Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Monarch Life Assurance Company v. *Ewan Mackenzie, from the Supreme Court of Canada (Privy Council Appeal No. 55 of 1912); delivered the 17th October 1913.*

PRESENT AT THE HEARING:

LORD ATKINSON.
LORD SHAW.
LORD MOULTON.
LORD PARKER OF WADDINGTON.

[DELIVERED BY LORD MOULTON.]

This is an Appeal in an action brought in The High Court of Justice of Ontario by Ewan Mackenzie, the present Respondent, against the Appellants, The Monarch Life Assurance Company. In the Statement of Claim the Plaintiff claimed as the holder of twenty-five shares in the Defendant Company, "repre- " sented by Certificate number nineteen issued " by the Defendant Company." The Statement of Claim proceeds as follows:—

2. The said shares were issued to the Plaintiff in consideration of the settlement of an action brought in this Court by the Plaintiff against the said Defendants [*i.e.*, the present Appellants] in which the Plaintiff claimed to be entitled to a large sum of money.

3. It was part of the said settlement that the said shares should be issued to the Plaintiff and that it should be thereby witnessed that the said shares were fully paid and that six hundred and twenty-five (625) dollars had been paid for premium thereon.

It then set out the certificate and alleged that the present officers of the Defendant

Company refused to recognise the Plaintiff as a shareholder or to put him on the list of shareholders in respect of the said twenty-five shares, or to issue to him five certificates of five shares each in place of the said certificate for twenty-five shares. It claimed a declaration that the Plaintiff was the holder of twenty-five fully paid-up shares in the Defendant Company and that the Company should be ordered to register him as such and to issue to him five certificates each of five fully paid-up shares.

In the Statement of Defence the Company denied that it issued the certificate in question, and as to the alleged settlement said :—

> 2. The alleged settlement of an action was a matter between the said Ostrom [*i.e.*, the then managing director of the Company] in his private capacity and not as managing director of the Defendants, and the Defendants did not agree thereto.

It then denied any application for the said shares or any consideration given to the Company therefor, or any allotment thereof, and pleaded the provisions of its special Act. In the 5th and last paragraph it set up that the cause of action was local and situated in Manitoba, and that on this ground the action was outside the jurisdiction of the Court of Ontario.

On the issues thus raised the action went to trial before Mr. Justice Riddell on June 6th 1910. The facts proved at the trial were substantially as follows :—In September 1905 the Plaintiff, Ewan Mackenzie, brought an action against the Defendant Company and Thomas Marshall Ostrom, its then managing director. It alleged that the Plaintiff was by virtue of an assignment from one George Stevenson, dated March 2nd 1905, the owner of an undivided quarter interest in the interim copyrights for the Dominion of Canada for certain

forms of insurance plans, for which Ostrom had obtained interim copyright some time prior to March 7th 1904 (at which date he had assigned the said quarter interest to the said George Stevenson), and also in the permanent copyrights for the same which the said Thomas Marshall Ostrom undertook to obtain. The only allegation in the Statement of Claim relating to the Company was as follows :—

> 5. The Defendants, The Monarch Life Assurance Company, have, in their prospectus presented to the public, advertised that they were the exclusive owners of the said copyrighted plans, and have procured all subscriptions to the capital stock of the said Company by reason of the alleged advantage of an exclusive ownership of the said copyrighted plans.

The relief prayed was an injunction restraining the Defendants from advertising that they possessed an exclusive interest in or using the said insurance plans, or in the alternative Judgment for $5,000 in respect of the Plaintiff's undivided one quarter interest.

It would be difficult to conceive a more absurd action so far as it relates to the Defendant Company. The interim copyrights had expired long before the assignment by George Stevenson to the Plaintiff, and had not been followed by the taking out of permanent copyrights if, indeed, the forms could be considered proper subject matter for copyright. It is, therefore, not necessary to examine here the defence raised by the Defendant Company, except to say that it traversed all the allegations of fact in the Statement of Claim in any way referring to it.

Under these circumstances it was to be expected that when efforts were made by the other parties to the action to effect a compromise the Defendant Company should refuse to take any part therein. It was willing that the action

should he dismissed against it without costs, but it would do nothing more. That this was the position that it took up and strictly adhered to was proved beyond the possibility of doubt by the evidence given at the trial of the present action, and more especially by the compromise itself (which was in writing) and the other contemporary documents which were put in. Two of these documents merit being cited here. On the day when the settlement was made the Counsel for the Company wrote to the Solicitors for the Plaintiff :—

> I understand this matter is being settled, and I am quite willing that it should be dismissed without payment of costs to the Defendant Company. I take no other part in the settlement.

And the actual memorandum of the settlement referred to in the Statement of Claim in the present action reads as follows :—

> This action is settled as follows :—
>
> 1. The Defendant, T. Marshall Ostrom, delivers to the Plaintiff twenty-five fully paid-up shares of stock in the Defendant Company.
>
> 2. The Defendant, T. Marshall Ostrom, in addition to the amount already paid, will pay $50 in full of any remaining costs of the Plaintiff.
>
> 3. Except as above there shall be no costs to either party.
>
> 4. The Plaintiff will release to the Defendant, Ostrom, or to the Company as his nominee, any interest which he has under the assignment in question herein from one George Stevenson in the interim copyrights in question herein.

And this memorandum is signed by Counsel on behalf of the Plaintiff and Ostrom only.

At the trial of the present action the whole efforts of the Plaintiff were directed to show that the settlement was made with the Defendant Company, and that it undertook to issue the shares in question to the Plaintiff. To effect this they sought to show by parole evidence that a certain Mr. Kerr, who seems to have taken

part in the negotiations, was the representative of the Defendant Company, but this evidence entirely broke down. The learned Judge, therefore, found that the settlement was made with Ostrom alone, and that the Defendant Company was not a party to nor liable in respect of it, and dismissed the action.

An Appeal was brought from this decision to the Court of Appeal in Ontario. Four out of the five Judges constituting the Court agreed substantially with the findings of fact of the Judge at the trial (which are not now disputed), and accordingly gave Judgment dismissing the Appeal on the ground that the Plaintiff was dealing with Ostrom only in making the settlement, and must accordingly look to him alone for any relief in respect of it. But unfortunately Magee, J.A., considered himself entitled to decide in favour of the Plaintiff on the ground, substantially, that the certificate for the twenty-five shares being signed by the vice-president of the Company, and by Ostrom, the managing director, created an estoppel against the Company, and that by virtue thereof the Company was not entitled to deny that the Plaintiff was the owner of twenty-five fully paid-up shares of the Company.

Their Lordships are of opinion that it was not open to the learned Judge to decide against the Defendants on any such ground. Estoppel was not raised in the Statement of Claim nor in the conduct of the trial at *nisi prius*. In such a case as this any question of estoppel must involve a special inquiry into the circumstances and the position and knowledge of the parties, of the necessity for which no warning was given to the Defendants either by the pleadings of the Plaintiff or the behaviour of his Counsel at the trial until after the evidence was concluded.

It would work grave injustice if in such a state of things a Court of Appeal were to permit a contention of this nature to be raised by the party in default, who in this instance had deliberately chosen to base his case on contentions of fact wholly inconsistent with any such contention.

The case set up by the Plaintiff was that the shares were issued by the Company to him in consideration of the settlement of an action, and that he received the certificate from the Company in performance by it of its own contract. If he succeeded in proving that the agreement of settlement was, in fact, made with the Company, estoppel was unnecessary. The Company was bound to issue the shares to him if it had not already done so. But if he failed (as, in fact, he did) to show that any such agreement was made with the Company, estoppel could not benefit him. He would be in the position of a man who admits that he has received what purports to be a certificate from an officer of the Company for fully paid-up shares issued to him for which he knows that he has given no consideration to the Company, and which falsely states that the full amount has been paid up on them. So soon as the pretended contract in supposed fulfilment of which he received the certificate was disproved, he could not take any advantage from the possession of such certificate, but must hand it back to the Company.

The estoppel relied on by Magee, J.A., relates to a case never set up by the Plaintiff, and doubtless for very good reasons. He treats it as though the shares were not to be issued by the Company to the Plaintiff, but to be transferred to him by Ostrom in fulfilment of a contract with Ostrom. But this is absolutely inconsistent with everything contended for by

the Plaintiff at the trial, and it would have exposed the Plaintiff's case to serious dangers of another kind. For instance, he must have admitted that he was aware that no transfer had been executed. Moreover, difficulties might have arisen under Section 25 of the General Act, whereby it is provided:—

> 25. No transfer of stock . . . shall be valid for any purpose whatsoever until entry thereof has been duly made in such book or books except for the purpose of exhibiting the rights of the parties thereto towards each other and of rendering the transferee liable in the meantime, jointly and severally, with the transferor to the Company and its creditors.

as well as under other provisions of the general and special Acts. But it is not necessary to inquire into these matters. The Plaintiff pinned his case to this being, and being understood by him to be, an issue of shares to him in fulfilment of an agreement made by him with the Company, and he cannot be heard to say on appeal that he thought it was something else, and that therefore the Company must not prove that the statements in the alleged certificate are not true and that the certificate does not bind them. To establish an estoppel it must be shown that the party relying upon it was deceived by the conduct of the other party, and by reason thereof altered his position to his own detriment. But in considering whether this is so it is essential to ascertain what he thought at the time, and for this purpose the allegations put forward in the Statement of Claim as the basis of his action undoubtedly bind him.

An Appeal was brought from the decision of the Court of Appeal to the Supreme Court

of Canada. The Judges were divided. Two agreed with the decision of the Judge at the trial and of the majority in the Court of Appeal. Two decided in favour of the Plaintiff on the ground of estoppel, and one, Anglin, J., while declining to decide on the ground of estoppel, held that the certificate was *primâ facie* evidence that the Plaintiff was a shareholder, and that the Defendants had neglected to call sufficient evidence to displace his *primâ facie* title. This illustrates the dangers of travelling out of the case made on the pleadings and at the trial. A defendant cannot be blamed for not meeting a case of which he has had no warning. But their Lordships are of opinion that the point relied upon by Anglin, J., does not arise. The Plaintiff having proved on his own case that he had no title to hold the certificate (even if a genuine one), nothing more was needed to displace his right to sue upon it.

Their Lordships are, therefore, of opinion that this Appeal can be decided on the simple ground that the case made by the Plaintiff at the trial was entirely disproved, and that it was not open to him afterwards to set up a case inconsistent with it, and the answer to which would have necessitated further evidence. This being so, their Lordships hold it unnecessary to consider the numerous other points raised by the Appellants, or to decide whether or not the certificate was, in fact, a forgery, and whether its issue ought to be regarded as being in any way an act of the Defendant Company so as to make them liable in respect of it. On all these points they pronounce no opinion.

It was attempted to show that estoppel was raised on the pleadings because, in a reply which was filed but not served on the

Defendant Company, it was pleaded to the defence of no jurisdiction raised by paragraph 5 of the defence. The Appellants relied in connection with this upon an Order made by the Judge of First Instance after judgment, directing that this reply should be served upon the Defendant Company *nunc pro tunc*. Their Lordships are of opinion that such an Order could only have been made in view of the fact that the plea in paragraph 5 of the defence was not relied on at the trial, and must have been taken to have been abandoned, so that no harm would, therefore, be done by allowing the special reply to it to appear on the record. It would not be within the power of a judge after judgment to make any order which would substantially affect the rights of the parties on Appeal, as would be done by such an Order if it were to have the effect of making estoppel appear to have been an issue between the parties during the taking of the evidence when in fact it was not so.

Their Lordships will, therefore, humbly advise His Majesty that this Appeal should be allowed, and the action dismissed with costs in all the Courts. The Respondent will pay the costs of this Appeal.

In the Privy Council.

THE MONARCH LIFE ASSURANCE COMPANY

v.

EWAN MACKENZIE.

DELIVERED BY LORD MOULTON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.