

assent, were not authorised by the contract and were such a variation of the rights of O'G. as surety as to discharge him.

Taschereau and Gwynne, JJ., dissenting.

Appeal allowed with costs.

D. McCarthy, Q.C., and *A. Ferguson, Q.C.*, for appellant.

Meredith, Q.C., and *Chrysler, Q.C.*, for respondent.

20 November, 1893.

NEELON v. THOROLD.

Ontario.]

Company—Stock in—Payment by holders of shares—Appropriation by directors—Formal resolution.

N., a director and shareholder of a railway company, agreed to lend \$100,000 to the company, taking as security among other things, 168 shares of their stock held by R., who owned altogether 188 shares of \$50 each and had paid thereon \$3,750, or about 40 per cent of their value. Before the agreement was consummated it was found that B. was unable to pay the balance due on said 188 shares, and at a meeting of the directors of the company it was proposed, and decided, to appropriate the sum paid by B. to 75 of his 188 shares, making that number paid up, and offer them to N. in lieu of the 168. N. agreed to this and B. signed a transfer to N. of 75 paid up shares, and retained the balance as stock on which nothing was paid. There was no formal resolution of the board of directors authorising the said appropriation of B's payment.

Judgment creditors of the railway company issued writs of execution on their judgment, which were returned *nulla bona*. They then brought an action 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