Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Arsène A. Larocque v. *Hyacinthe Beauchemin and others, from the Superior Court for Lower Canada, Province of Quebec, sitting in Review; delivered 7th April* 1897.

Present:

LORD HERSCHELL.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.

[*Delivered by Lord Macnaghten.*]

The Appellant is the liquidator of a Company called La Compagnie de Papier de Sorel incorporated in 1886 under an Act of the Provincial Legislature of Quebec known as "The Joint "Stock Companies Incorporation Act." The authorized capital stock of the Company was $100,000 divided into 1,000 shares of $100 each. The subscribed capital was $55,000 or 550 shares.

The Respondents are some of them shareholders and the rest the representatives of deceased shareholders in the Company. The shareholders whose representatives are parties to the action together with those of the Respondents who were themselves shareholders were the promoters of the Company. From them the Company bought the property upon which it carried on its business; and they held the whole of the subscribed stock with the exception of 50 shares belonging to Mr. Finlay the manager.

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The action was brought to recover from the Respondents in their individual or representative capacities sums amounting in the aggregate to $25,000. The relief sought was based on fraud and nothing else. The Declaration in the action stated that although the nominal and ostensible price of the property was $35,000 the real price actually paid was $10,000 only and it charged that the property was in fact worth no more; the difference according to the statement in the Declaration was accounted for in the books of the Company by means of entries which the Appellant as Plaintiff alleged to be false and fictitious making it appear that the promoters had paid up their shares in full while $25,000 still remained unpaid.

The facts are not in dispute. The property had belonged to a Company called "The St. "Lawrence Pulp and Paper Company" which failed almost immediately after it commenced operations. The liquidator put the property up for sale by auction in March 1886. It was then bought by or on behalf of four persons interested in the old Company for the sum of $9,000. The purchasers entered into communication with certain persons described by the Respondent Beauchemin who was one of their number as "capitalists" with the view of forming a new Company and re-establishing the business. M. Beauchemin was called as a witness by the Plaintiff. He said that the four purchasers represented that the property which they had bought was worth $50,000 but that he would not take it at that price and as the result of negotiations it was agreed that the property should be sold to the new Company as soon as it was formed for $35,000 and that the difference between that sum and the auction price which by the addition of interest and incidental expenses was brought up to $10,000 should be for the benefit of the promoters of the new Company

that is for the four purchasers and M. Beauchemin and his friends.

The evidence as to value was clear and uncontradicted. A M. Pontbriand a manufacturer living in Sorel who was interested in the old Company was called for the defence. His firm he said had made the machinery and put it up. He knew the property well. Including land buildings and machinery it had cost about $80,000 a sum which unfortunately exhausted the whole of the capital of the Company. He valued the property at the time of the liquidation of the old Company at $41,150. At the time of the sale the machinery was in perfect order but the buildings required some slight repairs, which might cost $1,000 or so. For the purpose of a paper manufactory the property was he considered worth $40,000. It would have cost the new Company from $50,000 to $55,000 to provide itself with similar works elsewhere.

On the 5th of May 1886 the promoters and Mr. Finlay who had then joined the enterprise having subscribed between them $55,000 towards the joint stock of the proposed undertaking held a provisional meeting as shareholders in the new Company. The meeting appointed provisional directors and authorised them to make an immediate call on the capital subscribed and to apply for incorporation. The directors accordingly met and made a call of 75 per cent. payable on the 20th of May.

On the 26th of June 1886 a petition for incorporation was presented on behalf of the shareholders in the new Company. The petition set forth the particulars required by the Act including the names of the shareholders and the amounts subscribed by them respectively. Letters patent incorporating the new Company were duly granted on the 5th of August.

On the 3rd of September a meeting of the shareholders was held ; the minutes of the former

meetings were read and adopted and directors were appointed. At a meeting of the directors held on the same day the President M. Beauchemin was authorised to sign in the name of the Company the deed of sale of the property and to acquire it from the then owners for the price of $35,000 and a final call was made of 25 per cent. payable on the 16th of October.

In September 1886 the promoters were credited in the books of the Company with payment in full of their shares. The amounts so credited were paid half in cash and half by receipts given to the Company by the vendors to the extent of $25,000 on account of the purchase price of the property.

After working for about two years and a half the Company went into liquidation. In June 1889 the Appellant was appointed liquidator and in March 1890 he was authorised to institute this action.

The action came on to be heard before the Superior Court on the 24th of November 1894, when it was dismissed with costs. The Court held that the Plaintiff had failed to prove the material allegations of his Declaration. The judgment was affirmed on appeal by the Superior Court sitting in Review on the 31st of December 1895.

It appears from the reasons given by the Honourable Jetté J. that the only question argued before the Court of Review was whether the shares of the promoters were paid in full having regard to the provisions of Article 4722 of the Revised Statutes of Quebec which formed part of the Statute under which the Company was incorporated. That Article so far as is material to the present question is as follows:—

(1.) The capital stock of all Joint Stock Companies shall consist of that portion of the amount authorised by the charter which

shall have been *bonâ fide* subscribed for and allotted and shall be paid in cash.

* * * * *

(5.) Every form and manner of fictitious capitalization of stock in any Joint Stock Company or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such Company and not represented by an amount of cash paid into the treasury of the Company which has been expended for the promotion of the objects of the Company is prohibited and all such stock shall be null and void.

Jetté J. considered that para. 1 of Article 4722 which was originally enacted as Sec. 1 of the Quebec Statute 47 Vict. cap. 73 was a reproduction more or less exact of Sec. 25 of the Imperial Statute known as the Companies Act 1867. Construing the expression "paid in "cash" in Article 4722 para. 1 by the light of well known English authorities as to the meaning of the same words in Sec. 25 of the Imperial Statute of 1867 His Honour held that the shares of the promoters were fully paid.

Before their Lordships an attempt was made to re-open the charge of fraud which seems to have been abandoned in the Court of Review. It was urged that the price of the property was not fixed or considered by an independent Board of Directors and that in this respect the transaction was improper and fraudulent. This argument seems to be based on a misconception of the decision in the New Sombrero Phosphate Company *v.* Erlanger 3 Ap. C. 1218 where the facts were very different. In the present case it was not disputed that every single shareholder was perfectly aware of all the circumstances attending the formation of the Company and that nobody was or could have been deceived.

Indeed their Lordships agree with the opinion of Jetté J. who prefaced his judgment by observing that the promoters acted in perfect good faith and that the value of the property was proved to be $35,000 at the least.

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

The Appellant's Counsel were at last driven to question the authority of Spargo's case (8 Ch. 407) and the long line of decisions in which that case has been approved and followed. They pointed out that on more than one occasion Spargo's case has been disapproved by the present Lord Chancellor (*Re* Johannesburg Hotel Co. 1891 Ch. 119; Ooregum Co. *v.* Roper 1892 A.C. 134) and they asked their Lordships not to follow it.

Their Lordships are not prepared to dissent from the decision in Spargo's case. It is a decision of the highest authority. It was pronounced by James and Mellish L.L. J.J. and the view which those eminent Judges expressed had as appears from their judgments the approval of Selborne L.C. Referring to Fothergill's case in which Sec. 25 of the Act of 1867 was considered and in which Judgment had been delivered only the day before by the Lord Chancellor and

the Lords Justices James L.J. made the following observations which are not inapplicable to the facts of the present case :—" it was said by the " Lord Chancellor and we entirely concurred " with him that it could not be right to put " any construction upon that Section which " would lead to such an absurd and unjustifiable " result as this |that an exchange of cheques " would not be payment in cash or that an order " upon a Banker to transfer money from the " account of a man to the account of a Company " would not be a payment in cash. In truth it " appeared to me that anything which amounted " to what would be in law sufficient evidence to " support a plea of payment would be a payment " in cash within the meaning of this provision. " . . . . If a transaction resulted in this that " there was on the one side a *bonâ fide* debt " payable in money at once for the purchase of " property, and on the other side a *bonâ fide* " liability to pay money at once on shares, so " that if bank notes had been handed from one " side of the table to the other in payment of " calls, they might legitimately have been handed " back in payment for the property, it did " appear to me in Fothergill's case, and does " appear to me now, that this Act of Parliament " did not make it necessary that the formality " should be gone through of the money being " handed over and taken back again; but that if " the two demands are set off against each other, " the shares have been paid for in cash . . . . . " Supposing the transaction to be an honest " transaction, it would in a Court of Law be " sufficient evidence in support of a plea of pay- " ment in cash, and it appears to me that it is " sufficient for this Court sitting in a winding-up " matter. Of course, one can easily conceive that " the thing might have been a mere sham or " evasion or trick, to get rid of the effect of the

' Act of Parliament, but any suggestion of sham, " or fraud, or deceit, seems to be entirely out of the " question in this case, because everybody in the " Company knew of the transaction; every share- " holder of the Company was present and was a " party to the resolution; there was no deceit " practised on any creditor, nor was there any " registration of these shares, except as shares " paid up. This seems to me to dispose of the " case." " It is a general rule of law " added Mellish L.J. " that in every case where a " transaction resolves itself into paying money " by A to B and then handing it back again by " B to A if the parties meet together and agree " to set one demand against the other they " need not go through the form and ceremony " of handing the money backwards and forwards." Even if this line of argument were less convincing than it appears to their Lordships to be they would not be disposed to disturb an authority which has been accepted and acted on for more than 20 years.

It is to be observed that in the Quebec Statute the expression " paid in cash " occurs in one place and " paid in cash into the Treasury of the " Company " in another from which it may be inferred that " payment in cash " does not necessarily and in all cases mean payment into the Treasury of the Company."

In the result their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The Appellants will pay the costs of the Appeal.

It appears that during the pendency of the Appeal proceedings were stayed against two of the Respondents against each of whom the claim was under the appealable limit. The order will include the dismissal of the appeal with the usual consequences as against those two Respondents.