be received for payment of shares in such company.

The capital stock was fixed at two million dollars and, by section 4, it was enacted

> so soon as two hundred and fifty thousand dollars of the capital stock of the company have been subscribed and ten per cent. paid, etc.,

a meeting of those

> who have paid not less than ten per cent. on the account of shares *subscribed for by them*

shall elect a board, etc.; and, by section 6,

> the shares of the capital stock subscribed for shall be paid by instalments, etc.,

and

> the company shall not commence the business of insurance until sixty-two thousand five hundred dollars of the capital stock shall have been paid in cash into the funds of the company

and

> the amount so paid by any shareholder shall not be less than ten per cent. of the amount subscribed by such shareholder;

and, by section 7, the increase of capital is made dependent on the vote of

> at least two-thirds in value of the subscribed stock of the company, etc.

No one but those having subscribed, or those claiming under them, or the profit participating policyholders, seems contemplated by the Act as having any right to do with its affairs.

Let us turn to the "Companies' Clauses Act" and see if this enlarges that view.

The "Interpretation Act" defines the shareholder to mean "every subscriber to or holder of stock in the company" which does not help us much, for obviously

a transferee of stocks might not be "a subscriber" yet "a holder of stock" and the latter might be such without either being subscriber or transferee if otherwise power given to create stock without a subscription and without cash payment.

When we consider each and every section of that Act I think the utmost that can be said relative to the scope thereof, is that there is nothing expressly giving power to create stock otherwise than by subscription and payment in cash. We must bear in mind that the purpose of the Act is to supply a standard set of clauses which will subserve any legislation relative to all the joint stock companies Parliament can create, save as to railway, banking or insurance companies.

Yet when by section 17 of the company's incorporating Act the "Clauses Act" is adopted save as to specific sections, it guards that adoption by adding thereto the words,

in so far as the said Act is not inconsistent with any provisions of this Act or of the Insurance Act.

We are thus thrown back upon the sections I have quoted from the incorporating Act, the general purview thereof and of the "Insurance Act" and the clear principle which though daily repeated is sometimes lost sight of, that corporate bodies are only endowed with such powers as the creating legislature has given them. There may, however, be implications in the creations to give them activity.

Nor should we overlook the fact that having regard to such implied purpose there are numerous cases which at an early stage of the operation of the English Act of 1862, the courts held the power existed of accepting payment of moneys worth, instead of cash.

That Act was general and intended to be most

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comprehensive in its terms and operations, and unless such elasticity was given it would have largely failed of its purpose. At the outset the most useful thing it could be put to was to create corporate bodies to take charge of existent properties used for business or connected therewith or the goodwill thereof.

The situation which thus arose was of an entirely different character from that existent at and surrounding the creation of this company. The purpose to be executed was entirely different. And there the result was soon specifically guarded against in the Act of 1867.

On the whole I conclude that the Act of incorporation here in question, does not contemplate the issue of stock for anything but money, and at all events is not a thing that can be done by the directors exercising only the usual powers of management assigned them.

Whether possible to be directed upon due consideration by the shareholders or not, it is not necessary for me to determine beyond this, that I do not think such a case was presented to them as to entitle them to delegate both the right to act for them in the making of such a contract and the determination of all the details of such a bargain as the manager, Ostrom, induced a meeting in April to attempt, and the reference did not include any issue of such stock to appellant.

If no power exists, of course, there is an end of this case.

But there is another aspect of the matter and that is that the question of the power of the company to make a bargain at all, and of the board in that respect, and of the grave doubt that must exist to put it no

higher, are all matters lying open for the appellant to have considered and are not mere matters of the internal regulation of the company's mode of transacting business, and thus hidden from any one having dealings with the company. This appellant was not, therefore, in this case, of necessity restricted to the measurement of the authority of this company's officers, by what it was clearly apparent the company had held them out to the world as having power to do in the way of binding the company. He had the statutes for his guide and a warning in the pleadings.

I am also strongly impressed in this particular case with the facts that the appellant's whole claim rested upon his dealings with the manager, Ostrom, personally, and that in such a case it was his bounden duty to have ascertained not only that Ostrom had discharged his full duty by making to his employers the complete disclosure that for him in his situation, dealing for and with them, was necessary to found any contract between him and them, but also had given due consideration for that he must have professed to have acquired from them the right to transmit to appellant. Nothing can be clearer than that Ostrom neglected his duty in these regards, acted without any, or even the shadow of any, authority, and that upon the most casual sort of investigation, such as I have indicated was required of this appellant, he never could have been deceived or in any way misled.

Nor was this the less incumbent upon him because he saw the signature of one purporting to act as vice-president attached to this certificate he rests upon.

I cannot understand how any one dealing with such an issue as was presented for trial could assume without more information that the company had

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changed its front and policy so suddenly as to have matured any scheme that would have justified in law the issue of such stock as this certificate professes to evidence. And that he was alive to this is pretty evident from his counsel's letter three weeks after the alleged settlement, appearing in Mr. Kerr's letter of the 6th of March, 1906.

It is as follows:—

March 31st, 1906.

A. W. Holmestead, Esq.,
Barrister, etc.,
Toronto.

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Dear Sir,—There does not seem to be any prospects of the Monarch Life issuing shares in this matter, and I understand that the shareholders have refused to agree to the proposition which Mr. J. K. Kerr assured me would be satisfactory. Had we better not see about getting the case again placed on the list for trial?

Yours truly,
(Sgd.) JAS. BICKNELL.

But more than that the appellant must have known from the very nature of things he was doing and being a party to, that neither he nor any one else had given the company anything, and that they could not be compensated for such a transaction by a release to Ostrom such as appears unsigned, but dated May 4th, 1906, and seems the true consideration as proposed for the issue of such stock.

Having regard to all these things and everything implied therein, we are tempted to ask: What could the payment to Ostrom of the sum of fifty thousand dollars ($50,000) for such an illusory thing as the alleged copyrights be, but a plan for exploiting a company that seemed to have had for two years a desperate struggle to come up to the standard needed to get organized, and to justify the issue of a license to entitle it to enter on its proper business?

Such being the general features of the material circumstances presented to appellant's mind up to said date, let us see if we can, accurately, just what did happen out of which there could spring an estoppel of such grave import as we are presented with here.

The case was again entered on the trial list. Matters so far as we can see, unless some illegal resolutions, stood as they had done quite unchanged from the view presented to Mr. Bicknell's mind, on the 31st of March, 1906.

Then in some way, but how brought about is unexplained, Mr. Kerr sends the following telegram from Ottawa:—

May 2nd, 1906.

To James Bicknell, K.C.,
Bicknell & Bain, Barristers, Toronto.

Tried to see you when in Toronto; have arranged with Ostrom for transfer of shares as per agreement signed by me and will be approved of by directors at first meeting to be called for that purpose, as soon as possible. Kindly let case stand over, and oblige.

J. K. KERR.

This may have been relied upon by appellant, but if so by its very terms he has to get the adoption of the board as basis for the issue of stock. Any undertaking to do so, even if broken, does not furnish ground of estoppel but action for a breach of the contract expressly made. We have, however, no evidence of any right in Mr. Kerr to act for respondent. And the minute book put in evidence and freely referred to by counsel on the argument, discloses no meeting from the 15th of April to the 19th of May, of either shareholders, directors or executive committee. In presence of such a record in evidence referred to by all parties, I fail to see how it can now be questioned as inadmissible.

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Nor can I understand, when such record shews no meetings were had, how, as is argued, the respondent was driven to call any or perhaps the whole of the twenty-five former directors of previous three years to attend; scattered as the record shews they were from Montreal to Winnipeg.

Moreover, the record shews the company had resolved to move its headquarters to Winnipeg, before this telegram from Mr. Kerr. The telegram from Mr. Kerr, so far from misleading, put appellant on his guard and imposed the duty on him of seeing before venturing to act on the alleged stock certificate that the directors had met and sanctioned it.

On the 14th of May the parties signed the following consent of dismissal of the action:—

Ewan Mackenzie,
Plaintiff;
and
The Monarch Life Assurance Company and T. Marshall Ostrom.
Defendants.

We hereby consent that this action be dismissed without costs.
Dated at Toronto, this 4th day of May, A.D. 1906.

JAMES BICKNELL,
For plaintiff.
D. C. ROSS,
For defendant Ostrom.
MATTHEW WILSON,
For defendant company.

This had to be substituted for another of a very different import, because the company's counsel very positively refused to sign the other or take part in such proposals of settlement as it indicated might be on foot. Such rejection must be held to have been known to the appellant. That rejected form of settlement, and its rejection being so known he cannot pretend fairly he was ignorant of the cause thereof, reads as follows:—

This action is settled as follows:—

1. The defendant, T. Marshall Ostrom, delivers to the plaintiff twenty-five fully paid-up shares of stock in the defendant company.

2. The defendant, T. Marshall Ostrom, in addition to the amount already paid, will pay $50 in full of any remaining costs of the plaintiff.

3. Except as above there shall be no costs to either party.

4. The plaintiff will release to the defendant Ostrom or to the company as his nominee any interest which he has under the assignment in question herein from one George Stevenson in the interim copyrights in question herein.

Dated this 4th day of May, 1906.

JAMES BICKNELL, Counsel for plaintiff.
Counsel for Monarch Life.
D. C. ROSS, Counsel for T. Marshall Ostrom.

Now we have presented for redemption or adoption three years later, this certificate bearing date, let it be well noted, the 3rd of May, 1906, undoubtedly in existence and I think handed over to appellant's solicitor before the final consent to the dismissal was signed.

Mr. Kerr's telegram of the 2nd of May, could hardly have been supposed to have been implemented by the directors' meeting and with marvellous despatch producing this thing on the 3rd of May. The most casual inquiry would have disclosed the twenty-five directors were so widely scattered that such a thing was impossible. And careful inquiry would have disclosed the facts that the seat of business for such meetings had to be Winnipeg.

How can it be said this evidence proves what constitutes an estoppel in conformity with any legal definition thereof ?

How can it be said the company did anything that misled appellant ?

How can he plead reliance on its acts or alleged acts as consistent with this certificate, in face of the positive refusal to sanction such a settlement as might

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have implied the countenancing of the issue of said stock ?

How can he, who is told the stock will be transferred with the approval of the board of directors in the future, pretend he acted upon the fact of its issue having been already made as if approved ?

How can he pretend to ignorance of the prerequisite of approval of shareholders or board placed before him in such divers ways ?

How can he claim these officers had ever been held out as possessing the right to so issue certificates of this kind which on their face presuppose the cash had been paid ?

I think this appeal should be dismissed with costs.

DUFF J.—The questions arising on this appeal depend, it seems to me, upon considerations of very wide application; the weight to be attached to these considerations in the courts of law being, I should think, a matter of no little importance to the very large number of people who have dealings in the shares of joint-stock companies.

The facts are hardly in dispute. The appellant received through his solicitor a share certificate in the ordinary form stating that he was the owner of 25 shares of fully paid-up stock in the defendant company. This certificate had been received by his solicitor from the solicitor of one Ostrom, the managing director of the company, in settlement of an action then pending between the appellant as plaintiff and Ostrom and the company as defendants. The action had been brought to establish that the appellant was entitled to an interest in certain copyrights of insurance plans which Ostrom had professed to

assign to the company. The plaintiff alleged that the company was advertising and otherwise making use of these plans in violation of his rights as part owner of the copyrights and he claimed an injunction accordingly. The action having come on for trial was adjourned (according to the note of the presiding judge) to enable a settlement to be carried out. There was some delay, but eventually it was arranged that Ostrom was to transfer twenty-five fully paid-up shares to the appellant in satisfaction of his claim, and the certificate in question having been delivered by Ostrom's solicitor the action was by consent dismissed. In point of fact the appellant was not registered as the holder of any shares. Ostrom had transferred none to him, and had no fully paid-up shares to transfer; the issue of the certificate, moreover, had not in fact been authorized by the directors. The appellant contends that he, having acted upon the certificate by consenting to the dismissal of his action (thereby altering his position) the company is estopped from disputing the truth of the statement contained in it, viz., that he was at its date the registered holder of the shares mentioned.

It was not disputed on the argument, or at all events but faintly disputed, that this consequence follows if the statement in the certificate must in law be taken to be the statement of the company. The good faith of Mr. Bicknell, the plaintiff's solicitor, in accepting and acting on the certificate, is expressly found by the learned trial judge. "There is no charge of bad faith against any person except Ostrom," he says. The learned judge, as appears from his manner of dealing with the question raised, indubitably meant to relieve Mr. Bicknell from any suggestion that he

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had any suspicion touching the propriety of Ostrom's conduct in delivering the certificate. It was upon the same basis of fact that the case was considered in the Court of Appeal, and I cannot find that any imputation against the good faith of the appellant has been made by counsel for the respondent throughout the case. It seems clear, therefore, that it is on that basis that the appeal must be determined; but as some point is now made against the plaintiff in this connection, there is one observation which I think ought not to be omitted. It was Mr. Bicknell who on behalf of the appellant carried on the negotiations with Senator Kerr—whom he believed, as the learned trial judge has found, to be acting for the company. Senator Kerr foresaw no difficulty in carrying into completion the arrangement that Ostrom was to transfer twenty-five shares (fully-paid) to the appellant; Ostrom's solicitor, Mr. Ross, a reputable member of the profession, filled in the body of the certificate with his own hand, and obviously saw no difficulty. Mr. Wilson, the counsel for the company in the action (who, as the books in evidence shew, had been acting as the company's general solicitor,) was made fully acquainted with the terms of the settlement, and, (in view of his attitude I am bound to assume,) had no suspicion that Ostrom, in proposing to transfer fully paid-up shares to the appellant, was contemplating any juggling with the company's books, or any improper use of the company's name or seal; nor, it is perhaps needless to add, does any misgiving appear to have crossed the mind of Dr. Graham. In the minds of these four gentlemen, presumably much more fully acquainted with Ostrom's relations with the company than Mr. Bicknell, an outsider, could be, the settlement excited no suspicion or apprehension

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of impropriety. In these circumstances if any point was to be made against the plaintiff's good faith, it ought to have been made, and distinctly made, at an earlier stage in the litigation. The question is then: Is the company bound by this statement as its own statement? I think it is bound by it.

The powers of the directors in respect of such certificates appear in section 13(*a*) of chapter 118, R.S.C. (1886):—

13. The directors of the company may, in all things, administer the affairs of the company, and may make or cause to be made for the company, any description of contract which the company may, by law, enter into; and may, from time to time, make by-laws not contrary to law or to the special Act or to this Act, for the following purposes:—

(a) The regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock.

In the execution of these powers the directors passed by-law X.(*d*) in the following words:—

(d) Certificates shall be issued for stock after payment of at least ten per centum of the par value, and each certificate shall shew upon its face the number of shares and the amount paid upon the stock represented by such certificate at the date of such certificate, and all such certificates shall be signed by the president or a vice-president and the manager and be sealed with the seal of the company; but, *unless by special resolution of the directors*, no shareholder shall be entitled to receive a second or subsequent certificate until he shall have delivered up to the company all prior certificates received by him from the company for the same stock.

The persons thus appointed to sign and attest the attaching of the corporate seal to stock certificates are the persons who by another article of the by-laws are charged with the general duty of executing documents on behalf of the company. The certificate in question here was signed by one of the vice-presidents

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— Dr. Graham — and by the managing director. It was stated in argument and not denied that the book of stock certificates which by leave of the court was returned to the respondent company after the trial, shews the vice-president in question and the managing director to have been the officers who down to the time of the transaction in question usually performed the duty of issuing such certificates. The minute book in evidence, moreover, shews that Dr. Graham usually presided at the meetings of the directors and of a committee called the executive committee to which the directors had professed to delegate their powers of management.

There can be no doubt that under the by-law set out above the vice-president and the managing director would be acting within their powers in issuing certificates to persons holding shares upon which the minimum amounts had been paid. There can equally be no doubt that they would be acting beyond their powers in issuing such a certificate in the name of a person not a stockholder. But if in such circumstances, they issue a certificate, I do not think it is necessarily a nullity. Share certificates, as everybody knows, are acted upon as documents of title. Speaking broadly, they do not in themselves confer ownership — they are only evidence of ownership and perhaps apart from statutory enactment evidence only against the company itself; but in practice they are treated as documents of title and the courts have so far recognized their character as such as to hold that the deposit of a certificate may create an equitable mortgage of the shares to which they relate. As representing those shares they constitute a most important part of the movable commercial securities of the country.

Now for such purposes a certificate (I am assuming it to be genuine in the sense that it is executed by the proper persons, the persons who, if the statements contained in it were true, would be the persons to execute it and give it forth to the world), would be perfectly valueless unless the statements certified to are to be taken to be the statements of the company itself. In commercial usage that is what a share certificate means — a statement not by an officer of the corporation, who may or may not be mistaken, but a statement by the corporation itself upon the faith of which the public are entitled to act. If before acting upon the statements you must first at your peril investigate them what purpose does the certificate serve ? Such a view of the effect of share certificates would, I think it is no exaggeration to say, quoting the language of Lord Cairns in *Burkinshaw* v. *Nicolls* (1), at page 1017,

> paralyze the whole of the dealings with shares in public companies.

The representations then, contained in such documents, as to the title to the shares and the amount paid upon them are representations which it is expected will be acted upon, and the object of the by-law authorizing certain named officers to execute such certificates is to place in the hands of shareholders documents upon the faith of which the public may act without further inquiry than to ascertain that they have been executed by those officers.

The statute left it optional with the directors whether they should or should not make provision for such certificates. But in making such provision, and providing that every shareholder on whose shares 10

(1) 3 App. Cas. 1004.

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per cent. had been paid should be entitled to such a document, they must be taken to have intended to arm the shareholder with a document which when executed by the proper officials should carry with it all the authority of a certificate given by the company.

It may be noted that the persons appointed for the purpose mentioned were not merely servants. The signatures of the manager and of the president or one of the vice-presidents were required. It is not easy to see how a stranger to the company could expect to verify a statement as to the contents of the company's books by obtaining any assurance which would be more conclusive than a statement so authenticated. In point of fact, (whatever may be said about a document executed by officers whose duties are well-known to be ministerial only,) no ordinary business man would think in ordinary affairs of business of refusing to accept and act upon — as the certificate of the company — a share certificate under the company's seal and signed as this was by such officers as a vice-president and a managing director when by the by-laws of the company those officers had been appointed to exercise, and regularly did exercise, the function of authenticating the execution of such instruments on behalf of the company.

The respondent's position rests upon two cases, *Ruben* v. *Great Fingall Consolidated*(1); and *George Whitechurch, Limited* v. *Cavanagh*(2). The distinction between this case and both those cases lies on the surface. In the first the certificate was not signed by the persons appointed to sign such documents. Their signatures were forged. The House of Lords held that

(1) [1906] A.C. 439. (2) [1902] A.C. 117.

the secretary who had countersigned it was not authorized to warrant the validity of the certificate. It does not appear to have been doubted that if the signatures had been genuine the company would have been bound. At page 447 Lord James of Hereford expressly says that in such a case the certificate would be binding. It is surely one thing to say that the persons authorized to execute such a document are thereby authorized to warrant in the name of the company the truth of the statements contained in it, or in other words that the public is invited to act upon a document executed by them, and a very different thing to say that the public is invited to act upon the signature of one of them only. That is the difference between the appellant's contention here and the unsuccessful contention in *Ruben* v. *Great Fingall Consolidated* (1). In *George Whitechurch Limited* v. *Cavanagh* (2) it was held that the secretary had no authority to guarantee the truth of the representation contained in his certification. The distinction is pointed out in all the judgments between a certification such as was there in question, and a certificate under the seal of the company; pages 126, 134. That persons empowered to execute documents of the latter character have (as necessarily implied in the power to execute such documents) the authority to warrant on behalf of the company the truth of the statements made in them was assumed throughout. The authority to give a certification of transfer on the other hand, does not imply (for the reasons pointed out by Lord Macnaghten) any invitation to the public to act upon it.

If I am right in thinking that by placing in the

(1) [1906] A.C. 439. (2) [1902] A.C. 117.

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hands of the officers in question the authority to issue such certificates and permitting them to exercise such authority, the company invited the public to act upon the faith of certificates authenticated by them, then I think no difficulty arises from the fact that Ostrom was acting fraudulently for his own purposes. In *Mahony* v. *East Holyford Mining Co.*(1) the directors were acting fraudulently for their own purposes and so were the agents whose acts were in question in *Bryant, Powis and Bryant* v. *La Banque du Peuple* (2), and *Hambro* v. *Burnand*(3).

I should perhaps add this. It was not argued that the vice-president and managing director were not the proper persons to issue certificates, on the application of the holder of shares in proper cases, or that they had not full authority to execute them in such cases. Indeed, the authority is admitted in the respondent's factum. If it should be suggested that they could attach the corporate seal only under the authority of the directors the answer is: assuming that to be so — I think that is clearly not the true construction of the by-laws — it is plain that these are the persons who are to authenticate the affixing of the seal. The by-laws quoted make that plain, and having that authentication a stranger is entitled to act upon it: *Montreal and St. Lawrence Light, Heat and Power Co.* v. *Robert*(4), at pp. 202 and 203.

It is proper also to mention the suggestion that certificates of shares in this company differ in effect from certificates of shares affected by the "Companies Act 1862," inasmuch as there is no enactment (corresponding to the provision in that Act) making the certifi-

(1) L.R. 7 H.L. 869.
(2) [1893] A.C. 170.
(3) [1904] 2 K.B. 10.
(4) [1906] A.C. 196.

cates of the respondent company *primâ facie* evidence of title. That, I think, is not material. If the statement in the certificate in question is to be treated as the statement of the company, then the doctrine of estoppel comes into play. That the English decisions upon the subject do not depend on this provision of the Companies Acts is clear from this. In many of the cases it is not the title to the shares, but the liability to pay calls upon them that is in question. On this point there is no statutory provision; but the estoppel operates notwithstanding its absence.

ANGLIN J.—I agree with Meredith J.A. that, upon the evidence in the record, and especially in the absence of proof of the authority of Mr. J. K. Kerr to represent the Monarch Life Assurance Company, it must be held that:

> So far as the defendants are concerned the only settlement made, of the former action, was that it should be dismissed, as it afterwards was, as against them without costs; that they were in no way parties to the settlement made between the plaintiff and their co-defendant Ostrom, in that action.

I find myself, however, unable to concur in the view which prevailed in the Ontario Court of Appeal as to the value of the certificate produced by the plaintiff as evidence that he is a shareholder in the defendant company, or as to the proper conclusion upon this question from the evidence adduced at the trial.

I express no opinion upon the issue of estoppel, which was much discussed at bar. When and how far such a document as the certificate held by the plaintiff, regular in form, creates an estoppel against the company whose officers have signed it and whose seal it bears is, upon the authorities, a question of some difficulty, which, in the view I take of the pre-

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sent case, it is not necessary to determine. That this case does not fall within the line of decisions of which *County of Gloucester Bank* v. *Ruddy, Merthyr Steam, etc., Co.*(1) is an example, but should be held to be governed by the principles on which the judgment in *Ruben* v. *Great Fingall Consolidated*(2) proceeds, I am not wholly satisfied. There is at least one marked distinction between the facts in *Ruben* v. *Great Fingall Consolidated*(2) and those now before us.

It is quite true, as stated by the learned Chief Justice of Ontario, that

> there is nothing in the special Act incorporating the defendants, 4 Edw. VII. ch. 96, or in sections of the "Companies Clauses Act" (Dom.) R.S.C. (1886), ch. 118, which are declared applicable to the defendant company, similar to the provisions contained in the "Imperial Act," 8 & 9 Vict. ch. 6, amended by various other acts, requiring the defendants to deliver to a shareholder a certificate of proprietorship which is to be admitted in all courts as *primâ facie* evidence of the title of the person named in it.

We have no provision corresponding with section 23 of the "Imperial Companies Act of 1908," which declares that "a certificate under the common seal of the company specifying any shares or stock held by any member shall be *primâ facie* evidence of the title of the member to the shares or stock." But these statutory provisions would appear to be merely declaratory of what would without them be held to be the law. For, as pointed out by Magee J.A., such a document as the certificate produced by the plaintiff is, apart from any statutory enactment, "*primâ facie* evidence of its truth."

In *Hill* v. *Manchester and Salford Water Works* (3), Denman C.J. says, at p. 874:—

(1) [1895] 1 Ch. 629. (2) [1906] A.C. 439.
(3) 5 B. & Ad. 866.

The plaintiff proved that the common seal of the company was affixed to the bond by the officer who had legal custody of it, and so threw upon the defendants the burden of proving clearly that it was not set by their authority.

In *D'Arcy* v. *Tamar Kid Hill and Callington Railway Co.*(1), Bramwell B., at p. 162, says:—

It is not to be presumed that what has been done is *ultra vires* and therefore when the bond is produced under the seal of the company it is *primâ facie* to be taken that the seal was properly affixed.

And Channel B. adds:—

On production of the bond under the corporate seal it is *primâ facie* to be assumed that it is valid.

In *North-West Electric Co.* v. *Walsh*(2), Sedgewick J. delivering the judgment of the court, says at p. 50:

The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, *while evidence of the statement*, was not conclusive evidence of it.

See, too, *Montreal and St. Lawrence Light and Power Co.* v. *Robert*(3), at pages 202-3.

By the production of his stock certificate, therefore, the plaintiff established a *primâ facie* case entitling him to relief. How is that case met by the defendant, upon whom the burden was thus cast of proving that the plaintiff is not the holder of the shares mentioned in his certificate?

Its plea is that:—

1. If the plaintiff holds a stock certificate as alleged, the same was not issued by the defendant and the amount thereof was not paid up to the defendant, and the defendant did not consent thereto.

— The substance of this plea is that the issue of the stock which the plaintiff claims to own was not sanctioned by the board of directors of the defendant com-

(1) L.R. 2 Ex. 158. (2) 29 Can. S.C.R. 33.
(3) [1906] A.C. 196.

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pany, who alone had power to authorize it. In support of this allegation counsel for the defendant cross-examined Dr. Graham, the vice-president of the company, who was one of the signatories to the certificate. His evidence on this point is summed up in the following question and answer:—

Q. Then there has never been any authority from the board of directors at all for you to sign this certificate? A. I do not know about that.

He was not asked if he had attended all the directors' meetings; nor was he or any other competent witness asked whether the minutes produced by another officer of the company were a true record of all that had transpired at the directors' meetings. He had no recollection of how he came to sign the certificate.

Do you remember anything about it?

A. No.

His Lordship: You are not in the habit of signing things just because they are put in front of you?

A. When they are filled up and signed by the managing director, I would take it for granted they are right.

Q. You have no recollection?

A. No, sir.

No other director of the company gave evidence. The defendant called the present general manager of the company, Mr. Stewart, who took office in November, 1906. The transactions leading up to the plaintiff obtaining his stock certificate occurred in March and May, 1906, and the certificate bears date the 3rd May, 1906. Mr. Stewart was unable to give any evidence as to what had transpired before he became manager. He produced certain books of the company. Mr. Vansickle, a bookkeeper with the defendant, was also called. He had no part in the management and gave no evidence of any value. The defendant did not call any other witness.

Mr. Stewart produced the stock ledger, the stock certificate book, the stock application book, and the minute book of the company. These books contained no record of anything which would indicate that the plaintiff had become a shareholder in the company.

Such of these books as the company is required, by R.S.C. ch. 79, sec. 144, to keep are, by section 175 of that Act (one of the companies clauses provisions made applicable to the defendant company by 4 Edw. VII. ch. 96, sec. 17), declared to be

primâ facie evidence of all facts purporting to be therein stated.

They are not, however, made negative evidence of the non-existence of the facts not therein stated. Moreover, books which the statute does not require the company to keep, *e.g.,* the minute book of directors' meetings, are not given any evidentiary value greater than they possess at common law. At common law such books are not admissible for the corporation as against a stranger. Neither, in my opinion, can the corporation without statutory authority put them in evidence when the question at issue is whether the opposing party is a member of it or a stranger to it; *Marriage* v. *Lawrence*(1); Taylor on Evidence (10 ed.), sec. 1781 — whatever might be the case were he by common consent a member.

The company might have called some of its directors of 1906 as witnesses and by them established, if such were the fact, that at no directors' meeting was there an allotment of the shares claimed by the plaintiff. It has not seen fit to do so. It is consistent with the evidence in the record that the board of directors may have sanctioned the issue of the shares in question

(1) 3 B. & Ald. 142.

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and that, by accident or design, a record of their action may not have been made. Counsel for the defendant contented themselves with cross-examining one director, called by the plaintiff, who was unable to negative the existence of the requisite authority for the issue of the shares claimed by the plaintiff and with tendering in evidence its own books — some of them probably inadmissible — none of them affording the evidence which it was bound to supply.

The *primâ facie* case made by the plaintiff, therefore, remains unanswered. The evidence of Dr. Graham sufficiently establishes that other certificates for shares were signed by him after that given to the plaintiff. It is thus made reasonably clear that when the plaintiff received his certificate the defendant held unissued shares to meet it; indeed, the defence of an over issue has not been suggested.

I am, with great respect, of the opinion that the plaintiff is entitled to the declaratory judgment for which he asks, and that his appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Bicknell, Bain, Strathy & Mackelcan.*

Solicitors for the respondents: *Wilson, Pike & Co.*