IN RE CRÉDIT CANADIEN INCORPORÉ
IN LIQUIDATION

1937

* Feb. 16.
* April 21.

THE SUN TRUST COMPANY LIMITED (PETITIONER) ..... APPELLANT;

AND

WILFRID BÉGIN AND OTHERS (CONTESTANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Company—Winding-up—Resolution of directors making a call on shareholders and declaring forfeiture of shares for non-payment—Whether illegal or irregular—Fiduciary obligations of directors—Breach of trust—Good faith—Collusive transaction between directors and shareholders—Forfeiture to be in the interest of the company and not for the benefit of the shareholders—Quebec Companies Act, R.S.Q., 1925, c. 223, ss. 58, 59, 60.

Upon a petition by the appellant, as liquidator of the Crédit Canadien Incorporé, alleging the illegality and irregularity of certain resolutions of its directors making a call on the shareholders and later declaring the forfeiture of these shares when the call was not paid, and further asking for a declaration that the directors had thus acted *ultra vires* and against the interests of the company,

Held that, upon the evidence, no adequate ground was disclosed for holding the call was not a valid call of which payment could have been enforced, that the charge has not been established by evidence that, in exercising the power of forfeiture, the directors had been availing themselves of that power for some purpose for which it could not be legitimately employed, and that, under the circumstances of this case, it was impossible to conclude that the forfeiture was not in the interest of the company.

Per Duff C.J. and Davis and Hudson JJ.—The directors of a company, in putting into effect the discretionary authority to declare the forfeiture of shares, are under the obligations which govern persons acting in a fiduciary capacity.—An act which is *ultra vires* of the company when done by its directors is void *ipso facto*. As regards acts within the scope of the company's objects and, therefore, *intra vires* of the company and belonging to a class of acts within the powers of the directors, the latter, by reason of their fiduciary obligations in the exercise of such powers, are bound to act with the utmost good faith for the benefit of the company.—Acts of the directors within the scope of the powers of the company, although impeachable by the company as a breach of trust, are binding on the company if done with strangers acting in good faith and without knowledge or notice of the breach of trust.—Where the transaction is one between a company represented by the directors and a shareholder, then somewhat different considerations may apply. Where the validity of a forfeiture

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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of shares is called in question in a winding-up on the ground that the act of the directors in professing to forfeit the shares is not binding upon the company, there is an important distinction which ought not to be overlooked. If the proceeding against the shareholder, i.e., a proceeding which in form is one of the kind contemplated by the authority to declare a forfeiture, is in reality in that respect fictitious, *aliud simulatum aliud actum*, if there has been no call the payment of which could have been enforced, and if in truth the real transaction was a collusive transaction between the directors and a shareholder or group of shareholders to enable a shareholder to surrender his shares and withdraw from the company, then, as between the company and the shareholder who is implicated in the breach of trust, the transaction cannot stand and the shareholder in a winding-up proceeding will properly be treated as a contributory.—The present case is not in any way analogous to such cases and there was in it nothing fictitious about the forfeiture of the shares by the resolution of the directors.

Held, also, that the rule, laid down in *Spackman* v. *Evans* (L.R. 3 H.L. 171) and approved by this Court in *McArthur* v. *Common* (29 Can. S.C.R. 239), that a forfeiture can be declared only when it is in the interests of the company and not when it is for the benefit of the shareholders whose shares are declared to be forfeited, is binding and, where the circumstances warrant it, should be followed; but the circumstances of this case take it out of the operation of that rule.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Surveyer J. and dismissing the appellant's petition with costs.—A winding-up order having been delivered against the Crédit Canadien Incorporé and the appellant having been appointed liquidator, the object of the petition was to have certain resolutions of the directors of the company in liquidation conducive to forfeiture of shares for non-payment of a call made by them declared null and void and the beneficiaries therefrom reinstated as shareholders.

The material facts of the case are stated in the judgment of Kerwin J.

Jos. Blain K.C. for the appellant.

L. Forest K.C. for the respondents.

The judgments of Duff C.J. and Davis and Hudson JJ. were delivered by

DUFF C.J.—I fully agree with the conclusions at which my brother Kerwin has arrived, and also with what, as I understand it, is the basis of that conclusion, viz.: that the evidence discloses no adequate ground for holding the call was not a valid call of which payment could have been

enforced; and, further, that the charge is not established by evidence that, in exercising the power of forfeiture in relation to the shares in question in respect of which the call was not paid, the directors were availing themselves of that power for some purpose for which it could not be legitimately employed.

There were, it seems, something like one hundred shareholders who failed to pay the call and these were domiciled in different parts of the province. There is no evidence as to the circumstances of these shareholders; and it is impossible to say on the evidence that the directors in the exercise of their responsibility may not have thought that a notice that shares would be forfeited on non-payment would on the whole (especially in view of the fact that the forfeiture would still leave the shareholders liable to the then creditors for the full amount unpaid on their shares) be more productive of results financially than the recovery of judgment against the defaulters with the attendant expense, and with, possibly, barren results.

Nothing more is strictly necessary for the disposition of the appeal; but, in view of some observations in the judgments in the courts below, it is, perhaps, desirable to consider briefly some of the legal principles involved.

It is, perhaps, needless to say that, in putting into effect the discretionary authority to declare the forfeiture of shares, the directors are under the obligations which govern persons acting in a fiduciary capacity. Directors have been said to be the "agents of the company" and, again, they have been said to be "in the position of a managing partner," and, still again, it has been often said that they are "trustees of their powers."

Of course, an act which is *ultra vires* of the company when done by the directors of the company is void *ipso facto*. As regards acts within the scope of the company's objects and, therefore, *intra vires* of the company and belonging to a class of acts within the powers of the directors, the directors, by reason of their fiduciary obligations in the exercise of such powers, are bound to act with the utmost good faith for the benefit of the company.

The position of directors is, perhaps, in respect of the execution of their powers, most satisfactorily put in a passage in Lord Lindley's book on Companies (6th edition) at pp. 509, 510:

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> Directors are not only agents, but to a certain extent trustees for the company and its shareholders * * * , they are not the masters but the servants of the shareholders; and the power of the directors is limited, and accompanied by a trust, and is to be exercised *bona fide* for the purposes for which it was given, and in the manner contemplated by those who gave it * * * So the powers which the directors have, e.g., of calling meetings, electing members of their own board, allotting, transferring and forfeiting shares, making calls, &c., &c., are reposed in them in order that such powers may be *bona fide* exercised for the benefit of the company as a whole; and any exercise of such powers for other purposes is regarded as breach of trust, and is treated accordingly.

Generally speaking, acts of the directors within the scope of the powers of the company, although impeachable by the company as a breach of trust, are binding on the company if done with strangers acting in good faith and without knowledge or notice of the breach of trust. If directors, for example, enter into a contract with a stranger which is within the scope of the objects and powers of the company and, therefore, *intra vires* of the company, but inconsistent with their fiduciary obligations to the company and the shareholders, as, for example, to procure a profit for themselves, the contract is nevertheless binding upon the company if the other party to the contract is acting in good faith.

Where the transaction is one between a company represented by the directors and a shareholder, then somewhat different considerations may apply. Where the validity of a forfeiture of shares is called in question in a winding-up on the ground that the act of the directors in professing to forfeit the shares is not binding upon the company, there is an important distinction which ought not to be overlooked.

If the proceeding against the shareholder, that is to say, a proceeding which in form is one of the kind contemplated by the authority to declare a forfeiture, is in reality in that respect fictitious, *aliud simulatum, aliud actum,* to employ Lord Westbury's phrase, if there has been no call the payment of which could have been enforced, and if in truth the real transaction was a collusive transaction between the directors and a shareholder or group of shareholders to enable a shareholder to surrender his shares and withdraw from the company, then, as between the company and the shareholder who is implicated in the breach of trust, the transaction cannot stand and the shareholder in a winding-up proceeding will properly be treated as a contributory.

The transactions in the liquidation of the Agriculturist Cattle Insurance Company, in which the forfeiture was held to be invalid, were of this character. In *Spackman's* case (1), Lord Westbury said:

> If a declaration of forfeiture proceeds upon and is the result of a collusive agreement, but is entered by the directors in the books of the company as if it were a *bona fide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the trust, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances of imposition on the other shareholders that the shareholder who sets up the forfeiture can make a case of acquiescence or derive any benefit from lapse of time whilst the truth remains unknown.

It should be observed here that the ground upon which such transactions are held invalid is not because of *mala fides* in the sense that the directors are not acting as they conceive in good faith for the good of the company as a whole. The ground is that there has been, in the words of that great judge, Turner L.J., in *Bennett's* case (2) "an illegal exercise of a legal power"; and, such being the case, the act of the directors will effectuate nothing notwithstanding that they honestly believed they were acting in the best interests of everybody.

The case before us is not in any way analogous to such cases. There was nothing fictitious about the forfeiture here, as I have already pointed out.

The forfeiture proceedings may be affected by a breach of trust in other ways. A proceeding may be taken by the directors in violation of the good faith they owe to the company and to the shareholders because the purpose of the proceeding is to benefit themselves personally or some individual shareholder or some group of shareholders at the expense or to the detriment of the shareholders as a whole. A board of directors resorting, for example, to forfeiture with the intention of disposing of the forfeited shares by selling them to themselves or their nominees with the object of obtaining or maintaining control of the company would be committing a breach of trust in respect of which the company would be entitled to relief against the directors as well as against the collusive purchasers. It does not necessarily follow (as between the company, or the liquidator in a winding-up proceeding, and the forfeited shareholder, against whom the proceeding was an adverse pro-

(1) (1864) 34 L.J. Ch. 321, at 330. (2) (1854) 43 E.R. 879, at 885.

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ceeding founded upon a valid call and who was entirely innocent and ignorant of the wrongful design of the directors,) that the validity of the forfeiture could be impeached and the forfeited shareholder held liable as a contributory. On principle it would appear that the shareholder, being at arm's length with the directors, could not be prejudicially affected by the breach of trust in respect of which he was completely ignorant and innocent.

In virtually all of the numerous judgments in the liquidation to which reference has been made the collusiveness of the transaction is insisted upon. Here, there is not the slightest evidence of collusion. Having regard, however, to the conclusions of fact above stated, I do not base my decision upon this ground.

The argument of the appellant mainly rests upon *Spackman* v. *Evans* (1) and *Common* v. *McArthur* (2), but, before entering upon a discussion of these cases, it is convenient, I think, to reproduce textually sections 59 and 60 of the Quebec *Companies Act,* R.S.Q. 1925, c. 223. I make use of the English version because in that version sections 59 and 60 correspond (with one immaterial discrepancy) word for word with sections 75 and 76 of the Dominion *Companies Act.*

59. If, after such demand or notice as is prescribed by the letters patent, or by resolution of the directors, or by the by-laws of the company, any call made upon any share is not paid within such time as, by such letters patent or by resolution of the directors or by the by-laws, is limited in that behalf, the directors, in their discretion, by vote to that effect duly recorded in their minutes, may summarily declare forfeited any shares whereon such payment has not been made; and the same shall thereupon become the property of the company and may be disposed of as, by the by-laws of the company or otherwise, they prescribe; but notwithstanding such forfeiture, the holder of such shares at the time of forfeiture shall continue liable to the then creditors of the company for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof.

60. The directors may, if they see fit, instead of declaring forfeited any share or shares, enforce payment of all calls, and interest thereon, by action in any court of competent jurisdiction; and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrears amount, in respect of one call or more, upon one share or more, stating the number of calls and the amount of each call whereby an action has accrued to the company under this Part.

(1) (1868) 3 E. & I. 171. (2) (1898) 29 Can. S.C.R. 239.

A certificate under the seal of the company, and purporting to be signed by any of its officers, to the effect that the defendant is a shareholder, that such calls have been made, and that so much is due by him thereon, shall be received in all courts as evidence to that effect.

Counsel for the appellants relied upon certain passages in the judgment of Lord Cranworth in *Spackman* v. *Evans* (1). In that case the House of Lords had to pass upon the question whether the appellant was properly placed upon the list of contributories in the winding up of a joint stock company which had been incorporated by deed of settlement under the statute of 7 & 8 Vict. By the deed of settlement the directors were invested with power to declare the forfeiture of shares for the non-payment of calls. Dealing with the articles of the deed under which the power of forfeiture arose, Lord Cranworth (at p. 186) used these words:

> The deed, it is true, gives to the directors the power of declaring a forfeiture of shares the holders of which refuse or neglect to pay their calls. But it is plain that this is a power intended to be exercised only when the circumstances of the shareholder may make its exercise expedient for the interests of the company, not a power to be exercised for the interest, or supposed interest, of the shareholder. This is plain from the very nature of the power, and it is made even more obvious from various provisions and stipulations contained in some other clauses in the deed. In the 125th clause, which confers the power of declaring a forfeiture, it is expressly stipulated that the directors, instead of declaring a forfeiture, may, if they think fit, enforce payment of the instalment, meaning obviously by means of legal proceedings. In the next clause (the 126th) they are empowered to restore the forfeited share to the holder on payment of a fine; and by the 182nd clause, the directors are empowered to sell forfeited shares, but only so many of them as shall be sufficient to raise the sum for non-payment whereof the forfeitrue was incurred and the expenses, and all shares not so sold are to revert and be restored to the person who held them at the time of the forfeiture.
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> These provisions are strong to shew that the power to declare shares forfeited was intended only to give to the directors additional means of compelling payment of calls, or other money due from the shareholder to the company by virtue of the deed. The shares are, in substance, made a security to the company for the money from time to time becoming due from the shareholder. The duty of the directors, when a call is made, is to compel every shareholder to pay to the company the amount due from him in respect of that call; and they are guilty of a breach of their duty to the company if they do not take all reasonable means for enforcing that payment. In the present case it has never been even suggested that the appellant was insolvent, that he was not perfectly able to pay the full 30s. per share, which was the amount of his call; and it was a plain breach of trust in the directors to take, in discharge of money due from the appellant, shares over which they had power as a security only for the money due, but which shares they knew to be valueless. They were bound, as trustees for the body of shareholders, to enforce payment of

(1) (1868) 3 E. & I. 171.

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the whole 30s. per share, and for that purpose to take all proper legal proceedings, unless they *bona fide* believed that he was not in circumstances which would enable him to pay the sum for which he was sued, and there has never been even a suggestion that this was the case.

I have quoted this passage in full for reasons which will appear as I proceed.

In *Common* v. *McArthur* (1), this Court appears to have thought that these observations of Lord Cranworth govern the application of the provisions of the Dominion *Companies Act* (now sections 75 and 76 of that statute). If the question were entirely *res nova,* I should have said without hesitation that these observations of Lord Cranworth could not be properly resorted to as affording in all cases a rule governing proceedings under the statute now before us or under the corresponding provisions of the Dominion *Companies Act;* but it is necessary to consider *Common* v. *McArthur* (1).

As Lord Cranworth himself points out, by the provisions of the deed of settlement which dictated the decision in that case, the directors might enforce payment of the call by means of legal proceedings; but they were empowered to restore the forfeited share to the holder on the payment of a fine; and although the directors were empowered to sell the forfeited shares, the sale of such shares was restricted so that the proceeds should, as far as practicable, not exceed the sum for the non-payment of which the forfeiture had been incurred, and all forfeited shares not so sold had to be restored to the person who held them at the time of the forfeiture. In view of these provisions, the conclusion was inevitable that the power of forfeiture was intended only to give an additional means of compelling the payment of calls and that the shares were, in substance, merely a security to the company for the payments from time to time becoming due from the shareholder; and, further, that it was a plain breach of trust in the directors to take, in discharge of money due from the appellant (a solvent person), shares over which they had power as security only for the money due, but which shares they knew to be valueless.

The provisions of the statute before us contain no enactments corresponding to these stipulations of the deed of settlement mentioned. The power given by the statute is

(1) (1898) 29 Can. S.C.R. 239.

to forfeit summarily on the proper notice any share in respect of which the call has not been paid. The directors are invested with discretion as to the exercise of the power. Upon the declaration of forfeiture, all shares becoming the property of the company may be disposed of "as by the by-laws of the company or otherwise they prescribe." There is nothing in this section authorizing a remission of the forfeiture by the directors; nor is there anything limiting the power of the company in prescribing the manner in which forfeited shares shall be disposed of. There is nothing requiring the company to return the surplus of the proceeds of any sale over and above the amount due in respect of the call and expenses to the shareholder, nor to return unsold shares after the company has, by sale of some of the forfeited shares, realized sufficient to pay the call and such expenses. It may be that it would be competent for the company by by-law so to direct, but in the absence of such direction, there would appear to be no justification for holding that the shares must in this connection be considered merely as security for moneys due to the company in respect of calls.

I think, subject to *Common* v. *McArthur* (1), that under the statute with which we are dealing, it may be said that the object of the power of forfeiture with which the directors are invested is that the directors, as representing the company, shall be enabled for the benefit of the company and adversely to the shareholder to forfeit his shares if he fails to pay his calls. The enactment does not contemplate a cancellation such as those in question in the cases arising out of the liquidation of Agriculturist Cattle Insurance Company where cancellation was made in each case at the request of the subscriber and not by adverse forfeiture.

In *Common* v. *McArthur* (1), Mr. Justice Sedgwick, delivering the judgment of this Court, applied the passages already quoted from Lord Cranworth's judgment to a case governed by the provisions of the Dominion *Companies Act*. The observations of Mr. Justice Sedgwick on this point, however, do not appear to have formed part of the *ratio decidendi* because the decision really proceeded upon the point that there was no forfeiture, or that the forfeiture was fictitious because the resolution declaring the forfeiture,

(1) (1898) 29 Can. S.C.R. 239.

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reciting that McArthur had failed to pay calls "made on said stock," was in this respect stating something which was contrary to the fact. The transaction in question in *McArthur's* case (1) was one entered into at McArthur's request and the manifest purpose of it was to relieve him from responsibility as a shareholder. The company was hopelessly insolvent and there appears to have been no doubt about the solvency of McArthur. I cannot regard *Common* v. *McArthur* (1) as an authority requiring us to hold that, in exercising the power of forfeiture under the Dominion *Companies Act,* or in the statute now before us, a board of directors is in all cases bound to follow in detail the course indicated by Lord Cranworth's remarks in the passage quoted above from his judgment in *Spackman* v. *Evans* (2). These remarks, it is proper to observe, concerned a case in which it was presumed that the shareholders were solvent and admitted that the shares were worthless.

I must not be understood to say that the failure to pursue the personal remedy, coupled with the forfeiture of the shares, may not, where the shareholder is a solvent person and the shares are valueless, be evidence in support of an allegation that the directors have been aiming at ulterior and improper ends inconsistent with their fiduciary character in declaring the forfeiture or, if the shareholder is implicated, establish a valid ground for treating the forfeiture as ineffectual.

On the other hand, doubts have unquestionably arisen upon the question whether or not, under the statutes we are now considering, the respective remedies of forfeiture and recovery by action of the amount of the call from the shareholders are not mutually exclusive. Where a share has been forfeited, of course, the shareholder is no longer a shareholder as respects that share and cannot be required by the company to pay a call in respect of it.

The language of section 60 is, perhaps, susceptible of the construction suggested, viz., that if the company sues a shareholder for payment of a call and pursues its suit to judgment, the company loses the alternative remedy of for-

(1) (1898) 29 Can. S.C.R. 239. (2) (1868) 3 E. & I. 171.

feiture; and that is a circumstance which may have influenced the directors in the case before us.

The appeal should be dismissed with costs.

The judgments of Crocket and Kerwin JJ. were delivered by

KERWIN J.—The appellant is the liquidator of the Crédit Canadien Incorporé. Pursuant to an order of the Superior Court permitting it so to do, the liquidator instituted proceedings by petition in which it sought a decree that a certain forfeiture of shares of the company, declared by resolution of the directors on December 10th, 1929, had not been "légalement, régulièrement et justement prononcée." It also asked a declaration that in passing that resolution and two others, dated respectively February 14th, 1928, and March 27th, 1928, the directors had acted *ultra vires* and against the interests of the company. Apparently it was deemed advisable to have the questions in dispute determined before a list of contributories should be settled but, as will be pointed out, it was by the resolution of February 14th, 1928, that a call of ten dollars per share had been made and the real attack is not upon that call but against the declaration of forfeiture. Accordingly and notwithstanding the form of the petition, the only point argued before us was whether the forfeiture was *ultra vires* the company.

The company was incorporated August 5th, 1912, by letters patent of the province of Quebec, granted under the provisions of the Quebec *Companies Act*. By these letters patent the company was authorized to issue ten thousand shares of the par value of one hundred dollars each. The capital had been fully subscribed by 1919, but prior to 1928 it had been found necessary to make but one call, and that of ten dollars per share. However, from time to time bonuses totalling seven dollars per share had been declared, which had been credited to the shareholders' stock accounts, and some of the shareholders had paid in advance on account of their shares the sum of $76,171. At the end of December, 1927, the paid up capital was $266,171.

While at first the business of the company had been profitable, losses were subsequently suffered and it was found necessary to provide further working capital. Early

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in 1928 it was decided to endeavour to reorganize the capital structure and correspondence with the Attorney-General's Department ensued. All of this correspondence is not produced but sufficient appears from a letter from the department to indicate that the directors had been considering reducing the capital. No further steps were taken in connection with this proposal, but on February 14th, 1928, at a meeting of the directors, a call was made of ten dollars per share, payable March 20th, 1928. On March 27th, 1928, the directors passed the following resolutions:—

Résolu:—Il a été proposé, dûment secondé, et unanimement résolu:—

Attendu que le 14 février 1928, une résolution a été adoptée par les directeurs de cette compagnie décrétant qu'un appel de 10% serait fait aux actionnaires de la compagnie, cet appel devant être payable le 20 mars 1928;

Attendu que certains actionnaires ont fait défaut de payer cet appel de 10%, et

Attendu que la dite résolution du 14 février 1928 a été portée à la connaissance des dits actionnaires avec avis d'avoir à s'y conformer dans le délai prescrit.

Qu'il soit en conséquence résolu que les actions de ceux qui n'auront pas payé le dit versement avant le 21 avril 1928 soient sommairement confisquées, et qu'à compter de ce moment, elles appartiennent à la compagnie qui pourra en disposer selon que les directeurs l'ordonneront, et qu'avis de la présente résolution soit donné sans délai par le secrétaire de la compagnie.

The owners of 7,163 shares had paid the call so that any forfeiture would affect the holders of only 2,837 shares. It is true that some time previously there had been negotiations for the sale of the assets of the company, or, at any rate, endeavours by some of the directors to sell their holdings with a view of securing further capital. It was contended that the result of the evidence was to indicate that these directors, if not all, were really using the power of forfeiture in order to reduce the capital of the company and endeavour to sell their own holdings but such a finding is not warranted. There is no suggestion of fraud on the part of the directors or any of them. There could not very well be as not one of the directors was the holder of any of the forfeited shares, and on December 9th, 1930, a further call of ten per cent was made on the holders of the remaining 7,163 shares.

In order to complete the narrative attention must be called to the resolution of December 10th, 1929, by which, after referring to the call made on February 14th, 1928, it was specifically declared that the shares, the holders of

which had not paid the call, should be forfeited. It was explained that the delay between March, 1928, and December, 1929, was because the directors, until they were advised by the company's solicitors that a formal declaration of forfeiture was necessary, had overlooked the matter.

A forfeiture of shares is invalid if it is not made for the company's benefit, and in every instance where, as here, there is no suggestion as to the absence of any formality, the inquiry must be limited to a consideration of this problem.

In view of all the circumstances, it is impossible to conclude that the forfeiture was not in the interests of the company. Section 59 of the Quebec *Companies Act*, R.S.Q., 1925, chapter 223, imposes an obligation upon those who held forfeited shares to pay the debts of the company which existed at the time of the forfeiture but this obligation is not in question in these proceedings. While the effect of the forfeiture is that, subject to this provision, the holders of the forfeited shares are relieved from their liability for the amount unpaid on the shares and thus a heavier burden is cast upon those who have paid the calls and are still the holders of shares not fully paid for, the court has no power to declare the forfeiture *ultra vires* unless it is able to determine that the action of the directors was a fraud upon the power to forfeit. It is true that the directors made no effort to ascertain whether the holders of the shares they were about to forfeit were solvent but the position must be the same as if the company had prospered and the holders of such shares had then sought to set aside the forfeiture. To state the problem in this way is on the evidence to indicate but one answer.

In view of some observations in the reasons for judgment in the courts below, it is advisable to refer to two cases mentioned therein, *Spackman* v. *Evans* (1), and *Common* v. *McArthur* (2). The majority judgment in the case first mentioned has always been considered as authoritatively determining that a power to forfeit may not be exercised for the benefit of a shareholder, and it was so treated in this Court in the *Common case* (2). These decisions are binding and, where the circumstances warrant it, should be followed. Sections 58 and 59 of the Quebec

(1) (1868) L.R. 3 H.L. 171. (2) (1898) 29 Can. S.C.R. 239.

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Companies Act, R.S.Q., 1925, chapter 223, dealing with the power of the directors to forfeit and enforce payment of calls by action, are, except for a few immaterial changes, the same as sections 41 and 42 of the Dominion *Companies Act,* R.S.C., 1886, chapter 119, which were in force when the *Common* case (1) was decided. The mere fact that by the first of these sections a discretion is given to the directors to forfeit and that by the later section

> the directors may, if they see fit, instead of declaring forfeited any share or shares, enforce payment of all calls

does not absolve the directors from obeying the established rule that a forfeiture can be declared only when it is in the interests of the company and not when it is for the benefit of the shareholders whose shares are declared to be forfeited.

As already indicated, however, the circumstances of this case take it out of the operation of the rule. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mercier, Blain & Fauteux.*

Solicitor for the respondents: *Lionel Forest.*