1882 GEORGE S. PAGE *et al*.....APPELLANTS;

*Dec. 4.

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*Mar. 8. JAMES AUSTIN.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—27 & 28 Vic., ch. 23—Shareholder, liability of—Estoppel—Mortgagee of shares.

The *Ontario Wood Pavement Company*, incorporated under 27 & 28 *Vic.*, ch. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from $130,000 to $250,000 before the original capital stock had been paid in. *P. et al*, execution—creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against *A.* as holder of shares not fully paid up in said company. It appeared from an examination of the books that the shares alleged to be held by *A.* were shares of the increased capital and not of that originally authorized.

Held (affirming the judgment of the Court of Appeal) that as there was evidence that the original nominal capital of $130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by *A.* consisted wholly of new unauthorized stock, *P. et al* were not entitled to recover. (*Gwynne*, J., dissenting, on the ground that the objection not having been taken by the defendant or tried, the court, under sec. 22, ch. 38 R.S.O., should put the questions of fact upon which the validity and sufficiency of the objections suggested by the court rested, into a course for trial in due form of law.)

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock.

Per *Strong* and *Henry*, JJ., (*Gwynne*, J., *contra*), that although *A.*,

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

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a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. (23 of sub-sec. 19, of sec. 5, 27 & 28 *Vic.*, ch. 23).

APPEAL from a judgment of the Court of Appeal (1) for *Ontario*, reversing the judgment of the Court of Common Pleas (2). The facts and pleadings are fully stated in the opinions of the judges on the present appeal.

Mr. *Bethune*, Q.C., for appellants, and Mr. *Robinson*, Q.C., and Mr. *MacLennan*, Q.C., for respondent.

The points relied on and the cases cited are reviewed in the judgments.

RITCHIE, C. J. :

This is an action brought by writ of *scire facias* by the appellants, who are creditors of the *Ontario Wood Pavement Company of Toronto*, a body corporate, to recover against the respondent the amount unpaid by him upon the one hundred and eleven shares held by him in the stock of the company.

The company was incorporated under a statute of the late Province of *Canada*, passed in the 27th and 28th years of Her Majesty's reign, chap. 23. The appellants recovered judgment on the 28th of July, 1874, against the company.

An execution issued by them against the company was returned *nulla bona*, and this action was commenced on the 22nd September, 1875, by *scire facias*.

To the said *scire facias* the respondent pleaded, amongst other defences:

1. For a first plea to the plaintiffs' declaration,

(1) 7 Ont. App. Rep. 1. (2) 30 U. C. C. P. 108.

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that he was not a stockholder of the said "*The Ontario Wood Pavement Company, Toronto*," as alleged.

2nd. And for a second plea, the defendant says that there is not still due and unpaid by him on the capital stock of the said company the sum of $8,880 or thereabouts, or any sum whatever, as alleged.

3. And for a third plea, the defendant says that one *George Arthurs* was the holder of 111 shares of the capital stock of the said company, amounting to the sum of $11,100, and was entered on the books of the said company as the holder thereof, and on the said books the said shares were entered as shares fully paid up; and the defendant says that he purchased the said shares from the said *George Arthurs* in good faith and for valuable consideration, believing the same to be fully paid up shares, and without any notice or knowledge that the same were not, in fact, so fully paid up, and the defendant says that the last mentioned shares are the same shares as in the declaration mentioned.

4. And for a fourth plea, the defendant says that the said writ of *fieri facias* has not been returned "*nulla bona*" by the said sheriff, as alleged.

5. And for a fifth plea, the defendant says that the stock held by him, and referred to in the declaration, was and is so held by him as trustee merely and not otherwise; and other than such stock so held by him as aforesaid, the defendant never had and has not now any shares or stock in the said company.

6. And for a sixth plea, the defendant says that one *George Arthurs*, being indebted to the defendant in a large sum of money, and being the holder of the shares in the declaration mentioned, transferred the same to the defendant as collateral security merely for such indebtedness and not otherwise; and the defendant accepted the said shares, and has always held and now

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holds the same as such collateral security merely and not otherwise; and other than the said shares, the defendant never held and has not now any shares or stock in the said company.

Issue was joined upon these defences, and the cause came on to be tried before Mr. Justice *Galt*, at *Toronto*, on the 20th June, 1878.

The appellants proved their judgment, writ of *fi. fa.* and return *nulla bona*, and that shares of the stock in the company stood in the defendant's name as holder in his own right on the books of the company.

The following is the certificate of stock held by defendant:

Organized under 27-28 *Vic.*, ch. 23, statutes of *Canada*.

No. 69 111 shares.

Shares $100 each.

The *Ontario Wood Pavement Company*, of *Toronto*.

This is to certify that James *Austin*, Esq., of *Toronto*, is owner of one hundred and eleven shares in the capital stock of the *Ontario Wood Pavement Co.*, of *Toronto*, transferable only on the books of the company, in person or by attorney, in the presence of the president or secretary, on the surrender of this certificate.

In testimony whereof the said company have hereunto caused their corporate seal to be affixed, and these presents to be signed by the president and secretary.

Toronto, Ont., September 29th, 1871.

H. Lloyd Hime, Secretary. *John Lamb*, Vice-President

{L. S.}

LIMITED.

The learned judge at the trial found that the stock in the books of the company appeared to be paid up, but in reality there was only ten per cent. in money paid on the stock.

He further found that the stock was only transferred to the respondent by way of security for the amount of Mr. *Arthurs'* debt, and that the respondent never intended to incur any responsibility with regard to any unpaid balance that might be due upon the stock.

A verdict was entered for the respondent.

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A rule *nisi* was obtained in the Court of Common Pleas to set aside that verdict, which rule is as follows :

It is ordered that the defendant, upon notice to be given to his attorney or agent, do show cause on the first day of Michaelmas Term next why the verdict for him, obtained in this cause, should not be set aside, and a verdict entered for the plaintiffs for $1,603, and interest from July, 1874, upon the ground that the verdict is contrary to law and evidence, and pursuant to leave reserved and the Law Reform and Administration of Justice Acts, or why a new trial should not be had between the parties, on account of the improper admission of evidence as to an alleged arrangement among the original shareholders as to the stock in question, and as to the terms on which the defendant accepted the stock.

And in the meantime that all proceedings be stayed.

That rule was made absolute on the 27th of June, 1879.

The Court of Common Pleas then gave judgment (1).

Wilson, C. J., states that the questions for decision are :

Firstly. Did the defendant take the shares from *Arthurs* as collateral security for the debt which *Arthurs* owed to him, and continue to hold them as such until the commencement of this action?

Secondly. If he did, should the fact that he was not absolute owner of the stock have appeared in the transfer of such stock to him or in the books of the company?

Thirdly. If it should, then, inasmuch as it did not so appear, had the defendant notice of these shares being in fact unpaid?

And the learned Chief Justice held :—1st. That the defendant took the shares as collateral security; 2nd. That the fact that he was not absolute owner should have appeared on the books of the company; 3rd. As this did not appear, and assuming as found by the judge who tried the case, that the stock had not been paid up, and that the defendant had notice of this fact, he decided that, in accepting an absolute transfer, defendant took upon himself the full responsibility of a shareholder.

Mr. Justice *Galt* concurred in this view, and the rule was made absolute.

(1) 30 U. C. C. P. 108.

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On appeal to the Court of Appeal for the province of *Ontario*, that court avowedly decided the case on a point not taken in the courts below nor in the reasons of appeal. It is thus stated by Mr. Justice *Burton*:

The defendant is sued in this proceeding by a judgment creditor of the *Ontario Wood Pavement Company*, whose execution was returned unsatisfied. It was claimed that the shares which had been transferred to the defendant by a transfer absolute in form, but which was intended to be as security only, were issued as paid-up stock to some of the contractors. It was not made very apparent upon the first argument how this was; but after the argument, Mr. Justice *Cameron* sent for the transfer book, from which it clearly appears that the stock held by the defendant consists wholly of new stock under the by-law of the 6th February, 1871, which recited that the whole of the original capital stock, amounting to $130,000, had been allotted and paid in, and that the company had determined to increase the capital stock to $250,000, and enacted that it should be increased accordingly.

Of the original stock of $130,000, $70,000 was first subscribed, and $7,000, or 10 per cent., paid. The subscription was subsequently made up to the full amount, of which the patentees took 920 shares, and in consideration of the other shareholders paying an additional 10 per cent., they agreed to pay up the balance of their shares.

This was carried out in the manner described in *Scales* v. *Irwin* (1).

In point of fact then the recital was untrue. The original stock was not fully paid up, and the right to pass the by-law increasing the capital stock never arose.

The question is, how far the present defendant, who pleads that he never was a stockholder, is in a position to raise that defence.

The power of the directors to increase the capital stock is derived from sub-sections 16, 17 and 18, of section 5 of the Act 27th and 28th *Victoria*, ch. 23, and arises only after the whole capital stock has been allotted and paid in, but not sooner, so that the by-law itself was in excess of the power of the directors; and it would seem by the 18th sub-sec. that the by-law, even when passed, is not to have any force or effect whatever, until after it has been sanctioned by a two-thirds vote of the shareholders at a meeting duly called, nor until a copy has been filed with the provincial secretary, and notice under his signature inserted in the *Gazette*, and from that time the new stock becomes subject to all the provisions of law in like manner

(1) 34 U. C. Q. B. 545.

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as though the same had formed part of the stock of the company originally subscribed.

The directors have no power to issue these shares, and there is no proof of the steps preliminary to the by-law becoming operative having been taken; and no shares having been legally issued, it is impossible to say that the defendant was a shareholder, unless on the ground of estoppel.

And on this question of estoppel the court held that the defendant was not estopped, by acceptance of the transfer, from questioning the legality of the issue, and on the ground that the plaintiff here is asking for a statutory remedy against a shareholder, and has failed to show that the defendant comes within the statutory definition they thought the case failed, and it became unnecessary to consider the points argued upon the appeal as opened.

Mr. Justice *Patterson* says:

This appeal turns upon a question not raised in the court below, and only suggested after the first argument before us. Had we only to consider the questions dealt with in the court below, my present opinion is that we ought to dismiss the appeal. The consideration which I have given to those questions has not led me to doubt the correctness of the judgment pronounced upon them. I cannot say, however, that I have considered them as maturely as if they were now to govern our decision.

Upon the newly suggested point, viz., the status of the defendant as a shareholder, I do not see how the plaintiff can suceeed.

It is plain from the evidence in *Scales* v. *Irwin* (1), which is taken as evidence in this case, that the original nominal capital of $130,000 was never paid. The power to make a by-law for increasing the capital stock was, by sub-sec. 16 of sec. 5 of the statute 27 and 28 *Vic.*, ch. 23, to arise "after the whole capital stock of the company shall have been allotted and paid in, but not sooner."

It also appeared from an examination of the books of the company, and the correctness of the deduction has not been impugned, that the company assumed to increase the capital, notwithstanding that the original capital had not been paid, and that the shares alleged to be held by the defendant are shares of the increased capital, and not of that originally authorized.

Mr. Justice *Cameron* concurred, without fully con-

(1) 34 U.C.Q.R. 545.

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sidering whether defendant might not have shown he was a mortgagee not liable to calls.

The judgment proceeds solely on the ground that the defendant is not a shareholder.

This is arrived at by assuming that it clearly appears that the stock held by defendant consisted wholly of new stock. And assuming that the old stock was not all paid up as plaintiff contends, and as the court below, and I think he, has established, the court held that the directors had no power to issue new shares till the old were all paid up; and also because section 18 requires a by-law increasing the capital stock to be sanctioned by a two-third vote of the shareholders and a copy to be filed with the provincial secretary and notice under his signature inserted in the *Gazette* before such a by-law could have any force or effect.

Had this case rested on the facts as they appeared in the Common Pleas, I should not, as at present advised, be disposed to disturb the judgment of that court. But, I cannot see how the difficulty suggested in the Court of Appeal, on which the judgment of that court is based, can be got over.

It seems to be clear, that Mr. Justice *Cameron* was right in the conclusions he arrived at, that the stock held by *Austin* was new stock issued under the by-law of 6th February, 1871, on the assumption that the old stock or previous issue had been allotted and paid in; if this was not all so allotted, as plaintiff now contends and claims to have established, the issue of the alleged new stock was clearly invalid and bad, and the defendant was not a shareholder in the company. But independent of this, the issue of the so-called "new stock" was also invalid and of no effect, by reason of a non-compliance with the provisions of the Act of Incorporation, without which a by-law such as that of the 6th February, 1871, for increasing the capital, could

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have, by the express terms of the Act, no effect whatever.

I quite agree with the court below, that when a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped, by the mere fact of having received transfers or certificates of stock he supposed to be in existence, from questioning the legality of the issue of such stock and from showing that he never was in law a shareholder liable to the debts of the company, because there never was any legal stock by which he could become a legal shareholder, so that he never filled the character to which alone the statutory remedy was given. The issue is clearly raised by defendant's second plea, in which he alleges "that there is not still due and unpaid by him on the capital of the said company the sum of $8,880, or thereabouts, or any sum whatever, as alleged," and which is necessarily so, if he is not a stockholder in the company.

STRONG, J.:—

This is a proceeding by *scire facias* by the appellants as judgment creditors of the "*Ontario Wood Pavement Co., of Toronto*," a joint stock company incorporated under the statute 27 and 28 *Vic.*, ch. 23, to have execution against the respondent as a shareholder whose stock has not been paid up for the amount of their judgment; a writ of *fieri facias* issued against the company having been returned wholly unsatisfied. The declaration alleges the respondent to be the holder of one hundred and eleven shares of $100 each in the capital stock of the company, upon which there still remains unpaid $8,880 or thereabouts. The respondent pleaded several pleas to the following effect: That he was not a shareholder as alleged. That no

sum whatever remained due and unpaid on his stock. That the shares were entered on the books of the company as paid up. That the respondent purchased the shares in good faith, believing the same to be paid up shares, and without notice that they were not so paid up. That the writ of *fieri facias* against the company had not been returned *nulla bona*. That the respondent held the shares as a trustee only. That one *George Arthurs*, being indebted to the respondent in a large sum of money, and being the holder of the shares in question, transferred the same to the respondent by way of collateral security to secure the debt, and the respondent now holds the shares as collateral security, and not otherwise. Upon these pleas issue was taken. At the trial before *Galt*, J., it was proved that the respondent took a transfer of the shares as collateral security for a debt due to him by *George Arthurs* and held them as a mortgagee, and not absolutely, and other facts as hereinafter stated were established in evidence. The learned judge before whom the cause was tried without a jury found a verdict for the respondent, reserving leave to the appellants to move to enter a verdict for the amount of their judgment, $1,603, and interest, if the court should be of opinion that, under the evidence given, the respondent was liable. A rule *nisi* having been obtained to enter a verdict accordingly, it was made absolute by the Court of Common Pleas. From this decision the respondent appealed to the Court of Appeal for *Ontario*, which court reversed the judgment of the Court of Common Pleas and ordered the rule *nisi* to be discharged. The present appeal is from the latter judgment.

The Court of Common Pleas, whilst holding that the respondent was, in fact, a mere mortgagee of the shares, held he was nevertheless in law liable as an absolute holder of them, inasmuch as it did not appear on the

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books of the company that they had been transferred to him by way of security, and that he was not entitled to avail himself of the provision contained in the latter part of clause 29 of the general provisions for the regulation of companies, prescribed by section 5 of the Act under which the company was incorporated, by which it was enacted that no person holding shares as collateral security should be personally subject to liability for calls, but that the person pledging such shares should be considered as holding the same, and should be liable as a shareholder accordingly. The Court of Appeal expressed no opinion upon the point which formed the *ratio decidendi* of the judgment of the Common Pleas, but founded their judgment upon a ground which does not appear to have been taken in the court below, viz. that there could be no liability upon the shares in question, even assuming the respondent to be an absolute holder of them, for the reason that they were void as having been illegally issued, being shares not in the original and legal capital of the company, but in an addition to the original capital which the directors had purported to make, but which increase or addition not having been made in conformity to the provisions of the statute but in direct violation of its terms, was wholly void.

The facts relating to the formation of the company, the increase of the capital, and the issue and transfer of the shares in question, as they appeared in evidence at the trial of this action, and upon the trial of the cause of *Scales & Irwin* (1), a proceeding similar to this, and the evidence in which was, by consent, read at the trial of the present case, may be summarised as follows: *The Ontario Wood Pavement Co* was incorporated in February, 1871, by letters patent issued under the authority of the statute already referred to (2).

(1) 34 U. C. Q. B. 546. (2) 27 and 28 Vic. c. 23.

The capital of the company was originally fixed at $130,000. Of this amount $70,000 was subscribed before the issuing of the patent, viz.: $35,000 by *William Wallace Perkins* and *Francis B. Fisher*, the owners of the patent for the invention which the company was formed to work, and $35,000, by seven subscribers of $5,000 each. *George Allan Arthurs* and *Humphrey Lloyd Hime*, hereafter to be mentioned as the persons from whom the respondent acquired the shares in respect of which he is sued in this action, were original subscribers each for $5,000. Ten per cent. upon the original subscriptions for shares was paid in in cash previously to the issue of the patent. Subsequently to the issuing of the charter of incorporation, and on the 6th of February, 1871, at a meeting of shareholders of the company held at the *Rossin* House, in *Toronto*, a resolution was passed which stands recorded in the minute book of the company in the following words:

Ordered that the offer of Messrs. *William W. Perkins* and *Francis B. Fisher*, representing the patentee of the Monitor Wood Pavement, to sell to this company the exclusive right to use and enjoy all the benefit of the said invention in the city of *Toronto*, for the sum of thirty-one thousand dollars in cash and nine hundred and twenty shares of the paid up capital stock of this company, be accepted, and the secretary-treasurer is hereby authorized to pay over to the said *W. W. Perkins* and *F. B. Fisher*, for the said assignment of the said patent, the said sum of thirty-one thousand dollars and nine hundred and twenty shares of paid up stock of the said company (such shares to include the three hundred and fifty shares subscribed by the said *W. W. Perkins* and *F. B. Fisher*) are hereby allotted to the said *W. W. Perkins* and *F. B. Fisher*, to be issued to them upon the due execution and registration of an assignment to the company of the said patent right for *Toronto*.

The following by-law for the increase of the capital stock of the company was then introduced and adopted:

No. 13—*A By-law to increase the Capital Stock of the Ontario Wood Pavement Company of Toronto.*

Whereas the whole capital stock of the said company, amounting

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to one hundred and thirty-thousand dollars, has been allotted and paid in; and whereas the said company have determined to increase the capital stock to the amount of two hundred and fifty thousand dollars, in order to the due carrying out of the objects of the company;

It is therefore enacted by the said the *Ontario Wood Pavement Company of Toronto*, that the said capital stock of the said company shall be and is hereby increased from the sum of one hundred and thirty thousand dollars, or thirteen hundred shares of one hundred dollars each, to the sum of two hundred and fifty thousand dollars, or two thousand five hundred shares of one hundred dollars each.

Dated this 6th day of February, A.D., 1871.

Confirmed. (Signed), *JOHN LAMB*, Vice President.
H. LLOYD HIME, Sec.-Treas.

At the same meeting a transaction was agreed to and carried out, which is thus described by Mr. *Hime*, who acted as the secretary of the company, in his evidence already referred to given in the case of *Scales* v. *Irwin*

The seven shareholders, that is all the members of the company but the two holders of the wooden pavement patent right, were to pay in an additional ten per cent. upon their stock, which would be equal to $3,500, and in consideration of that being done, the patentees of the right, who it was said had a large cash claim against the company for the price of the right which they had sold to the company, over and above their paid up stock of $35,000, were to pay up the balance of the unpaid stock of the seven shareholders, equal to $28,000, out of this cash claim. In pursuance of that arrangement each of the seven shareholders gave his cheque for the balance of his unpaid stock. The cheques were handed to Mr. *Hime*, the secretary, at that meeting. The secretary passed in the cheques to the patentees who accepted them and gave receipts to the company, or the shareholders, for the amount of the cheques. The patentees then handed back the cheques to the secretary with the receipts and the secretary delivered back the cheques to the shareholders who gave them.

The original subscribers for shares other than *Perkins* and *Fisher*, and three other persons, Messrs. *McMullin*, *Attwell* and *Smith*, who would appear to have become subscribers for original shares after the charter was obtained, paid in in cash an additional ten per cent. on the nominal value of their shares, making in all 20

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per cent. Each of the original subscribers of 50 shares thus paid in $1,000, but, except in the manner described in the passage from Mr. *Hime's* evidence in *Scales* v. *Irwin*, above extracted, there never was any payment of the residue of the amounts for which the shares were issued. There is no proof that the patent or patents which *Perkins* and *Fisher* were to assign to the company in consideration of their 972 shares, and of the $31,000 in cash, out of which the unpaid balances due upon the shares of the other original subscribers were to be considered as paid, were ever so assigned. The only evidence on this point is an instrument dated the 9th of February, 1871, which has been put in evidence and is printed at p. 25 of the case. It purports to be an agreement between the respondent, *James Austin*, of the first part, and the seven original shareholders, *Perkins* and *Fisher* the patentees, and the three other persons already named, Messrs. *McMullin*, *Smith* and *Attwell*, who, it is to be inferred, became subscribers for shares after the letters patent of incorporation were issued; and after a recital that *Edgar McMullin* had executed a transfer of even date to the said *James Austin* of the exclusive right to make use and vend in and for the whole of the Province of *Ontario*, except the city of *Toronto*, the new and useful improvement in the article now in use for paving streets, called or known as "The Monitor Wooden Sectional Pavement," for which letters patent were granted to the said *Edgar McMullin* on the 6th December, 1870, and that the said *James Austin* had agreed to hold the transfer of the letters-patent upon the trusts thereinafter contained, it was witnessed (amongst other things), that the said *James Austin* did thereby covenant and agree with the parties to the said agreement of the second part, that he, the said *James Austin*, should and would hold and stand possessed of the transfer and assignment of the said

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letters patent and all rights thereunder in trust for the sole benefit of the parties of the second part severally and their executors, administrators or assigns, in equal portions or shares. The company was no party to this instrument, and it contained no trust in favor of the company but an absolute and exclusive trust for the several individual shareholders, and the company consequently acquired no interest or benefit under it. This, for all that appears, may not have been the only patent assigned, and there may have been other assignments of the right to use and vend this patent as regards the city of *Toronto*, but I repeat there is no evidence of any such assignment and nothing to show that the company ever acquired any right to an interest in any patent, or that the agreement to assign the patent to the company referred to in the resolution of the meeting at the *Rossin* House was in any way carried out. At the time of the passing of the by-law of the 6th February, 1871, the whole of the shares in the original capital stock of $130,000 had been allotted, $35,000 of it having been taken up by the seven original shareholders who subscribed before the issue of the letters patent incorporating the company, $92,000 by the patentees, and the residue of the $3,000 it must be presumed had been allotted to the gentlemen who had become shareholders subsequently to the original sub scription. All subsequent issues of shares are, therefore, to be ascribed to the additional capital of $120,000 which this by-law of the 6th February, 1871, assumed to authorize the directors to raise.

Mr. *George Allan. Arthurs* was one of the original shareholders and, from the evidence, he appears to have acquired subsequently to the organization of the company and the adoption of the by-law relating to the increase of its capital, a large number of other shares in addition to those he originally held. Being indebted

to the respondent and being pressed by him for security, Mr. *Arthurs*, on the 29th September, 1871, executed a transfer to the respondent of 83 shares in this company then standing in his name in the books of the company, and also procured Mr. *Atwell* to execute a transfer to the respondent of 28 shares. Both these transfers were absolute on their face, but as well the learned judge before whom the action was tried, as the Court of Common Pleas, have, upon satisfactory and conclusive evidence, determined them to have been intended by way of security only. Neither the transfers nor the certificates for the shares which were delivered to the respondent describe the shares as fully paid up, and the only reasons which the respondent gives for the belief which he states he had, that the shares were paid up shares upon which he could incur no liability, are that they were represented by Mr. *Arthurs*, and also by *Perkins*, one of the persons interested in the patents, to be so paid up, and further, that he had a conversation about the shares with Mr. *Hime*, the secretary of the company, or some one in his office, which the respondent, in his evidence, states as follows:

> I think I spoke to Mr. Hime about it, and he told me it was paid up stock; I think it was in his office; I think I asked if it was paid up stock. I do not know whether it was Mr. *Hime* or the young man in his office that I asked. I never addressed any communication on the subject to the board of directors as a board.

All of these one hundred and eleven shares transferred to the respondent are clearly shown, by the exhibits which had been put in evidence at the trial, and which the Court of Appeal called for, to have been shares, not of the original capital, but of the additional capital which was assumed to be authorized by the by-law of the 6th February, 1871. At the time this by-law was passed, the original capital had, as before stated, all been taken up. It therefore follows that all

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shares originally issued subsequent to that date are *primâ facie* at least, to be presumed to be attributable to the added capital. All the one hundred and eleven shares in respect of which it was sought to make the respondent liable in this action are easily traced to original issues of shares made subsequently to the 6th February, 1871.

For the 83 shares directly transferred to the respondent by *Arthurs*—the latter held and handed over two certificates, Nos. 37 and 38—for 60 shares and 23 shares respectively. The counterfoil of the certificate book shows that these 83 shares were shares which had previously been held under certificate No. 52, which had been cancelled, the following words being printed and written on the counterfoil:—"This certificate is issued "on account of cancelled certificate No. 52." Then the counterfoil of No. 52 shows that certificate to have been for 550 shares, issued by the company as original shares to *H. L. Hime*, on the 20th February, 1871, the same day as that on which the transfer to *Arthur* was made. As regards the other 28 shares, the counterfoils of the same book show that for the shares which were originally issued to *Atwell* on the 20th February, 1871, three certificates Nos. 47, 48 and 49 were given, comprising respectively 9, 10 and 9 shares, and that these shares were transferred directly by *Atwell* to the respondent. Upon presenting the certificates for the 111 shares, of which he had secured a transfer from *Arthurs*, they were, according to the ordinary course of business, cancelled, and a new certificate was issued to the respondent—the counterfoil of the latter showing, as in former cases, that it was issued on account of the previous certificates Nos. 37, 38, 47, 48 and 49. In this way the shares which the respondent now holds under the transfer from *Arthurs* and *Atwell*, are clearly traced and identified as shares which were allotted and issued for the first time subsequent to the

passing of the by-law of the 6th February, 1871, and consequently at a date subsequent to that at which the whole of the original capital of $130,000 had been subscribed for and allotted. The conclusion is, therefore, inevitable, that these were shares in the increased amount of capital which the by-law was intended to authorize as an addition to that provided for at the time of the formation of the company.

The company, having performed some small contracts in the latter part of 1871, stopped their operations and virtually failed. The appellants are judgment creditors of the company, who, having had an "execution on their judgment against the company returned *nulla bona*," have taken this proceeding by *scire facias*, under sub-sec. 27, sec. 5, of the Act, to enforce their judgment against the respondent, as a holder of unpaid shares.

It was contended at the argument that these shares were, in the hands of the respondent, to be considered as paid up shares, and that the case of *McIntyre* v. *McCracken* (1), as decided in this court, was an authority for the respondent in this respect. A consideration, however, of the principle of the decision in that case, will show that it can have no application to the facts before us in the present appeal. *McIntyre* v. *McCracken*, following many English authorities, merely decided that the holder of shares which had been originally issued by the company as paid up in full could not be made liable, either to the company or to the creditors of the company, as for a debt due in respect of the shares, regarding them as having been issued as unpaid shares. In such a case, the directors who issue the shares are no doubt guilty of a breach of trust, and the shareholder who takes them is a participator in such breach of trust, and may be made jointly liable with the directors therefor. But the remedy is the usual equitable

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

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remedy in such cases, of a decree for the restoration of the property (the shares) illegally alienated, or of their value in the event of their having passed into the hands of a *bonâ fide* purchaser without notice (1). This remedy can be enforced by a suit in the name of the company and, in the case of a winding up under the English Companies Act, by the official liquidator suing in the name of the company. It cannot, however, be made available by a judgment creditor against a holder of shares improperly issued as paid up, by treating such shares as unpaid, and making the holder thereof liable thereon under the 27th clause of the general provisions of sec. 5 of the Act under which this company was incorporated. That clause is as follows:—

> Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company to an amount not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholders.

It is manifest that this provision cannot entitle a creditor of the company to enforce a payment against a holder of shares issued as paid up, though such issue was a breach of the duty of the directors of the company. There can be no liability to payment unless there is a debt to be paid, and there can be no debt if there is no contract to pay. Then, in the case of an agreement to take unpaid shares, and an issue of the shares upon the terms of such agreement, it cannot be said that there was any contract to pay for the shares so issued. To fix the shareholder with a liability in such a case would be to impose upon him a contract he never entered into. The only contract is to take paid up shares, and, as shown by *Mellish*, L.J., in *Carling's* case, no other contract can be presumed

(1) *Carling's* case, 1 Ch. D. 115. Per Mellish, L. J.,

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in order to make the shareholder liable. The principle is concisely stated in the following passage extracted from the judgment of *Mellish*, L. J., in the case just referred to, he says:—

> If, therefore, the case depends on a contract between them and the company, the contract must either be approbated or reprobated. If the contract was a contract that they would take paid up shares, we cannot convert that into a contract to take unpaid shares.

This, also, appears to be one of the *rationes decidendi* of the case of *Waterhouse* v. *Jamieson* (1), although that case may also be supported on another ground hereafter to be considered, for Lord *Chelmsford*, in his judgment, rests the decision expressly on the ground that no shareholder can be called upon to do more than perform his contract with the company, and "that you cannot, alter the terms of the agreement under which you seek to fix a person with liability" (2). This was also the the ground of Lord Justice *Turner's* decision in *Currie's* case (3).

There are, no doubt, American authorities which, at first sight, are contradictory to those just mentioned. But on examination it will be found that, so far from controverting these principles, they proceed upon a doctrine which is not applicable in our law. In a very recent case in the Supreme Court of the *United States*, *Scovill* v. *Thayer* (4), this question was under consideration, and Mr. Justice *Woods*, in delivering the judgment of the court, says:—

> No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid on a fair understanding, and that bound the company. In fact, it has been held in recent English cases that not only is the company, but its creditors also, are bound by such a contract.

And he refers to *Carling's* case, *Currie's* case, and

(1) L. R. 2 Sco. App. 229.
(2) Campbell on Sales p. 550.
(3) 32 L. J. Ch. 57; 3 DeG. J. & S. 367.
(4) 15 Otto 154.

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Waterhouse v. *Jamieson*, already cited and then proceeds :—

> But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside ; that when their rights interfere and their claims are to be satisfied, the stockholders can be required to pay their stock in full. The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors.

And the learned judge then refers to cases in support of this last proposition ; and, amongst others, to *Wood* v. *Dummer* (1), which is the leading authority. In the case of *Wood* v. *Dummer*, Mr. Justice *Story*, for the first time, determined that the capital and assets of a corporation were to be considered as a trust fund for the payment of its creditors. It follows, as a necessary consequence of this principle, that any unauthorized application of the capital or assets is a breach of trust as regards the creditors, and is of no avail against them, though authorized by all the shareholders of the corporation, and not merely by the directors or governing body, and that holders of unpaid shares, though issued as paid up, can still be made liable by creditors for the nominal value of the shares. This doctrine has not been adopted by the English courts as part of the general law, and, except in so far as the Companies Acts and the enactments relating to the winding up of insolvent companies have otherwise provided, the property of a corporation or joint stock company is not regarded as a trust fund for the payment of its general creditors—nor have creditors any other or greater rights in respect of such property than every creditor has against the property of an individual debtor (2). This being the state of the law, it is out of the question to say that the American rule, sound and wholesome as it undoubtedly is, can be applied here

(1) 3 Mason 308.

(2) *Mills* vs. *Northern Ry. Co.*, L. R. 5 Ch. 621 ; Taylor on Corporations secs. 658 and 749.

without legislative authority—a legislative provision applying it to all corporations and joint stock companies might perhaps be considered a very beneficial alteration of the law—but without statutory authority it is beyond the power of the courts to adopt and act upon it. To do so would be nothing less than to assume legislative powers. The result is, that whilst in *England*, when a winding-up order has been made, the official liquidator as representing the company can, by a proceeding in equity, make directors, who have, by gratuitously issuing shares as paid up, been guilty of a breach of trust, liable for the value of the shares, and also make the holders of such shares who have taken them directly from the company, or with notice, liable to the same extent as participators in such breach of trust, and thus recover the value of the shares as part of the assets to be applied for the benefit of creditors, and whilst in the *United States* the creditors, as *cestui que* trusts of the assets, have a direct remedy against unpaid shareholders, though they have contracted to take paid up shares and nothing else, in the present state of our law neither of these remedies is attainable, and creditors have neither a direct remedy to compel holders of paid up shares to make good the breach of trust in which they have concurred, nor can they, for the reason already given, make the shareholders liable as upon a contract to the terms of which they never agreed.

If the statute contained anything which would enable the court to say that either expressly or by implication a holder of shares issued as paid up, though in truth unpaid, should be liable, then, undoubtedly, there would be a liability, not founded on contract, but on the statute. The statute does not, however, contain any provision, either expressly or by implication, which can be so construed. The words "not paid up," in the 27th

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sub-sec., must mean and are to be read as implying a debt to the company "not paid up," and it is out of the question to say, upon the reasoning already stated, that there can be any debt to the company when the contract has been to take paid up shares and nothing else.

There is, however, another ground of defence in the present case, for which *Waterhouse* v. *Jamieson*, *McCracken* v. *McIntyre*, and other cases, are invoked as authorities. It is said the respondent took the shares in question for valuable consideration, believing them to be paid up, and without notice to the contrary. *Primâ facie* all purchasers and transferees of shares take them *cum onere*, and are bound by all legal and equitable liabilities attached to them.

When, however, shares improperly issued as paid up have come into the hands of a subsequent transferee as a *bonâ fide* purchaser for value, who has taken them upon the representation of the proper officers of the company made to him directly, either in answer to enquiries or otherwise, or upon the faith of a written representation appearing on the certificates, that the shares are paid up, it is well established that no liability, either at law or in equity, attaches to the shares in the hands of such an innocent purchaser. Numerous cases, both in *England* and the *United States*, warrant the decision of this court in *McCracken* v. *McIntyre*, to the effect just mentioned, and it is manifest that were it not for such a rule the transfer of property in shares would be so affected as greatly to impair its value (1).

The right to the benefit of this protection thus afforded to *bonâ fide* purchasers is, however, liable, as in all other similar cases, to be defeated by notice, pro-

(1) *Steacy* v. *Little Rock*, 3 Dill. 348; *Forman* v. *Bigelow*, 4 Cliff. 508; Morawitz on Corporations, pp. 556, 557.

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vided such notice emanates from a person qualified to give it, and is sufficient to convey to the purchaser before he pays his money a knowledge of facts which constitute a *primâ facie* case of liability. There is, however, no necessity for notice, unless the transferee can show that he took the shares as paid up shares upon the faith of representations to that effect, not representations by his vendor or immediate transferor, but upon representations by the company, made through its properly authorized officers, either in writing on the certificates or otherwise, or verbally in response to enquiries. If the shares are purchased as paid up, in reliance merely upon the assurance of the transferor or of some third person, that they are paid, it is manifestly impossible that such representations can have any effect on the liability of the purchaser to the company or its creditors. In such case, as *primâ facie* in all cases, he takes the transfer subject to all liability which attached to the shares in the hands of the transferor. In order to require notice there must be an equity in favor of the purchaser which notice is required to countervail, and that can only arise from some representations made by the company in the way already indicated.

Then, coming to the application of these principles of law to the facts of the present case, it is at once apparent that they afford no defence to the respondent. Assuming that the shares in question were part of the original capital of $130,000, it cannot be disputed as a fact that these shares were not originally issued as unpaid; that, on the contrary, they were shares, as were all the shares of the original capital, allotted on the understanding, agreement and contract that they were to be paid for in full, and the only pretence for saying that they were subsequently paid up, is the fraudulent and illegal contrivance of a colorable payment which was resorted

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to at the meeting at the *Rossin* House; which, upon its face was, as all the courts below have held, no payment at all, and of which, as I shall have to consider it a little more fully hereafter in connection with another part of the case, I need say no more about at present. This is sufficient to show that the first point adverted to before, as established by *Carling's* case, *McCraken* v. *McIntyre*, and other cases, that the shares having been originally issued as paid up shares there never was any contract, express or implied, to pay for them, is entirely inapplicable here. Equally clear is it that the defence of purchase for valuable consideration without notice, pleaded by the third plea on the record, is not established. That plea may possibly not be good on general demurrer, and it may be said, as issue has been taken on it, and as this is an appeal from a decision on a motion for a new trial, or to enter a verdict, and as there has been no motion for judgment *non obstante*, it is only open to us to enquire if there was, in fact, notice to the respondent, and that it is not open to this court to determine that the facts proved do not show a case entitling the respondent to notice as a condition of his liability. The answer to this, however, appears to be, first, that we must so construe the plea as to read it as setting up a good legal defence, which would require us to add to the allegation that the respondent purchased believing the shares to be paid up shares the implied allegation, "and having good reason for so believing," or some equivalent statement. But it would seem that we are relieved from all difficulty on this head by the 1st section of the statute of 1880, which would authorize us now, if the decision of the appeal depended on it, to make all such amendments of the record as might be necessary to raise the substantial questions of law as well as of fact which are essential to the determination of the real questions in dispute between the parties.

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Then, if the propositions of law which have been before stated are correct, it was incumbent on the respondent, before he was in a position to say that he purchased the shares under such condition as entitled him to hold them free from all liability which had attached to them in the hands of the persons from whom he acquired them unless notice could be proved by the appellants, to show that he purchased on the faith of a representation made by the company or its officers that the shares had been paid up. There is, however, no proof that any such representation was ever made. The respondent clearly was not justified in relying on the statement of Mr. *Arthurs* to that effect, nor was *Perkins*, if he ever in fact told the respondent that the shares were paid up, in a position to make such a representation. He was merely one of the directors, not a managing officer entitled to speak for the company on such a matter, and a statement made by him did not warrant the respondent in neglecting the obvious means of ascertaining the fact by an enquiry of the secretary or other proper officer of the company.

There is nothing to be found in the evidence shewing that any such enquiry was made, except the following passage in the respondent's own evidence. He says:

I think I spoke to Mr. *Hime* about it and he told me it was paid up stock. I think it was in his office I think I asked if it was paid up stock. I do not know whether it was Mr. *Hime* or the young man in his office that I asked. I never addressed any communication on the subject to the board of directors as a board.

This is entirely insufficient to show that any representation was, in fact, made by Mr. *Hime* or by any official of the company. Mr. *Hime* was examined as a witness, but says nothing about any inquiry of this kind by Mr. *Austin*. There is, therefore, an entire absence of evidence to show that Mr. *Austin*, the respondent, when he took the transfer, had any just grounds for believing the stock to have been paid up. He must,

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therefore, be considered, so far as he is to be treated as an absolute transferee of valid shares, as having taken the transfer subject to the same liabilities the shares were subject to in the hands of *Arthurs*, and it was not requisite to prove notice to him in order to fix him with liability.

In the case of *Waterhouse* v. *Jamieson*, it will be found that the certificates for the shares transferred expressly stated that they were paid up, and in every case, when notice to the transferee has been considered requisite, there was either this fact, or a representation to the same effect, shown to have been made by some authorized officer of the company.

If the shares transferred to Mr. *Austin* have been successfully identified as shares not of the original capital of $130,000, but of the additional $120,000, by which the stock was pretended to be increased by the by-law of the 6th February, 1871, passed at the *Rossin* House meeting, there is really no shadow of a pretence for saying that they were paid up. As regards the shares in the original $130,000 stock, it is true that there was a simulation of payment by the transaction relating to the transfer of the patents, and the alleged assumption of the liability for the debts of the original subscribers by the patentees over and above the 20 per cent. actually paid in cash. But as regards the added amount of $120,000 it is not shown that there was even a resolution of the shareholders, or even of the directors—ineffectual though they would both have been—that the shares were to be considered as paid up. Nothing is said as to it except the statement of Mr. *Hime* that all the shares were entered as paid up in the books of the company, which have so mysteriously disappeared. The evidence of *Perkins* as well as that of Mr. *Hime* himself, shows that these shares were not paid up in cash. There is nothing to show that the shareholders, as a body, or

the directors, ever authorized such an entry, and we must, in the absence of the books, regard it as extremely improbable that any such entry was ever made, or come to the conclusion that if it was made it was false and fraudulent. These considerations, coupled with the fact that the shares are most satisfactorily traced back and ascertained to form part of the pretended additional stock under the authority of the by-law, make the presumption inevitable that no representation was ever made to Mr. *Austin*, by any one having authority from the company to make it, that the shares he was about taking a transfer of were actually paid up.

This disposes conclusively of the points which were made at the argument, based on the authority of *Carling's* case and *McCracken* v. *McIntyre*, and of the propositions that the shares were either issued as paid up, or were, in fact, paid up subsequently to their issue, as well as of the argument founded on the insufficient proof of notice.

There remains to be considered the two questions which were discussed in the courts below; the legal consequences of the transfer having been by way of mortgage or security merely—which was alone argued and adjudicated upon in the Court of Common Pleas—and the question of the respondent's liability in case it appears as a fact that the shares were part of the added capital provided for by the by-laws, this latter being the only point decided by the Court of Appeal.

The learned judge before whom the cause was tried found that the "transfer was made to Mr. *Austin* as security for Mr. *Arthurs*' debt to him," and this finding was confirmed by the Court of Common Pleas. The evidence, that of the respondent himself and of Mr. *Leys*, who acted as the solictor of Mr. *Arthurs*, was amply sufficient to warrant these findings.

The fact being then established that the respondent

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was a mere mortgagee of the shares and not an absolute holder, and the statute (sub-sec. 29, sec. 5), containing the express enactment—

> That no person holding such stock as collateral security shall be personally subject to such liability, but the person holding such stock shall be considered as holding the same and shall be subject to liability accordingly—

the question arises whether the respondent has, by taking a transfer absolute in form, though intended to operate as a security merely, and by causing it to be entered in the books of the company as an absolute transfer, incurred liabilities to the company and its creditors which the statute in the provision just cited expressly declares he shall not be subject to as a mortgagee merely. The Court of Common Pleas determined this point against the respondent, and held that, as he had caused this transfer to be entered on the books as an absolute transfer, he must be held to be an absolute holder of the shares, and that it was not open to him to show, in answer to the action of the appellants, that he was but a holder of it for the purposes of collateral security. A careful consideration of the statute has led me to form a contrary opinion, for the following reasons. The statute contains nothing expressly requiring that the entry or registry in the books of the company should show the nature of the transaction to be a mortgage or pledge in order that the mortgagee or pledgee should be able to entitle himself to the protection accorded by the 29th clause of sub-sec. 19 of sec. 5. If, therefore, we are to hold, as the Court of Common Pleas has done, that the respondent was bound to see that his transfer was registered as a mortgage, and that by not having done so he has lost the right to avail himself of the exemption from liability conferred on mortgagees by the 29th clause, it can only be on the principle that such registration is required by implication, or because the respondent is

estopped from showing the facts as they really were. To warrant us in adding a clause to the statute by implication, something more than mere inconvenience must be shown. It must appear that such proposed addition is a necessary incident or a logical consequence of the express enactments of the statute, but nothing of the kind is established here. It is said that the transfer must be taken to be an absolute transfer unless it is registered in the books of the company as a mortgage only, for the reason that the right to vote would appear by the books to be in the transferee, and not, as the statute says it shall be, in the mortgagor. This, however, is merely to suggest an inconvenience. The statute does not say that the entries of transfers on the books of the company shall be conclusive as to the ownership of shares, for the purpose of determining the right to vote. Therefore, to say that a mortgagor or pledgor is to be excluded from voting because the transfer to the mortgagee or pledgee is registered as an absolute title, is to assume the very question now in dispute, which is, whether the mortgage character of the transfer may be shown by parol evidence, although it is absolute in form, and has been registered as such. In the case of the right of a registered holder of shares to vote being challenged on the ground that he is a mere mortgagee, the right, as in many other cases to be easily supposed, must, for the reasons to be presently given, depend upon actual facts *aliunde* the entry in the company's books.

The 23rd clause of sub-section 19, however, seems to be decisive in favor of the respondent. It enacts that :

> Such books shall be *primâ facie* evidence of all facts properly purported to be thereby stated in any suit or proceeding against the company or against any shareholder.

The statute itself, therefore, contains an enactment which destroys the argument that the entry or registry

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as an absolute transfer is to be conclusive and binding on the transferee ; for in saying that the books are to be *primâ facie* evidence only, it necessarily implies that they may be controverted or explained by other proof. It is therefore impossible, in the face of this express declaration that the books are to be *primâ facie* evidence, to say that they are to be conclusive evidence.

The whole argument, which appears to me to be fatal to the appellants' contention, may be resumed thus: The respondent's liability depends upon whether he was an absolute holder of the shares, or a mortgagee merely. If there was nothing in the statute as to the effect of the books as evidence, and apart from the question of estoppel, to be considered hereafter, that question would have to be determined like every other question of mortgage or no mortgage, by the proof of facts according to the general rules of evidence, and in the circumstances of the present case, by the parol testimony of witnesses. The statute, however, does make an exception to the general rules of evidence, by declaring that the books shall be evidence of all facts purporting to be thereby stated in any suit or proceeding against any shareholder, but only to a limited extent ; that is to say, they shall be *primâ facie* evidence, which expression *ex vi termini* necessarily implies that a fact established by them may be rebutted. Let us suppose that the converse case had arisen and that instead of being, as it is in the present case, the mortgagee whom the creditor seeks to make liable, it was *Arthurs*, the mortgagor, could it for be a moment pretended that he was not liable, under the express provision of the statute that the holder of shares who transfers them by way of pledge or mortgage only shall be considered as being still the holder, and shall continue liable in respect of them accordingly, merely by reason of the transfer being absolute in form, and the

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entry or registry being limited to the particulars of the transfer? Surely not. Then, if parol evidence would be admissible to show that *Arthurs* was liable as mortgagor, it is clear that the same kind of evidence must be admissible to prove that the respondent is not liable as mortgagee, the only alternative being one that the statute does not contemplate, save in the single case provided for by clause 21, of a transfer executed but not registered—a double liability to creditors on the part of both mortgagor and mortgagee. It appears to me, therefore, not only that the proper construction of the statute is that which the learned counsel for the respondent have contended for, but that, having regard to the exigencies of business, which frequently make it necessary, in the course of transactions entered into upon sudden emergencies and requiring immediate despatch, that shares shall be transferred by way of security by informal instruments, prepared without professional assistance, it is a more convenient construction than that which would make the intervention of a legal agent indispensable in every case for the due protection of the mortgagee. In the late case of *Burgess* v. *Seligman* (1) the Supreme Court of the *United States* held that parol evidence was admissible to show a transfer of shares, absolute in form to have been intended by way of security merely.

Another and distinct ground for the same conclusion is that, whilst the statute by sec. 5 sub-sec. 29 provides in the terms already mentioned that the mortgagee shall not be liable, it also provides by sec. 5, sub-sec. 25, that the company shall not be bound to see to the execution of any trust, whether express, implied, or constructive in respect of any shares. The just inference from this is that the company are entitled to refuse to register a transfer of shares as a mortgage, as they certainly are

(1) 107 U. S. 20; See also *McMahon* v. *Macey*, 51 N. Y. 155.

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entitled to refuse to register a transfer as being made in trust—for I am of opinion that the word "trust" in this 25th sec is not used in any technical or narrow sense, but generally as embracing all transfers other than those for the behoof of the transferee absolutely. The transfer in the present case was therefore registered in the only form in which the company could have been legally compelled to register it.

The objection that the respondent is estopped by the registry of the transfer as an absolute assignment, seems as little founded as the one already discussed and disposed of. Indeed, the answer already given to the contention based upon the statute, involves a refutation of this one also. The indispensable elements of an estoppel *in pais* are well established to be that there must be a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he is dealing, and the additional fact that the latter shall have so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it. It may be conceded that if it had been shown that the respondent had actually represented himself to be an absolute holder of the shares in question, and the appellants, creditors of the company, had brought their action relying on the truth of that assertion, the respondent would have been concluded from contradicting his representation and from showing the facts as they really were, upon the ground that the bringing the action was such an acting on the representation induced by the conduct of the respondent in making it as to constitute an estoppel (1).

(1) *Finnehan* v. *Canaher* on Estoppel, 47 N. Y. 493; *Hall v. White*, 3 C. & P. 136; Bigelow on Estoppel Ed. 3, p. 557.

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But granting that the second ingredient of an estoppel *in pais*, that just adverted to, is sufficiently established, the very foundation upon which such a mode of concluding the rights of parties rests is wanting, for where is to be found the representation or statement of the respondent which must be the basis of the estoppel? The only pretence of which the facts admit for saying that the respondent ever represented himself to be an absolute holder of the shares in question is, that he in effect did so by causing himself to be entered on the books of the company as a transferee of them, without showing by the same entry that the transfer was by way of mortgage merely. But the effect to be given to such an entry or registry is, as already pointed out, expressly declared by the 23rd clause of sub-sec. 19 to be, that it shall be *primâ facie* evidence only against the shareholder, the words *primâ facie* indicating, as already shown, that it is not to be conclusive or binding, but may be contradicted, qualified, or explained by evidence on the part of the shareholder. Consequently, such an entry can have no greater effect than a written representation directly made by the shareholder to the creditor, that he was a transferee of the shares, but reserving to himself the right of showing in what character he held them, and of thus qualifying or explaining the instrument of transfer, could have had, and in the case supposed there could, of course, be no ground for saying that any binding representation had been made. In short, the argument by which it is sought to show that the respondent is concluded by an estoppel is directly met by the clause of the statute already referred to, which expressly warns the creditor not to rely on the entry in the books as a statement intended to be conclusive.

To establish an estoppel, it is indispensable that the appellants should show that a binding representation of

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the character in which the respondent held the shares should be made. The only evidence of such a representation is the entry in the books, and the statute expressly says that such an entry shall be only *primâ facie* evidence, which is equivalent to saying that it shall not have a conclusive or binding effect. Therefore to give it such a conclusive operation would be directly to contravene the statute.

It is not pretended that the plaintiffs became creditors upon the faith of the appellant's name appearing in the shares' account contained on the books, or that they ever inspected the books before permitting the company to incur liabilities to them. Indeed, they had no right to inspect the books until after they became creditors. There is a marked difference in this respect between the provisions of the English Companies Act and the statute, which applies in this case, for by the English Act the shares registers are made public records and are open to public inspection on the payment of a very small fee; but by this statute of 27 and 28 *Vic.*, ch. 23, as already noticed, a public inspection is not authorized, and a party must be a creditor before he has a right to examine the share book.

The reasons given in the American cases for holding that the mortgagee—transferee of shares who registers absolutely is liable upon the principle of estoppel as holding himself out as an absolute owner of the shares cannot apply in the present case. This doctrine is apparently derived from the law of partnership, which, although affording an analogy in the case of a joint stock company which is said to be a compound of a partnership and a corporation, can have no application to the case of a corporation whose creditors in certain events are entitled to a statutory subrogation to the rights of the corporation against the shareholders, since the liability of the shareholders de-

pends upon the letter of the statute. But if such a principle was generally applicable to a corporation it could not apply to a company incorporated under this statute in the face of the warning contained in the provision that the books were to be *primâ facie* evidence only; that they were not to be conclusively relied on; and in the present case at all events it could not be said that there was any holding out a representation sufficient to found an estoppel, since the transfer was registered in the only form in which the company was bound to register, and, as it must be assumed, would have consented to register a transfer by way of security.

The consequence is, that neither by the statute nor by the application of the doctrine of estoppel is the respondent precluded from showing, by parol evidence, the fact that he was a mere mortgagee of the shares and as such not liable for further payments, and that fact he has, to the satisfaction of all the courts before which this cause has come, sufficiently established by evidence which could leave no doubt in any judicial mind.

For these reasons I come to the conclusion that if the decision of this appeal depended upon the single question which the Court of Common Pleas considered, I should be compelled, with great respect, to differ from the opinions of the learned judges of that court.

The Court of Appeals, however, decided in the respondent's favor, upon another ground already stated, and I concur with that court, for the reasons which they gave, in holding that the appellants were not entitled to recover. It requires very little in the way of argument to show that the pretended increase of the capital stock of the company from $130,000, the amount at which it was originally fixed by the charter, to $250,000, under the by law of the 6th February, 1871, was wholly illegal and void. The 16th clause of the general provisions which the statute enacts this com-

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pany shall be subject to, and which it requires to be set forth and embodied in the letters patent, is as follows:

The directors of the company, if they see fit at any time after the whole capital stock of the company shall have been allotted and paid in, but not sooner, may make a by-law for increasing the capital stock of the company to any amount which they may consider requisite, in order to the due carrying out of the objects of the company, but no such by law shall have any force or effect whatever, until after it shall have been sanctioned by a vote of not less than two-thirds in amount of all the shareholders, at a general meeting of the company duly called for the purpose of considering such by-law, nor until a copy duly authenticated shall have been filed, as hereinbefore mentioned, with the Provincial Secretary or such other officer as the Governor in Council may direct.

These requirements were beyond all question not complied with. First, it does not appear that the meet- of shareholders at which the by-law was adopted or confirmed, was called for the purpose of considering the by-law. Then it is not shown that a copy was filed with the provincial secretary. But even if these objections could have been surmounted by supplying the defects in the evidence, there would remain the fatal and insurmountable objection that an indispensable condition precedent to the right of the company to increase its capital had not been complied with. The whole of the original capital had not been paid in.

From the statement of the evidence already given, it is apparent that there is no pretence for disputing this fact. The pretended payment of the amounts of the shares which had been allotted at the date of the *Rossin* House meeting, the 6th February, including the 920 shares subscribed for by the patentees, was, as it was found by the learned judge before whom the action was tried, wholly illusory. Had it been found that the patentees actually assigned to the company valuable patents for the price agreed on, and that they had then agreed that their account should be debited with the amounts due in respect of the shares held by the other

subscribers as well as themselves, there might have been some ground for considering whether there had been a *bonâ fide* payment in full or not. But there is not a scintilla of evidence to show that the patents were ever transferred to the company. From the only assignment given in evidence, it appears that the contrary was the fact, for instead of being an assignment to the trustees in trust for the company in its corporate capacity, it was an assignment to the trustees in trust for certain named shareholders of the company. It does not, therefore, appear that any property in the patents ever passed to the company. This being so, it is manifest that the handing of the cheques to the patentees (as they have been called) and by them back to the company, as described in Mr. *Hime's* evidence, was a mere manipulation of pieces of paper in the form of cheques and which were never intended to be used as cheques, and could have had no legal effect whatever. It therefore follows that the entries made in the books showing that the shares were paid up were fraudulent, and if so the officers making the same incurred the penalties enacted by the 24th clause of the 19th general provisions of the charter for making false entries in the books of the company. The by-law purporting to provide for the increase of the capital stock was, therefore, wholly *ultra vires* and void, and there never was any increased capital, and the pretended shares which the compay afterwards assumed to allot, and which are referable to the increased capital, never had any real existence.

Then the Court of Appeal have found that the respondent's shares are attributable to this illegal capital, and a careful examination of the evidence will demonstrate that this conclusion is entirely correct.

It appears very clearly from the exhibits called for by the Court of Appeal, and particularly from the

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counterfoil of the certificate book, that all the 111 shares held by the respondent, and which were transferred to him by *Arthurs*, either directly or procured by him from *Attwell*, were shares which had been originally allotted and issued by the company on the 20th February, 1871. Then it is also shown by the books of the company, which, as already repeatedly shown in discussing another branch of the case, are by force of the statute *primâ facie* evidence in any suit or proceeding against the company or any of its shareholders, that the whole of the original shares amounting to $130,000 had been subscribed and allotted at the time the by-law of the 6th of February was passed, for this fact is recited in the by-law, and the by-law is duly recorded in the minute books of the company. Moreover, Mr. *Hime* in his evidence states the same thing. There being no evidence to controvert this, the conclusion is inevitable that all of the certificates delivered to the respondent were for shares in the void and illegal capital.

It only remains therefore to enquire what must be the legal effect of this state of facts. Upon this point also I entirely concur in the conclusion of the learned judge of the Court of Appeal, for nothing can be clearer that no legal liability can be attached to the mere holding of certificates for void shares—which are nothing more than certificates for shares which do not exist and which never existed.

This is a proposition of law so self-evident that it seems superfluous to cite authority in support of it. I may, however, refer to Lord Justice *Lindley's* work on Partnership (1), where it is laid down that:

> The holders of shares which the company have no power to issue in truth hold nothing at all and are not contributories. The only possible ground for holding them to be contributories would be by applying to them the doctrines by which a person who holds himself

(1) P. 1349 Ed. 4.

out as a partner incurs liabilities as if he were a partner. These doctrines would probably suffice to render an apparent member of an unincorporated insolvent company liable as a contributory in it; but they have little if any bearing on the statutory liability of persons to be made contributories in incorporated companies, in respect of shares which do not exist in point of law.

And that the doctrine of estoppel has no application in such circumstances is apparent from the case of the Bank of *Hindustan* v. *Alison* (1), a case which, it is true, was subsequently found to have been decided on in an erroneous statement of facts, but which has not, so far as I have been able to ascertain, ever been questioned as an authority for the doctrine in support of which it is now referred to. In *Scovil* v. *Thayer* (2), the Supreme Court of the *United States* decided this point in the same way.

For the foregoing reasons I am of opinion that the judgment of the court below must be affirmed and this appeal dismissed with costs.

FOURNIER, J. :—

Il est clair que l'émission des actions dont il est question en cette cause a été illégalement faite. Le pouvoir donné aux directeurs, en vertu de l'acte 27 et 28 *Vict.*, c. 23, d'augmenter le stock d'une compagnie ne peut être exercé, en vertu des sub-sections 16, 17 et 18 de la section 5, qu'après que le capital originaire a été entièrement réparti (*allotted*) et payé. Il est bien établi que tel n'a pas été le cas pour le montant du capital originaire de $130,000. Les actions de *Austin* sont démontrées faire partie de la nouvelle émission du stock, en vertu du *by-law* du 6 Fév. 1871, et sont en conséquence nulles, parce que le *by-law* lui-même est nul comme fait en contravention au statut. *Austin* n'a jamais été de fait légalement actionnaire dans la compagnie. Pour cette raison, je suis d'avis que l'appel doit être renvoyé,

(1) L. R. 6 C. P. 54 and 222. (2) 105 U. S. 143.

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HENRY, J.: -

There are two issues joined on the pleadings in this case to which I turn my attention. In the first place, to ascertain whether under these two issues the plaintiffs in this action have established a right to call upon the defendant to pay the judgment debt set out in their declaration. Having satisfied my mind as to those two issues, I concluded that it was unnecessary to go into any of the subsiduary ones, I therefore did not perhaps sufficiently consider the question of estoppel, but still at the same time I formed the opinion that the doctrine of estoppel was not applicable to the position of the respondent here. He had received shares as paid up shares, and there was no action taken by him which the plaintiffs in this action could say affected their conduct, and therefore one of the principles on which the doctrine of estoppel was set up was wanting; the evidence on one point was altogether absent.

There are two points, however, of importance to be considered, and I so thought on the argument—that was in the first place whether this respondent was the holder in his own right of shares of the company. My learned brethren who have preceded me have decided that he was not, and in that conclusion I entirely concur. The whole of the stock he held was stock issued which subsequently was shown, on the evidence that was given in another case, referred to, and part of the evidence in this case, to have been issued irregularly and illegally, and it is clear that the party holding stock can in such case say to the company: "You had no right to issue that stock, I am not a stock holder," and if he can say that to the company, he can say it to the creditors of the company, and it is a good answer to an action brought by the creditors, for it is only the owner of stock—that is stock legally issued—that can be made answerable. Now in the

case of the Bank of *Hindustan* v. *The Imperial Bank of China* (1), the court allowed interest on money had that been paid by the party who purchased stock from one of the companies, that stock having been illegally issued. The decision of the court was, that he was entitled, not only to get back the money that he had paid for it, but also interest upon that money. I consider, then, that the party here was not answerable to the parties in this action for the stock, but, after the exhaustive judgments that have been read, I will not go into the matters referredto in the judgments which have preceded mine.

As to the second point I may say generally I consider that under the law, the mortgagee of stock is not answerable to the creditors, he is the mere holder of stock undera lien, and is not the owner, and that the owner is not discharged from his liability to pay up the balance of the stock to the company or for the debts due by the company. I think, therefore, that *Arthurs* is the owner of the stock here, with a legal lien upon it by the transfer. The question is, was the evidence here sufficient to establish legally that proposition? I consider that it was. I do not consider that it was necessary that it should have been so entered in the books of the company. As my learned brother *Strong* said, there is *primâ facie* evidence of what they contend, but the mere fact of its being made *primâ facie* evidence shows that it is capable of being rebutted. Here the party has rebutted it by oral testimony. Now, it is well known that a deed absolute on its face may be shown by parol evidence to have been as between the parties only, a mortgage. I consider here, then, that as between *Arthurs* and the respondent, notwithstanding what was entered in the book, and notwithstanding that he became by the issue of a certificate to him subsequently nominally the owner of the stock, it was competent for *Arthurs* at any time

(1) L. R. 6 Eq. 91

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to have said to the respondent, "Return me this stock. Here is the money you advanced me on account of it, and here is the amount for which I gave it to you as security." It was therefore to all intents in law a mortgage. I do not think the intention of the statute was to hold persons in that situation answerable for the debts of the company. That principle is well seen in the legislation in regard to mortgages on ships. There it is declared specially that mortgagees shall not be considered owners for the purpose of debts, or for any other purposes than as the mere holders of security. The same principle that we find in the legislation on this point, I think, is perfectly applicable in cases of joint stock companies. So, to say that if it should become necessary to alter the dealings between *Arthurs* and the respondent, that that should be shown in the books, I do not think is a proposition that is well grounded. It can be shown independent of the books altogether, and no matter what the entries in the books are, the true position between *Arthurs* and the respondent, I consider, can be and has been established by oral evidence. Therefore, I think, in the first place, this party was not the owner of the stock, because it was not good stock. It was stock that was issued illegally for several reasons that have already been pointed out in the judgments in the court below, and in the judgments that have been delivered here to-day, and that I consider would be sufficient to answer the plaintiffs claim, but as mortgagee again I consider he was not answerable. Under all the circumstances, the appeal should be dismissed with costs.

TASCHEREAU, J.—I am of opinion to dismiss this appeal with costs.

GWYNNE, J. :—

I have been unable to bring my mind to the same

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conclusion as that arrived at by my learned brothers in this case.

The action is in the nature of *Scire facias quare executionem non*, brought by the plaintiffs as judgment creditors of the *Ontario Wood Pavement Co.* against the defendant as a shareholder in the company, and claiming satisfaction of their judgment out of the monies remaining unpaid upon the shares held by the defendant in the capital stock of the company under the provisions of the Statutes of *Canada*, 27th and 28th *Vic.*, ch. 23, the 27th section of which enacts that:

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

To an action alleging the defendant to be a holder of shares in the company upon which a sum still remained unpaid more than sufficient to satisfy a judgment recovered by the plaintiffs, which remained unsatisfied, and that a *fieri facias*, issued to obtain satisfaction of the judgment out of goods and chattels of the company, had been returned *nulla bona*, the defendant pleaded as follows:

1. That he was not a stockholder in the said company as alleged.

2. That there is not still due and unpaid by him on the capital stock in the said company any sum whatever.

3. That one *George Arthurs* was the holder of 111 shares of the capital stock of the said company amounting to the sum of $11,100, and was entered on the books of the said company as the holder thereof, and on the said books the said shares were entered as shares fully paid up, and that the defendant purchased the

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said shares from the said *George Arthurs* in good faith and for valuable consideration, believing the same to be fully paid up shares, and without any notice or knowledge that the same were not so fully paid up.

4. That the said writ of *fieri facias* in the declaration mentioned, has not been returned *nulla bona* as alleged.

5. That the stock held by him and referred to in the declaration was and is held by him as trustee merely and not otherwise, and other than such stock so held by him as trustee, the defendant never had and has not any shares or stock in the said company.

6. That one *George Arthurs* being indebted to the defendant in a large sum of money, and being the holder of the shares in the declaration mentioned, transferred the same to the defendant as collateral security merely for such indebtedness and not otherwise, and the defendant accepted the said shares and has always held and now holds the same as such collateral security merely and not otherwise, and other than the said shares the defendant never held and has not now any shares or stock in the said company.

Issue having been joined upon these pleas, the case came down for trial before Mr. Justice *Galt*, without a jury, under the provisions of the consolidated statutes of Ontario (1). At the trial a Mr. *Hime*, who had been one of the directors, and also secretary of the company, was called as a witness, and the transfer of shares book kept by him as secretary of the company having been produced, it appeared that the shares held by the defendant were shares assigned to him by prior holders. The transfers assigning the shares to the defendant were as follows:

TRANSFER No. 27.

For value received, I, *George A. Arthurs*, of *Toronto*, do hereby assign and transfer to *James Austin*, of *Toronto*, eighty-three shares

(1) Ch. 50 sec. 253.

of capital stock of the *Ontario Wood Pavement Co.*, of *Toronto*, standing in my name in the books of the company.

In testimony whereof I have signed these presents at *Toronto* this twenty-ninth day of September, A.D. 1871.

Witness—*H. Lloyd Hime.* *Geo. A. Arthurs.*

TRANSFER No. 28.

For value received, I, *William J. Attwell*, of *Montreal*, do hereby assign and transfer to *James Austin*, of *Toronto*, twenty-eight shares in capital stock of the *Ontario Wood Pavement Co.*, of *Toronto*, standing in my name in the books of the company.

In testimony whereof I have signed these presents at *Toronto* this twenty-ninth day of September, A.D. 1871.

Witness—*H. Lloyd Hime.* *W. J. Attwell*, per his Attorney. *Geo. A. Arthurs.*

The evidence given by this witness in another case of *Scales* v. *Irwin* (1), was read as if taken in this suit. From that evidence and the evidence given by him in the present suit it is sufficient to say that in substance it was to the effect that Mr. *Arthurs* was an original shareholder in the company. In fact he was one of the original subscribers named in the agreement upon which the letters patent issued. That agreement was signed by him as a subscriber for fifty shares of $100 each in a capital stock of $130,000, and, at the time of the transfer of the 111 shares to the defendant, *Arthurs* appeared in the books of this company to be holder of 163 shares. That, in fact, although the capital stock of $130,000 as originally contemplated had not been paid up in full, nor had more than 10 per cent. thereof been paid, an arrangement was come to by and between the original subscribers, of whom *Arthurs* was one, whereby the original capital stock should appear to be paid in full, although, in fact, no more than 10 per cent. had been paid upon it, in order that the company should pass a by-law, which accordingly they did pass, increasing the capital stock to $250,000.

(1) 34 U. C. Q. B. 545.

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This arrangement, it may be added, was decided in *Scales* v. *Irwin* to have been in substance a fraudulent device to defeat the claims of creditors of the company, like the plaintiffs in this suit, obtaining payment of their just demands against the company. The defendant having been called upon to produce, did produce the certificate issued to him by the company upon the assignment to him by *Arthurs* of the 111 shares, which certificate is as follows:

This is to certify that James *Austin*, Esquire, of *Toronto*, is owner of one hundred and eleven shares in the capital stock of the *Ontario Wood Pavement Co.* of *Toronto*, transferable only on the books of the company in person or by attorney in the presence of the president or secretary on the surrender of this certificate.

In testimony whereof the said company have hereunto caused their corporate seal to be affixed, and these presents to be signed by the president and secretary.

Toronto, Ont., September 29th, 1871.

{L. S.} *H. Lloyd Hime*, Secretary. *John Lamb*, Vice-President.

A Mr. *Perkins* was examined as a witness to show *Arthurs'* connection with the company, and the manner in which, and the extent to which, he became interested therein, and also to show the defendant's knowledge of the condition in which the stock held by *Arthurs* stood when the defendant took an assignment of the one hundred and eleven shares. The witness was himself one of the original promoters of the company, and a subscriber to the agreement upon the strength of which the letters patent issued incorporating the company, to the amount of $18,000 dollars, or 180 shares. He says that *Arthurs* was one of the original promoters of the enterprise of the company, and was a shareholder at the outset. He received about ten or eleven thousand dollars of the stock par value, he subscribed for it, over one hundred shares, the fact is his actual subscription did not exceed ten thousand dollars of the stock par

value, but he had more stock than he subscribed for, and he paid on that subscription not to exceed 10 per cent. in cash, that was all he ever paid in any shape. Again he says:

Mr. *James Austin* was solicited by Mr. *George A. Arthurs* and myself to become one of the parties to the organization of the company, to become one of its directors and stockholders. Mr. *Arthurs* and myself told Mr. *James Austin* repeatedly how the company was to be organized, and how it was organized. I was in the habit of visiting Mr. *Austin's* and Mr. *Arthurs'* houses in *Toronto*, during the winter of 1870 and 1871 and nearly always meeting Mr. *Austin* at Mr. *Arthurs'* house when I was there. Mr. *Arthurs* was Mr. *Austin's* son-in-law.

Again he says:

On several different occasions in the presence of Mr. *Arthurs* I requested Mr. *Austin* to become one of the directors of the company and to invest money in the enterprise. I stated to him that only 10 per cent. of the amount of the subscription would be called for in cash, as that was all any of the subscribers were to pay; that the balance of the subscriptions to stock would be considered paid by the conveyance of the patents to the company. Mr. *Austin* always declined to become one of the shareholders, stating that he had no time to give to it, and that he was engaged in the organization of a banking company at the same time. He asked during these conversations how this stock was to be paid and made all enquiries as to its conditions, and I told him, and Mr. *Arthurs* told him that with the exception of the 10 per cent. in cash, the balance was to be paid by patents—the transfer of patents to the company. Mr. *Austin* did not at that time become a shareholder. The organization of the company was perfected and the stock issued upon the basis I have stated. Mr. *Arthurs* was one of the directors of the company and received the amount of stock subscribed for by him. The 10 per cent. paid in was by arrangement with Mr. *Austin* deposited to the credit of the company in the *Dominion* bank, of which Mr. *Austin* was president, the arrangement was made with Mr. *Austin* for this deposit by Mr. *Arthurs*, Mr. *H. L. Hime* and myself. Mr. *Austin* was told by me and the others were with me that this 10 per cent. so deposited was all the money that was to be paid on account of stock subscriptions. The deposit was placed there to the credit of the *Ontario Wood Pavement Co.*, of *Toronto*. Late in the summer, or early in the fall, I think it was in September, (I am not certain) of the year 1871, Mr.

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Austin came to me and stated that Mr. *Arthurs* was owing him a considerable sum of money, I think $10,000. I am not certain that he did state any sum, and Mr. *Austin* stated that Mr. *Arthurs* wanted him take or had offered him this *Wood Pavement Co's.* stock as a payment or part payment on account of his indebtedness, and asked me what I thought of it, the prospects of the company, and the value of the stock. He asked me how *Arthurs* obtained the stock and if it was fully paid stock. I told him that it was issued as fully paid stock, and that the certificates so stated on their face, that the company had some valuable contracts, or were about getting them. I do not remember whether at that time the contracts had been actually obtained by the company, but they were obtained at about that time. Mr. *Austin* knew at that time whether the contract had been obtained at the time or not, he was perfectly conversant with the operations of the company and its prospects. At this interview, that is at its conclusion, Mr. *Austin* stated to me that he considered the stock a good investment at fifty cents on the dollar, and that he thought he should take the stock from Mr. *Arthurs.*

And being asked:

Did Mr. *Austin* advance any money to Mr. *Arthurs* to help him to make the 10 per cent. payment on his, *Arthurs'*, stock?

The witness answered as follows:

When Mr. *Arthurs* made his last payment on account of the 10 per cent. that he paid on his stock subscription, he handed me a cheque for an amount considerably less than the amount that would have completed his payment, with the request that I would hand it to Mr. *Austin* for deposit in the *Dominion* bank to the credit of the *Wood Pavement Co.*, and to ask Mr. *Austin* to deposit for him Mr. *Arthurs'*, the balance to make up the sum required to be paid. It was necessary that the full amount should be paid that day, in order to answer the requirements of the charter of the company, so much had to be deposited, subsequently Mr. *Austin*, as president of the *Dominion* bank, certified that the amount required by law to be deposited had been deposited within the time required.

The defendant having been called as a witness on his own behalf, the following question was put to him:

Did you know anything about whether this stock was or was not paid up?

To which he replied:

I knew nothing about it, when I took the stock I asked *Perkins* and *Arthurs*, and *Perkins* told me that there was nothing but paid up stock, that it was all paid up.

To the following question:

Mr. *Perkins* in his evidence says that he told you all about the details of the company's affairs, is this correct?

He replies:

I do not think he ever told me anything about it, I had no reason to ask him. He may have talked over a lot of things that I took no interest in. I do not know, I have no recollection of it. He told me that the stock was paid up; whether he had reference to the directors or the shareholders stock, I do not know. That was just before I took this stock. No one told me before I took it that the stock was not fully paid up. I never heard that. If I had been told I would have been a little more particular in having it marked on the thing itself.

And being asked:

Have you not ascertained since this matter has been under discussion that you did arrange to get the 10 per cent. that he (*Arthurs*) paid in to get it from your bank?

He answers:

I know nothing of it, I have heard it stated so in *Perkins's* evidence, but it is not true.

To the question:

Can you swear positively that it is not true?

He answers:

No, I cannot. I have not looked into the bank books to ascertain. Without search among my bank books and papers. I will not swear that I did not, but I believe that I never did. It is a good many years ago. I have still my cheques. I am still president of the *Dominion* bank. I may have given Mr. *Arthurs* a cheque for some money, but for what I do not know. I cannot swear positively that there is no material there to show that I did.

Being asked:

Why did you not search when you saw what *Perkins* stated?

He replied:

I did not think his evidence was reliable. I do not think he is a reliable man. I took this stock only as security, and I thought it was paid up stock. I did not think there was any liability on my part, or I would not have touched it at all.

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And being asked:

Did you think, as a matter of fact, that he (*Arthurs*) had put $10,000 or $11,000 into that concern in money to pay that stock up?

He replies:

I did not think so at that time. I thought the probability was that there was some arrangement between them. I did not know what that arrangement was. Probably that he should be paid something for his services. I had heard that. I thought he had paid some cash on it, but I did not know what he had paid. I did not think he had paid the whole $10,000 or $11,000. I did not know anything about it, and therefore I had no right to think. He might or he might not. I do not know that it was that which made me enquire from *Perkins*. I never saw the books of the company. I think I spoke to Mr. *Hime* about it, and he told me it was paid up stock. I think it was in his office. I do not know whether it was Mr. *Hime* or the young man in his office that I asked. I never addressed any communication to the board of directors as a board.

Being asked:

Will you swear that *Perkins* did not say to you that it was issued as paid up stock, was not that the way of it?

He replied:

He said it was all paid up stock, I could not undertake to remember the very words that *Perkins* used; I will not swear what was the expression he used, but I know that he led me to believe that the stock was paid up. He intended to convey that idea to me I know, because I told him that I was going to take the stock as security. I took the stock because I could get nothing else. I did not think it was worth much, I thought it was worth probably thirty cents on the dollar, at all events I thought it was better to take that than take nothing. There was no arrangement between my son-in-law and me about this stock.

Again he says:

There was no instrument in writing showing the arrangement between Mr. *Arthurs* and myself.

Arthurs' solicitor, through whom the arrangements had been completed, having been asked as a witness by the defendants, said:

Mr. *Arthurs* was indebted to Mr. *Austin*, and wanted to give him security for what he owed him. He had an interest in his father's

estate and some other claims. The proposal was that he should transfer these to Mr. *Austin* as security for what he owed him. The transfer was made. The bargain itself was not put in writing. The transfers of the different properties were put in writing, Mr. *Arthurs* would transfer the stock and interest in his mother's estate; there was no writing showing the transaction except the transfers.. There was no writing to show that it was a security.

Witnesses were called by the defendant to impeach the credibility of the witness *Perkins*, but nothing turns now upon this evidence, for Mr. Justice *Galt*, before whom the case was tried, considered such evidence to be unimportant, as he said it was not upon *Perkins'* evidence he should decide the case.

A document was given in evidence by the plaintiff, dated the 9th February, 1871, and made between the defendant of the first part, *John Lamb*, *James David Edgar*, *John Day Irwin*, *David Galbraith*, *James Sauin McMurray*, *Humphrey Lloyd Hime*, *James Edward Smith*, *George Allan Arthurs*, *Edgar McMullan*, *William Jesse Allswell*, *William Perkins*, and *Francis Burton Fisher*, of the second part, whereby the respondent became trustee of the letters patent for the "new and useful improvement on the art now in use for paving streets called the "monitor wooden sectional pavement," upon the trusts therein declared in favor of the several parties of the second part, the persons then constituting the *Ontario Wood Pavement Co.*, of *Toronto*.

At the close of the trial Mr. Justice *Galt* rendered a judgment in the following words:

I find that by the books of the company the stock appeared to be paid up, but that in reality there was only 10 per cent. in money paid on the stock. I find that the transfer was made to Mr. *Austin* as security for the amount of *Arthurs'* debt to him. I find that the defendant never intended to incur any responsibility with regard to any unpaid balance that might be due upon this stock. This finding and the one before it are subject to the objection taken by Mr. *Bethune*, that parol evidence is not admissible to prove that Mr. *Austin* held it

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merely as security. Therefore I find a verdict for the defendant, but the plaintiff, of course, can move to enter a verdict for the amount of $1,603 and interest from July, 1874, if the court shall be of opinion that under the evidence given Mr. *Austin* is liable.

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Upon a rule *nisi* obtained to set aside this verdict for the defendant and to enter a verdict for the plaintiff, pursuant to leave reserved and the Law Reform and Administration of Justice Acts, the Court of Common Pleas, in which court the action was brought, after argument, made the rule absolute whereby it was ordered that the verdict be set aside and a verdict entered for the plaintiffs for $1,603, with interest thereon from the 25th day of July, 1874, the court being of opinion that the defendant was liable to the plaintiffs under the provisions of 27th and 28th *Vic.*, ch. 23, as the transfer to him was absolute and not stated to be by way of security, and as the defend ant had procured to be issued to him a certificate to the effect that he was absolute owner of the stock; and the court held that he did not come within the protection of the final clause of sec. 29 of the Act. The court were also of opinion that upon the evidence the defendant, at the time of the transfer of the shares to him, had actual notice that they were not, in fact, paid up in full Mr. Justice *Galt*, who tried the case and who also gave judgment upon the rule, when pronouncing his judgment, said (1):

I entered a verdict for the defendant at the trial on the ground that the transfer was made to him as security for the amount of Mr. *Arthurs'* to him, and because he never intended to incur any responsibility with regard to any unpaid balance that might be due upon the stock. The transfer of the stock in question was absolute on its face, and there was nothing on the books of the company to show that Mr. *Arthurs* retained any interest in it. He had, as far as the books of the company were concerned, ceased to be a shareholder, and the stock is in the name of the defendant.

The learned judge might have added, that no instru-

(1) 30 C. P .119.

ment, or writing of any nature, had ever been signed by either of the parties to the transfer to show that any intention was entertained by either of them at the time of the transfer that the transfer should be anything different from, or have any effect different from, what upon its face it purported to be, and to have—that is to say, to be, and to have the effect of, an absolute unconditional transfer to the defendant as sole owner of the shares in his own right and to his own sole use The learned judge, drawing attention to the clauses of the Act, arrives at the same conclusion as the learned Chief Justice of the court had done, that the defendant, by accepting an absolute transfer of the shares, took upon himself the responsibility of a shareholder.

From this judgment the defendant appealed to the Court of Appeal for *Ontario*, in which court it was contended that the judgment was erroneous for the following reasons: that, as contended upon behalf of the defendant, the stock was, in fact, shown to have been fully paid up; that the mode of payment was a matter of agreement between the company and the shareholder; that it was for the company to say what equivalent they should accept for stock, whether money or money's worth, property, services, &c., and that it was not disproved that in some way or other the stock in question was paid and satisfied to the company; that if, as between the shareholder and the company, the stock is paid up or satisfied, there is no principle upon which it can be questioned by a creditor; that if questionable for want of *bona fides* between the company and the shareholder, yet it is not so against a transferee for value in good faith without notice; that the defendant had no notice that the shares were not fully paid up; that the stock was held by the defendant as security only, and that he is protected by section 29 of the Act; that the judgment complained of pro-

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ceeds upon the assumption that the Act required that the fact that the stock is held as security should be in writing and appear in the company's books; that there is no such requirement in the statute—nor does the law require it; that the intention of the legislature was to make beneficial ownership the condition of liability to creditors; that the restriction adopted by the judgment is unnecessary and productive of inconvenience and injustice, and would interfere with that freedom in the use of property which trade and commerce require.

Now, from the above statement of the matter presented by the defendant himself to the several courts for adjudication, it is obvious that his sole contention at the trial, and on the argument of the rule *nisi* to set aside the verdict then rendered for the defendant, and upon the appeal from the rule absolute of the Court of Common Pleas setting it aside and ordering a verdict to be entered for the plaintiffs, was that the shares transferred to the defendant were shares which were paid up in full and which were acquired by him as such and as collateral security only for a debt due to him by the assignor of the shares, and that under these circumstances he was, by the 29th section of 27 and 28 *Vic.* ch. 23, exempt from liability.

Such a point as that upon which the Court of Appeal for *Ontario* proceeded, while declining to express any judgment upon the point which was submitted to it by the defendant in the case as settled upon his appeal, never had been suggested in any stage of the cause, and the facts, upon the assumption of the establishment of which, by entries in the books of the company unexplained, the judgment of the court is rested, never had been tried in the court below, or found to be existing facts, nor had any question been submitted by the defendant in the action (the now appellant) relating to the point upon which the judgment of the Court of Appeal

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was given. The point, in fact, first suggested itself to one of the learned judges of the Court of Appeal, who, after the argument had taken place upon the case as settled between the parties and the reasons of appeal submitted therewith, sent for the transfer book of the company, from a perusal of which the court arrived at the conclusion, that the shares which the defendant insists he holds in good faith, as fully paid-up shares and as security for a debt due to him, are in reality no shares at all, and that his security for his debt, equally as his responsibility to the plaintiffs, is a delusion. In pronouncing the judgment of the Court of Appeal, Mr. Justice *Burton* shows how the point arose. He says there :—

After the argument Mr. Justice *Cameron* sent for the transfer book from which it clearly appears that the stock held by the defendant consists wholly of new stock, under the by-law of the 6th February, 1871, which recited that the whole of the original capital stock, amounting to $100.000, has been allotted and paid in, and that the company had determined to increase the capital stock to $250,000, and enacted that it should be increased accordingly. Of the original stock of $130,000, $70,000 was first subscribed, and $7,000 or 10 per cent. paid. This subscription was subsequently made up to the full amount of which the patentees took 920 shares, and, in consideration of the other shareholders paying an additional 10 per cent., they agree to pay up the balance of their shares. This was carried out in the manner described in *Scales* v. *Irwin*, reported in 34 U.C.Q.B. 545. In point of fact then the recital was untrue, the original stock was not fully paid up, and the right to pass the by-law to increase the capital stock never arose.

Then at the close of the judgment he says :

The defendant is entitled upon this objection to have the judgment reversed and this appeal allowed, but, as the point upon which we have decided the case was not taken in the court below nor in the reasons of appeal, it should be without costs.

Now, assuming it to have been clearly established, as alleged in this judgment, and in that of Mr. Justice *Patterson*, that the shares transferred to the defendant consisted wholly of new stock, purported to be issued

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under the authority of the by-law of the 6th February, 1871, it does not appear to me to be so clear that the court was justified in giving to the defendant, as against the claim of the plaintiffs, the benefit of an objection never made by him, but suggested by the court itself, while certain matters of fact upon which the validity and sufficiency of the objection must necessarily rest had never been brought into contestation and tried. Assuming that there does appear in the books of the company sufficient to warrant the conclusion at which the court arrived as a conclusion of fact, the utmost which, under the circumstances, I think, the court should have done was under the provisions of the 22nd sec. of ch. 38 of the Revised Statutes of *Ontario* to have put the questions of fact upon which the validity and sufficiency of the objection suggested by the court rested into a course for trial in due form of law, as they never had been tried, and to have thus given to the plaintiffs an opportunity to produce evidence, if they could, for the purpose of establishing that the defendant had such knowledge of the acts of *Arthurs* in the organization of the company, and of his participation in the acts of the members of the company which made the issue of the shares illegal, as should preclude him from setting up the illegality of those acts to deprive himself of the shares for the purpose of defeating the plaintiffs' action. The plaintiffs have, as it apppears to me, just reason to complain that the objection taken by the Court of Appeal upon which the plaintiffs'action has been dismissed never was taken by the defendant or tried, and that they have been deprived of all opportunity of offering evidence of the defendant having had such knowledge of the participation of *Arthurs* in the illegality attending the issue of the shares as should deprive him of all benefit from the objection. The objection to the

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stock issued under authority of the by-law of the 6th February, 1871, whereby the capital stock of the company was increased from $130,000 to $250,000 is, that the increase was made contrary to the provisions of the 16th sec. of 27th and 28th *Vic.*, ch. 23, whereby the directors were authorized to pass a by-law for increasing their capital stock beyond the amount of $130,000 originally authorised when the whole of the original capital should be allotted and paid in, and not sooner. The reason, therefore, for the second issue having been *ultra vires* of the directors is, that the whole of the original capital was not paid in, although it was recited in the by-law that it was, and such recital was untrue. Now the evidence in this case and in *Scales* v. *Irwin*, which was read by agreement in this case, is in my judgment sufficient to establish, as it appeared to the court in that case, that the device whereby it was sought to make it appear that, contrary to the fact, the whole original capital was paid up, was a fraudulent device designed for the express purpose of endeavouring to protect the shareholders in this company from the claims of judgment creditors of the company like the plaintiffs. *Arthurs* was a party to that fraudulent contrivance, and if the plaintiffs' claim were now asserted against him, if he were now the holder of the shares which he transferred to the defendant, I am not prepared to assent to the proposition that he could be heard to set up as a defence to the plaintiffs' claim the nullity of the issue brought about by his own participation with his co-directors in the fraud which caused the nullity of the issue; and if the defendant had notice of the fraud of *Arthurs* and his co-directors, and took the transfer of the shares with knowledge of such fraud, I am not prepared to say that it would be competent for him, any more than it would be for *Arthurs*, to set up and rely upon the fraudulent

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conduct of the latter for the purpose of defeating the plaintiffs' claim. Whether the defendant had or had not notice of the fraudulent design and contrivance of *Arthurs* and his co-directors, is a question which never has been tried, and, in my opinion, it should be tried before the defendant can be relieved from liability to the plaintiffs upon the ground upon which the judgment of the Court of Appeal has proceeded.

Mr. Justice *Burton*, in his judgment above quoted from, says:

> If, in the present case, the defendant had known all about the manner in which the increased stock had been issued, and with that knowledge had accepted the transfer, it might well be that he might be estopped from setting up the want of power in the directors as a defence to an action by the company, or on an application to place him on the list as a contributory on winding up, but nothing of the kind is established here.

But that nothing of the kind is established here may well be attributed to the fact that no such objection as that under consideration was ever made by the defendant, who alone could make it if it could be made at all. The plaintiffs had only to give—as they did give—evidence that the defendant appeared to be a holder of shares in the capital stock of the company, the whole of which was not paid up, and the unpaid amount of which was sufficient to satisfy the plaintiffs' judgment in whole or in part. Having presented such a *primâ facie* case the *onus* lay upon the defendant to make such a defence as he intended to rely upon as displacing such case. Not having made any of the nature of the objection to the plaintiffs' recovery which was taken by the Court of Appeal for *Ontario*, and upon which that court gave their judgment, it is not surprising that matters which would be only applicable for the purpose of displacing such objection do not appear in the evidence which was taken in respect of an wholly different defence, and upon an wholly different

issue. But without going so far as to say that sufficient does appear to attribute to the defendant knowledge of the fraudulent design of the original shareholders in making arrangement for the distribution of the original capital stock and, for its increase, I think I am justified in saying that there does appear much in the evidence as taken which, unless it should be satisfactorily explained, tends to such a conclusion, and which should be submitted to a proper tribunal for enquiring into the truth of the matter before the defendant should have the benefit of being considered to be, equally as if he had been proved to be, a transferree of the shares without notice of such fraud, upon an issue raising that question. The evidence of Mr. *Perkins* is of a nature, as it appears to me, to require a better answer than has been offered to it. Mr. *Hime* was referred to by *Perkins* as having been present at some or one of the conversations testified to by *Perkins*, as having been had between him and *Arthurs* and the defendant, and if called, as he might have been by the defendant, he could have confuted or confirmed *Perkins* upon the matter in connection with which he had referred to *Hime*; and, if *Perkins* be a credible witness, theextent of the defendant's knowledge of the organization of the company, and of the distribution of the shares and of the number originally agreed to be taken by *Arthurs*, and upon which he paid the 10 per cent. thereon through the defendant, as is said, into the *Dominion* bank, has to be considered before the defendant can be relieved from liability in this action, if knowledge should be brought home to him of facts which would subject *Arthurs* to liability to the plaintiffs if he was the defendant in this action, and still the holder of the shares transferred by him to the defendant. The answers of the defendant to the questions put to him relative to his assistance to *Arthurs* to enable him to pay the 10 per

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cent. on the stock subscribed for by him, and of which he agreed to become the holder are, to my mind, by no means satisfactory.

In the absence of any contention having been raised by the defendant of the nature of that suggested by the Court of Appeal on his behalf as against the plaintiffs' claim, I am of opinion that that court should have given to the plaintiffs, and that they should now have, if they desire it, an opportunity to have an enquiry made and issue joined and tried, as to the knowledge or notice the defendant had, if he had any, of such acts of *Arthurs* in connection with the organization of the company and the distribution of the shares therein, as if he (*Arthurs*) was still the holder of the shares in question and defendant in this action would deprive him of the right to insist that the shares were illegally issued, and that he was not, for that reason, liable to the plaintiffs in respect of them. The liability or non-liability of the defendant, in case he had such knowledge, raises a question which I do not think the record and evidence as they stand warrant the expression of an opinion upon, and as the defendant himself never suggested the defence now relied upon on his behalf, I think he should be ordered to pay all the costs of the former trial and of this appeal; for considering the case upon the basis upon which it was presented by the defendant himself for trial and was tried, and upon which it was argued in the Court of Common Pleas, upon which basis alone it was also presented to the Court of Appeal, I am of opinion that the judgment of the Court of Common Pleas is put upon sound principles and ought to be sustained.

I am of opinion that the 29th section of 27th and 28th *Vic.*, ch. 23, applies only to mortgagees or trustees appearing upon the books of the company so to be, and to cases where shares appear to have been pledged as collateral security, the owner of

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the shares still appearing on the books of the company to be the proprietor thereof, subject to the pledge, and does not apply to the case of shares absolutely transferred upon the books of the company from one person to another, as the unconditional owner thereof, whatever secret understanding there might be between the parties, that the transferee should hold the shares so transferred as a pledge only, and collateral security for a debt. I am of opinion, however, that the proper inference to be drawn from the evidence in this case, is that there was no agreement between *Arthurs* and the defendant, that the latter should hold the shares transferred to him as a pledge only, or as a collateral security for the debt due to him by *Arthurs*, but that the intention of both parties to the transaction was, that the defendant should be, in fact, as upon the books of the company he appeared to be, absolute proprietor of the shares transferred, the transfer of which, as of the interest in lands, transferred in like manner, the defendant took in substitution for the original debt, and as he himself says in his evidence, "because he could get nothing, and that it was better to take what he got than take nothing."

Appeal dismissed with costs.

Solicitors for appellants: *Bethume, Moss, Falconbrigde Hoyles.*

Solicitors for respondent: *Rose, Macdonald, Merritt & Coatsworth.*