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*Mar. 17.
*Nov. 20.

SYLVESTER NEELON (DEFENDANT).....APPELLANT;

AND

THE CORPORATION OF THE TOWN OF THOROLD (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Stock in—Payment on shares—Appropriation of payment by company—Portion treated as paid up—Legality of company's action.

N., a director and shareholder of a railway company, agreed to lend the company $100,000 taking among other securities for the loan 168 shares held by B. which were to be paid up. B. owned 188 shares on which he had paid an amount equal to 40 per cent of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer which was entered on the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B.

A judgment creditor of the railway company whose writ of execution had been returned *nulla bona* brought an action against N. for payment of his debt claiming that only 40 per cent had been paid on the 75 shares and that the remaining 60 per cent was still due the company thereon. A judgment in favour of N. was affirmed by the Divisional Court but reversed by the Court of Appeal on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a formal resolution authorizing it.

Held, reversing the judgment of the Court of Appeal, Gwynne J. dissenting, that the company having got the benefit of loan by N. were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares upon the security of which the loan was made and creditors, not having been prejudiced, are bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could accept the 75 shares in lieu of the 168 he was entitled to.

* PRESENT.—Sir Henry Strong C. J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) in favour of the defendant.

The material facts of the case are as follows:—

By an agreement in writing entered into November 1st, 1887, the defendant Neelon agreed to advance to the St. Catharines & Niagara Central Railway Company $100,000, taking as security, among other things, a number of paid up shares in the stock of the company specified in a schedule attached to the agreement. Among the said shares were 168 held by one Blain, who owned in all 188, upon which he had paid $3,750 equal to about 40 per cent of their value. Before the agreement was consummated Blain had got into financial difficulties and was unable to pay the balance of his subscription to the stock and at a meeting of the directors of the company it was proposed that the said sum of $3,750 be appropriated to payment in full of 75 of Blaine's shares and that number be transferred to Neelon instead of the 168. This was agreed to by the board, but no formal resolution was passed authorizing it. The secretary sent a transfer to Blain of the 75 shares in favour of Neelon and it was executed by Blain and accepted by the defendant who was aware of what had transpired at the meeting of the board. The transfer was entered in the books of the company as of 75 fully paid up shares and the remainder of Blain's shares he retained as stock upon which nothing was paid.

The plaintiff corporation had obtained judgment against the railway and issued execution which was returned *nulla bona*. They then brought an action against Neelon claiming that only 40 per cent had been paid on the 75 shares received from Blain and the

(1) 18 Ont. App. R. 658. (2) 20 O.R. 86.

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balance was still due the company and liable to satisfy their judgment debt.

At the trial judgment was given in favour of Neelon, the trial judge finding as facts that while he, Neelon, had a general knowledge of all that had been done he received the 75 shares believing that they were fully paid up and relying upon the representations of the proper officer of the company to that effect. Also that he would not have received them, nor advanced his money to the company, if there had been any doubt about the legality of the transaction. The judgment at the trial was affirmed by the Divisional Court but the Court of Appeal held that the want of a formal resolution by the board of directors authorizing the appropriation of the money paid by Blain to the 75 shares made the transaction void and the judgment of the Divisional Court was accordingly reversed.

W. Cassels Q.C. and *Cox* for the appellant referred to *Miles* v. *New Zealand Alford Estate Co.* (1); *McCracken* v. *McIntyre* (2).

Collier for the respondents.

THE CHIEF JUSTICE.—In my opinion the judgment of the Divisional Court delivered by Mr. Justice Ferguson as regards the appellant's liability in respect of the seventy-five shares acquired by him from Blain as paid-up shares, was entirely right.

There can be no doubt that under the agreement of the 1st November, 1887, made under the seal of the railway company, the appellant was entitled to have paid-up shares. From Blain he was to receive 168 paid-up shares. No variation in this agreement was assented to by the appellant, further than this: finding that all the 168 shares to be transferred by Blain were

(1) 32 Ch. D. 266. (2) 1 Can. S. C. R. 479.

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not paid-up, he made a concession in favour of the company and agreed to take less than he was entitled to, namely, 75 shares in lieu of 168. These 75 shares were accordingly transferred to him, with a certificate of the proper officer of the company that they were paid-up, and on the faith of this and on the security of these shares the appellant honestly advanced his money.

Mr. Justice Robertson, who tried the action without a jury, found as follows:—

I also find, that according to the terms of the said agreement the stock was to be paid-up stock, and the defendant received it believing and relying on the representations of the proper officer of the company that the stock was fully paid-up at the time it was transferred to him. I also find that, had there been any doubt in the mind of the defendant at the time the said stock was transferred to him that the said stock was fully paid-up he would not have received the same, nor would he have made the advance of $100,000, or any part thereof, to the company. I also find that there never was any contract between the defendant and the railway company, or with the said parties of the second and third parts to the said agreement, to take, accept or receive the said stock or any part thereof other than on the terms mentioned and set forth in the said agreement.

These findings were fully warranted by the evidence.

Mr. Blain had originally acquired 188 shares of $50 each, upon which there had been paid $3,750. The transaction between Blain and the company, as regards these shares, was entered in the stock ledger of the company by charging Blain with $9,400 as for 188 shares at $50 per share, and giving him credit generally for $3,750 in a gross sum, as having been paid on account of these shares, without any specification of the particular shares sold to him, and without any specific application of the money paid, either as distributed amongst all the shares ratably, or as having been applied to any particular shares.

The first question which arises is as to the powers of the company to apply this money to 75 shares in full

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payment for these shares. Blain does not appear to have made any objection to such a proceeding but, on the contrary, to have fully assented to it. Then, apart from the rights of creditors if the company, either acting as any creditor has a right to do in applying money not particularly appropriated by a debtor, or even having made originally an application of the money by which it was ascribed ratably to all the shares, had thought fit, Blain consenting, to re-appropriate it and treat it as a payment in full for 75 shares, I am at a loss to see why they should not have been free to do so. No authority has been, or could be, invoked to show that such a simple transaction was *ultra vires*. Blain would still have continued to be the holder of shares in the company to the amount of $9,400, upon which $3,750 had been paid, and its appropriation, or re-appropriation, to particular shares could have made no difference to him.

Then no prejudice to creditors can be suggested.

As Mr. Justice Ferguson in his judgment says this transaction had not the effect in any way of derogating from the rights of creditors. In the words of the learned judge:

> Mr. Blain's liability remained for the same amount as before this transaction. What the creditor really complains of, is that he is not permitted to gain an accidental advantage by making his claim against a man of wealth rather than against one who, however high his financial standing had been, was, and I suppose is, more or less embarrassed by reason of the occurrences before alluded to.

It was, however, considered by the Court of Appeal that the transaction as regards the imputation of all cash paid to the 75 shares was invalid by reason of the want of any formal resolution of the board of directors authorizing it. Blain having consented to the transfer of the credit, and the creditors' rights not being

in any way affected by the appropriation made, this must be regarded purely as a question between the appellant and the company.

The first observation I have to make on this is, that we are not dealing with a case between the directors and the whole body of the shareholders. The company got the money loaned by Mr. Neelon on the strength of their 75 shares being fully paid-up, and without that, as he swears and as the learned trial judge has found, the advance would not have been made. Surely, under these circumstances, as between the company and Mr. Neelon, if the latter was seeking to deal with these shares by transferring them as paid-up shares, the company would not be permitted now to allege the want of a resolution as a ground for refusing to register the transfer. In such a case, they would undoubtedly be held to be estopped from insisting on such a dishonest defence to a proceeding to compel registration.

I am further of opinion that the high authority of Lord Justice Bowen may also be invoked for the appellant. I refer to his judgment in the case of *Miles* v. *New Zealand Alford Company* (1), cited in the judgment of the learned Chief Justice of Ontario. In that case the Lord Justice was of opinion that the want of formality in the proceedings of the company could not affect a third party with whom it was dealing. The other Lord Justices differed, it is true, but on a ground which did not call for any opinion on this point. It has long been the doctrine of the courts, as I understand it, that mere irregularities in the internal proceedings of corporations and joint stock companies do not affect persons contracting with the corporation or company. I do not think that such a doctrine is the less applicable in the present case for the reason that Mr.

(1) 32 Ch. D. 289.

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Neelon was himself a director and had notice of all that was done.

Then the deed of the 1st November, 1887, was authorized by the resolutions of the 12th and 13th October, 1887, and was recognized as binding by the resolution of the 10th November, 1887.

By this agreement Mr. Neelon was entitled to 168 paid-up shares from Blain. Surely there could be no reasonable objection why he should not take less than he had stipulated to receive, viz., 75 shares in lieu of the 168. If a resolution of a board of directors authorizes the payment to a creditor in full it could not be said that having received a part payment only he was disentitled to retain it because he did not get all the resolution authorized. I cannot distinguish that case from this.

It appears to me, therefore, that there are two distinct grounds upon which the allowance of this appeal may be rested: first, the company having got the benefit of the loan by the appellant were estopped from disputing the application of the money paid by Blain, in such a way as to constitute him the holder of the 75 shares upon the security of which the loan was made, and creditors, not having been prejudiced, are bound in the same way; secondly, the transaction having been perfectly binding as between Blain and the company, and not objectionable as regards creditors, there was no reason why the appellant should not have been at liberty to do as he did in accepting 75 shares instead of 168, which, under the agreement duly authorized by the resolution of October, 1887, he was entitled to call for.

The appeal must be allowed with costs, and the judgment of Mr. Justice Robertson restored, with costs to the appellant, in all the courts below.

FOURNIER J.—Concurred.

TASCHEREAU J.—I would allow this appeal and dismiss the action. I agree with the opinion of Robertson J. at the trial and of Mr. Justice Ferguson in the Divisional Court.

GWYNNE J.—I am of opinion that this appeal should be dismissed with costs, for the reasons given in the judgment of the learned Chief Justice of the Court of Appeal for Ontario. The appellant not having acquired the stock from Blain in virtue of the arrangement authorized by the St. Catharines & Niagara Railway Company, but in virtue of a private arrangement with Blain himself not authorized nor sanctioned by the company can take under Blain's transfer of the stock to the appellant no greater right than Blain himself had, that is to say, as liable to the creditors of the Railway Company which the respondents are to the amount which at the time of the transfer of the stock to the respondent remained unpaid thereon.

SEDGEWICK J.—I concur in the judgment delivered by the Chief Justice.

Appeal allowed with costs.

Solicitors for appellant: *Cox & Yale.*

Solicitors for respondents: *Collier & Shaw.*