

against N. for the amount due on their executions, claiming that the \$3,750 paid by B. could not legally be appropriated as it was by the directors, but was paid on the whole 188 shares, and N. therefore held the 75 shares as stock on which only 40 per cent. was paid, and the remaining 60 per cent. was still due to the company. The judge trying the action found as facts that N. took the 75 shares believing that they were fully paid up, and relying on the representations of the proper officer of the company to that effect; that if he had had any doubt about it he would not have received them, nor advanced his money; and that he had a general knowledge of what had taken place at the meeting of the board of directors. A judgment in favour of N. was affirmed by the Divisional Court, but reversed by the Court of Appeal on the ground that the want of a formal resolution authorizing the appropriation made the action of the board invalid.

Held, reversing the decision of the Court of Appeal (18 A.R. 658), and restoring that of the Divisional Court (20 O.R. 86), that as it appeared from the books of the company that the sum paid by B. was not paid on, nor appropriated to, any particular shares, the directors could, with B.'s consent, re-appropriate it to the 75 shares; that the rights of creditors were not prejudiced, as B. was still liable on the balance of his stock; that the matter was not one between the whole body of shareholders and the directors, but only between N. and the company; that the want of a formal resolution by the directors authorizing the re-appropriation was a mere irregularity which could not affect the rights of a third party contracting with the company; and that it made no difference that such third party was himself a director of the company, and had knowledge of all that had been done.

Appeal allowed with costs.

W. Cassels, Q.C., and Cox for the appellant.

Collier for the respondents.

Ontario.]

[Nov. 20, 1893.]

O'GARA v. UNION BANK OF CANADA.

Surety—Interference with rights of surety—Discharge.

The Union Bank agreed to discount the paper of A. S. & Co., railway contractors, endorsed by O'G. as surety, to enable them to carry on a railway contract for the Atlantic & Northwest Railway Co. O'G. endorsed the notes on an understanding of agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was, in consequence, executed. After several estimates had been thus paid to the bank, it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractors and the bank, guaranteed certain debts, and made large payments directly to the creditors of the contractors, other than the bank, for moneys subsequently earned by the contractors. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque of \$15,000 accepted by the bank, and held by the company as security for due performance of the contract, and signed a release to the railway company "for all