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*May 25, 26.

*Oct. 9.

IN THE MATTER OF THE HESS MANUFACTURING COMPANY.

GEORGE W. EDGAR (LIQUIDATOR.).....APPELLANT;

AND

WILLIAM SLOAN (CONTRIBUTORY).....RESPONDENT.

Winding-up Act—Contributory—Shares paid for by transfer of property—Adequacy of consideration—Promoter selling property to company—Trust—Fiduciary relation.

Shares in a joint stock company may be paid for in money or money's worth and if paid for by a transfer of property they must be treated as fully paid up; in proceedings under the winding-up act the master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories.

There is a distinction between a trust for a company of property acquired by promoters and afterward sold to the company and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed.

A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him the contract may be rescinded provided the property remains in such a position that the parties may be restored to their original status.

There may be cases in which the property itself may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of

*PRESENT:—Sir Henry Strong C. J. and Fournier, Taschereau, Sedgewick and King JJ.

the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) which affirmed the ruling of a master who had placed the respondent on the list of contributories of the company.

The material facts of this case, which are fully set out in the judgment of the court, may be briefly stated as follows:—

The appellant, liquidator of the Hess Manufacturing Company which is being wound up under the Winding-up Act of Canada, seeks to have the respondent placed on the list of contributories under the following circumstances.

In 1889 two brothers named Hess, wishing to purchase a site for building a factory but not having the means to do so, applied to the respondent, who was father-in-law to one of them, to assist them and he entered into an agreement with the owners of the proposed site by which it was to be conveyed to him free of charge provided the contemplated factory was erected and running within a limited time, and if not he was to pay $3,000 for it. The respondent had the factory built and received a conveyance from the owners and a company was formed to carry on the manufacturing of furniture of which he was a provisional director subscribing for shares to the amount of $7,500. The building had cost over $7,000, and some $5,000 was expended on it after its completion.

The respondent after its formation transferred to the company the property so purchased with the building

(1) 21 Ont. App. R. 66. (2) 23 O.R. 182.

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having previously mortgaged it for $7,000, and was allotted 360 shares of paid-up stock of the value of $50 a share. The company having failed the liquidator appointed under the winding-up act applied to the master to have the respondent placed on the list of contributories for these 360 shares. It appearing that 234 shares had been transferred before the winding-up proceedings commenced the master acceded to the request in respect to the remaining 126 holding that when the respondent bought the property he did so as trustee for the contemplated company and had consequently given no value for his stock. This decision was affirmed by the Divisional Court but reversed by the Court of Appeal and the liquidator has appealed to this court.

The directors of the company when the property was transferred by the respondent were his son and the Hess brothers one of whom was his son-in-law.

S. H. Blake Q.C. and *Raney* for the appellant. Dr. Sloan got these shares without paying the full consideration and is liable to account to the company *Society of Practical Knowledge* v. *Abbott* (1); *Pagin & Gill's case* (2); *White's case* (3).

The last two cases are authority for placing him on the list of contributories.

There is no doubt that respondent stood in a fiduciary relation to the proposed company and that the contract with him might have been rescinded; *New Sombrero Phosphate Co.* v. *Erlanger* (4); and if he was a trustee the contract with him could not have been ratified by the shareholders; *Flitcroft's case* (5); *Mann* v. *Edinburgh Northern Tramways Co.* (6). And see *Hichens* v. *Congreve* (7); *Beck* v. *Kantorowicz* (8).

(1) 2 Beav. 559.
(2) 6 Ch. D. 681.
(3) 12 Ch. D. 511.
(4) 5 Ch. D. 73; 3 App. Cas. 1218.
(5) 21 Ch. D. 519.
(6) [1893] A. C. 69.
(7) 4 Russ. 562.
(8) 3 K. & J. 230.

It is not necessary that we should show fraud if the company never received value for the shares. *In re Eddystone Marine Insurance Co.* (1); *Ooregum Gold Mining Co.* v. *Roper* (2); *Lydney & Wigpool Iron Ore Co.* v. *Bird* (3).

Moss Q.C. and *Haverson* for the respondent. If shares are paid for in money's worth instead of money they must be treated in winding-up proceedings as fully paid up. *In re Baglan Hall Colliery Co.* (4).

Admitting that Dr. Sloan was a promoter that would not debar him from selling his property to the company provided he observed the duties appertaining to the relation of a promoter to the company. *New Sombrero Phosphate Co.* v. *Erlanger* (5). At all events the only remedy would be recission of the contract of sale.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal in a proceeding instituted under a Dominion Act of Parliament for the winding-up of the Hess Manufacturing Company (Limited), a joint stock company incorporated by letters patent under the general act of Ontario. The liquidator made an application to the master in ordinary to place the name of Dr. Sloan, the respondent, on the list of contributories in respect of 360 shares of $50 each. The master decided in favour of the liquidator as regarded 126 shares (of the aggregate nominal value of $6,300), and dismissed the application as to the remaining 234 shares. Both parties having appealed the appeals were heard before Mr. Justice Meredith, who sustained the master's ruling. The present respondent, Dr. Sloan, then appealed to the

(1) [1893] 3 Ch. 9.
(2) [1892] A. C. 125.
(3) 33 Ch. D. 85.
(4) 5 Ch. App. 346.
(5) 3 App. Cas. 1218.

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Court of Appeal, which court allowed the appeal by a majority composed of Osler, Maclennan and Ferguson JJ., the Chief Justice dissenting. The liquidator has now, pursuant to leave given by an order in chambers, appealed to this court.

The facts material to the appeal may be stated as follows:—

In 1889 William Hess and Emil Hess, his son, who were then out of business and not in good credit in consequence of having met with losses by fire, were desirous of establishing a furniture manufactory. They found a site which they thought would answer their purpose at the town of West Toronto Junction. This land belonged to R. S. McCormack, W. L. McCormack and Charles J. Boon. The Hesses were not in a position to take the title in their own name; they therefore applied to Dr. Sloan, the present respondent, who was the father-in-law of Emil Hess, to become the purchaser of this land, and to undertake the performance of the conditions upon which the owners agreed to convey it; to this request the respondent assented. Accordingly by an agreement dated in September, 1889, and made between the McCormacks and Boon of the one part, and Dr. Sloan, the respondent, of the other part, it was agreed that if Sloan should build upon the land within seven months a factory for furniture manufacture, with the capacity for employing not less than thirty hands, that then, when D. W. Clendennan and others, the purchasers of the west half of the lot, should pay their purchase money the vendors would convey the east half to the respondent, and if the respondent should not build the factory within seven months he would pay $3,000 purchase money for the same land, the factory if built within seven months being intended "to wholly satisfy said purchase money."

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Soon afterwards the respondent entered into contracts for the erection of a factory which was accordingly built and completed in the month of March, 1890. The land was duly conveyed to Dr. Sloan by the vendors at some date prior to the 19th February, 1890; the exact date does not appear. Dr. Sloan who was then a physician practising at Blyth, in the county of Huron, was not at West Toronto Junction whilst the factory was being built, and the work was superintended by Emil Hess, his son-in-law, who acted under a power of attorney from the respondent. The respondent expended in the construction of the factory and the building appurtenant to it the sum of $7,300, and upwards of $5,200 had in addition been expended on the factory before its acquisition by the company, as will be hereafter mentioned, being money furnished for that purpose by Alice Hess, the wife of Emil Hess, and Elizabeth Hess the wife of William Hess. William Hess and Emil Hess also contributed their time, labour and services during the erection of the factory, the former in superintending and assisting in the mechanical part of the work, especially the plumbing, the latter giving his attention to the management of the financial and other business incidental to the enterprise. On the 27th of November, 1889, the Hess Manufacturing Company of West Toronto Junction (Limited) was incorporated by letters patent under the Great Seal of the Province of Ontario, pursuant to the provisions of chapter 157 of the Revised Statutes of that province. The object and purpose of the company was stated in the letters patent to be the manufacturing and selling of all kinds of furniture. The capital stock of the company was fixed at $40,000, divided into 800 shares of $50 each. The place of business of the corporation was to be at West Toronto Junction. Dr. Sloan, Hugh

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Boulton Morphy and Francis Charles McDowell were named in the charter as the first directors of the company, and it was recited therein that William Sloan, the respondent, had taken shares to the amount of $7,500, and that Elizabeth Hess, Alice Grace Hess, Hugh Boulton Morphy and Francis Charles McDowell had severally subscribed shares in varying amounts, and that nothing had been paid in upon any of the shares so subscribed for. These letters patent were granted pursuant to the statute, after due publication of advertisements as thereby required, upon a petition addressed to the Lieutenant-Governor. This petition was signed by the several parties mentioned as stockholders in the letters patent, representing themselves to be subscribers for the shares before mentioned.

On the 22nd December, 1889, a stock book of the company was opened, and the several parties before named signed a memorandum of agreement inscribed therein by which they agreed to take the number of shares mentioned in the letters patent.

On the 27th January, 1889, a general meeting of all the shareholders was held whereat all were present either in person or by proxy. Those present personally were H. B. Morphy, Emil G. Hess, William Hess and Elizabeth Hess. H. B. Morphy was the son-in-law of William Hess, Emil G. Hess was his son, and Elizabeth Hess his wife. There were also present by proxy Dr. Sloan (the respondent), W. W. Sloan, his son, and Alice Hess, the daughter of Dr. Sloan and wife of Emil Hess. At this meeting W. W. Sloan, William Hess and Emil Hess were elected directors for the ensuing year. The following resolution was then passed:—

Moved by Alice Grace Hess and seconded by Emil George Hess: whereas arrangements have been made with Dr. William Sloan, of the Village of Blyth, in the County of Huron, for the purchase for the

purposes of the company of the factory site (describing it) together with all the buildings erected on said described lands, there being a four-story brick factory 45 by 127 feet, a boiler and engine house, one story, 26 by 55 feet, a brick dry kiln 36 by 50 feet, a brick smoke stack 85 feet high, and a frame stable erected on the land; and whereas the said Dr. Sloan has agreed to sell such land and buildings to the company for the sum of $25,000 payable as follows: The company to assume a mortgage of $7,000 on the said lands, and issue to the said Dr. Sloan $18,000 of paid-up capital stock of the company, the subscription for $7,500 of the said capital stock by Dr. Sloan to be included in such issue of paid-up stock for $18,000 and such subscription of $7,500 to be deemed therefore as merged therein. Resolved that the shareholders accept the terms of sale as herein stated with the said Dr. Sloan, and the directors of the company are hereby empowered and authorized to carry out such purchase and pass any necessary by-laws and execute all documents and make such entries in the books as are necessary to effectuate the same.

This resolution was confirmed at a directors' meeting held on the 21st March, 1890, and is also said to have been confirmed at a subsequent shareholders' meeting held on the 26th of April, 1890. On the 19th of February, 1890, Dr. Sloan mortgaged the property to secure $7,000 to the Canada Permanent Building Society, which corporation advanced that sum to him as a loan. This recouped his expenditure, less about $300. On the 21st of March, 1890, the property was conveyed by Dr. Sloan to the company pursuant to the resolution of the 27th of January, 1890, and additional shares to the number of 210 were entered in the stock book as being taken up by Dr. Sloan, making in all, with the 150 originally subscribed for, 360 shares, representing $18,000, and which were by the resolution of the 27th of January, 1890, to be all treated as paid by the conveyance of the property for which they and the $7,000 mortgage formed the consideration. Previous to the loan by the Canada Permanent Building Society the property was valued by the valuator for that company, Mr. Wellington J. Peck, at the sum of $25,100, and without entering upon any critical ex-

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amination of the evidence, which in the view I take is not very material, I may say at once that upon the evidence of the value of the land, and of the expenditure on the buildings and improvements, I consider this valuation to have been by no means an excessive one. These 360 shares so allotted to Dr. Sloan were therefore, according to the terms of the resolution of the 27th of January, 1890, to be, and were considered by all parties, and treated, as paid-up shares. Of these 360 shares Dr. Sloan subsequently, and at the instance of the Messrs. Hess, transferred 20 shares to Messrs. Hoover & Jackson who had assisted in starting the company, by way of remuneration for their services, and he also transferred 214 shares to Elizabeth Hess, the wife of William Hess, leaving 126 shares which were standing in his name at the date of the winding up order, and in respect of which the master has put him on the list as the holder of unpaid shares to that amount. These 126 shares, Dr. Sloan says, were intended to be transferred by him to his daughter, the wife of Emil Hess, it being intended, Dr. Sloan himself having been paid for his expenditure within $300 by the money raised on mortgage, that the paid-up shares were to be divided between the two ladies who had provided the residue of the money with which the factory had been built, to repay them for their outlay. That these ladies had expended at least $5,200, probably $5,500 or even more in this way, appears without contradiction from the evidence. By an arrangement between these parties, Dr. Sloan the respondent, and Mrs. William and Mrs. Emil Hess, the price received by him was to be thus apportioned. Dr. Sloan says he considered himself a trustee for these ladies for any residue of price remaining after he had been satisfied for his own outlay. This arrangement between the parties as to the disposition of the price

can be no concern of the liquidator, the creditors, or the company, provided the latter got valuable consideration for what it gave; and by the conveyance by Dr. Sloan of the land and buildings the company did beyond question acquire a property worth $25,000, unless that property was, by the legal result of what had taken place already, upon equitable principles, the property of the company held by Dr. Sloan as a trustee for it. Upon this state of facts the master treated Dr. Sloan as the holder of 126 unpaid shares amounting to $6,300 for which sum the respondent has been placed upon the list of contributories.

My first proposition is that the master's whole proceeding was *ultra* his jurisdiction; that under the winding-up order he had no jurisdiction to entertain the question of Dr. Sloan's liability under the facts here in evidence that question being one which could only be properly litigated in an action in due form instituted by the liquidator on behalf of the company. In considering this case it must at the very outset strike any one that a judicial result which would have the effect of vesting in a joint stock company without any consideration whatever, absolutely for nothing, property which has been produced by an expenditure of certainly not less than $5,200, can hardly be a sound one, and yet that would have been virtually the effect of the master's order had it been allowed to stand. Granting for the sake of this argument all that is contended by the liquidator about the trust of the land itself, yet the company got more than the land; it got the improvements in the creation of which large sums of money had been invested, and I maintain if these 126 shares are now to be treated as unpaid shares the company would get these improvements gratuitously, by a lucrative title as a mere gift. The only principle upon which the master

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could have acted in making the order he did was in assuming that no consideration whatever had been given for the shares. If any consideration was given it was beyond the master's competence to inquire into the adequacy of it. For this, as I should expect, I find ample authority in the books. Shares can be paid for either in money or money's worth, and when paid for by property conveyed to the company the value of the property given in consideration will not be inquired into. On this head Lord Justice Lindley in his book on Company Law, (1) has the following passage :—

> Previously to the above enactment it had been decided, when the statute in question (that requiring in England an agreement in writing when payment is otherwise than in cash) does not apply, it may be taken as settled that shares may be fully paid up not only in money but in money's worth ; and shares which are *bonâ fide* given as paid up in payment of property transferred to the company or of services rendered to it, or of claims against it, must on the winding up of a company be treated as paid up shares ; and in the absence of fraud the court will not inquire into the value of that which is taken by the company in payment instead of money ; for example, where payment was made in paper which turned out to be worthless it was nevertheless treated as duly made.

And in Brice on Ultra Vires, (2) it is said :—

> Shares must be paid for but not necessarily in money, and the amount of the consideration will not be examined by the courts.

So that unless a case of fraud was made and proved which could only be done in a formal action to rescind it must be held that there was a valuable consideration given *bonâ fide* for the 126 shares in question in the improvements alone, even granting that there was some trust as regards the land, and therefore the master in a winding-up proceeding could not say the shares were wholly without consideration and unpaid for, which he must be able to do before he can put a

(1) 5 ed. p. 785. (2) 3 ed. p. 298.

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holder on the list as a contributory for unpaid shares. I wholly differ from the master when he refers his jurisdiction to the R.S.O. c. 157, section 61. That manifestly has no application here; to make it apply it must first be shown that the shares are unpaid. The master thus assumes that which is the very question in dispute. As no attempt has been made to demonstrate that this section 61 has any reference to such a case as this, I may content myself with the answer I have just given. It is, however, very apparent that consideration to the full value of the shares was received by the company, and this for the reasons given in the able judgments delivered by the three learned judges who formed the majority of the Court of Appeal, who very clearly demonstrated the correctness of their conclusions. I suppose no one can dispute the authority of *The New Sombrero Phosphate Company & Others* v. *Erlanger & Others* (1). That case was decided in the House of Lords after two arguments, the last before an exceptionally large House consisting of nearly all the law lords of that day, and it is therefore as high an authority as could possibly be invoked. I am then content to let the present case be tested entirely by this case of *The New Sombrero Company* v. *Erlanger* (1). In order to make out that there was no consideration for these shares it must then be proved that Dr. Sloan, when he conveyed to the company, was a mere trustee for it. This cannot be better put than it is by Mr. Justice Osler in his judgment, where he says:—

> In a case like the present the liquidator must make out that at the time the purchase was made the appellant stood in such a position that he could not claim to have bought the property for himself; in other words, that he was not in a position to sell to the company when afterwards formed, because that company, when it came into

(1) 3 App. Cas. 1218.

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existence, had already acquired the right to say that the purchase was made by the appellant for them, and not for himself.

The evidence shows that a joint stock company was contemplated from the beginning, a company which might take over the land acquired by Dr. Sloan after a factory had been built upon it. But was there any trust which such a company could have enforced against Dr. Sloan, or could Dr. Sloan after bringing the company into existence have compelled it to accept the land and to indemnify him for his expenditure upon it? This is the test question and it admits of but one answer; most emphatically no enforceable trust of the kind just mentioned ever existed. Dr. Sloan could, after building the factory, have refused to convey it to a company; he could have sold it to any purchaser, or he could have kept it and worked the factory himself; or he might have abstained from building at all on the land, have paid the purchase money of $3,000 and thus have acquired the title to the land which the vendors would have been bound to convey to him on payment of the ascertained price. This is law which no one can gainsay, for it is, as the learned judges who were the majority in the Court of Appeal have shown, the law as laid down in all the opinions delivered in the House of Lords in the New Sombrero case, and thus expressed in a passage in the speech of the Lord Chancellor given as a quotation in the judgment of Mr. Justice Osler, but which is in words so apposite to the present case that I must repeat it. Lord Cairns says:

> The syndicate in entering into this contract acted on behalf of themselves alone and did not at that time act in or occupy any fiduciary position whatever. It may well be that the prevailing idea in their mind was not to retain or work the island, but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, it seems to me, perfectly free to do with the island whatever they liked, to use it as

they liked and to sell it how and to whom and for what price they liked.

It is not merely because the language of the Lord Chancellor in the extracted passage is adapted to the facts disclosed by the evidence in the present case that it is of value here, but for the further reason that it makes with great exactitude and clearness a distinction which is the key to the decision in the Erlanger case and must be decisive in the present case. Lord Cairns here distinguishes between a trust for the company of the property acquired by the promoters and afterwards sold to the company, which he says did not exist in the case before him, and which may with confidence be said not to have existed in the present case' and that fiduciary relationship which is engendered by the promoters of a company, between themselves and the company, coming into existence so soon as the latter is formed. This is a distinction running through all the cases but one which has not always been sufficiently kept in mind. As regards any trust of the land acquired from McCormack by the respondent, I repeat, there was none. On the one hand Dr. Sloan was as free to deal with the company in respect of it as if it had been property of which he had been the owner for thirty years before he sold to this company, but on the other hand he was beyond all doubt a promoter of this company and whether he sold it this land which he and those whose interests he represented had acquired with a view of building upon it a factory and afterwards transferring it to a company or whether he sold them land which he had bought and paid for years before, in neither case could he deal with the company as an ordinary vendor, who had had nothing to do with the promotion of the company, might have done; he could only sell under the restrictions which courts of equity have imposed upon

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fiduciary vendors of the particular class known as promoters of joint stock companies. Thus it was incumbent upon him to sell the land for no excessive price; he was bound to misrepresent nothing which could influence the company in determining whether to buy or not; to conceal nothing that it was material should be known in order to enable them to form a sound judgment on that question, and to put them in possession of all material information. Further it was above all the duty of Dr. Sloan as a vendor selling property to a company towards which he stood in a fiduciary relation to see that the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which he could exercise no influence and which would, as the expression is, keep him at "arms' length" in making the bargain. Some of these duties Dr. Sloan performed but not all. Now it was because the promoters failed in the performance of their duties, because they were guilty of misrepresentation and concealment as to the price they had paid and in other respects, that the House of Lords upheld the judgment which set aside the sale in the New Sombrero Phosphate Company's case. It was not in that case decided that there was no consideration whatever for the conveyance of the island, nor that any paid-up shares which had found their way into the hands of the vendors as part of the consideration were wholly unpaid shares, nor that the company had merely acquired what was already their own property; but in that action, which was one to set aside the contract not as void but only as voidable in equity, it was decided that the sale must be rescinded and the parties put in *statu quo*; that is that the property was to be re-conveyed to the promoters who had sold it and the price returned by them to the vendors.

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Whilst I say that this distinction between a trust of the property and the personal fiduciary relationship of the vendors exists, and that it is the very turning point in most of the cases which have been determined upon this question of the validity of sales by promoters, I am far from saying that there may not possibly be a case in which the property itself may be regarded as being bound by a trust in some cases *ab initio*, in others in consequence of *ex post facto* events. For instance, if a promoter of a company acquires property ostensibly for the company from a vendor who is by the terms of the bargain to be paid by the company when it comes into existence, either in money or shares, and the company is formed and this agreement is carried out, and part of the price which has been paid by the company finds its way in pursuance of some secret arrangement between the vendor and the promoter into the hands of the latter, that is a secret profit which the promoter who in such a supposed case has put himself in the position of an agent for the company cannot retain. It makes no difference that in such a case the property may have passed through the hands of the promoter and have been formally conveyed by him to the company; it would be in no sense his own property which he would in such a case be deemed to convey, but the property of the company. In this hypothetical case there would be no contract to rescind; that would not be the appropriate relief; and although the company might not be in a position to ask for rescission by reason of its having conveyed away the property, it would still be entitled to compel the promoter to account for and repay his secret profit, and if any portion of that consisted of paid-up shares of the company issued as such as part of the consideration still held by the promoter, such shares might in a winding-up proceeding

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be treated as unpaid shares. But the supposed case, of which the *Emma Silver Mining Co.* v. *Grant* (1) is an example, is not the case here; this property was acquired not for the company, and the consideration which consisted of the money expended in building the factory was not paid for out of the funds of the company but by Dr. Sloan and those he represented out of their own monies, just as in the New Sombrero case and other cases to which I will refer.

The principles of decision which are thus to be applied here have been given as the *rationes decidendi* in many other cases besides the New Sombrero case.

Thus in *Gover's Case* (2), Lord Justice James says :—

> At the time when this agreement was made there was no company in existence, and no promoter, trustee, or director; the company had not even an inchoate existence except in the brain of Mappin; and the utmost that could be said of Mappin was that he was a projector of a company which he intended and had agreed to promote.

Again Lord Justice James says :—

> It is surely open to any man, in point of law, to sell his property to a joint stock company and to invite persons to form themselves into a joint stock company to purchase from him, just as it is open to any man to sell to any persons in the world the right to become his partners in any property or undertaking. * * * * * * * No impropriety in the contract can make it the contract of the company, or the contract of a promoter, trustee, or director of a company, when at the date of the contract there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties.
>
> I may illustrate my view by referring to a contract which, I think, would be within the act. If, instead of contracting to sell to the company, or inviting the company to become shareholders in the thing itself, Mappin had invited them to become shareholders with him in a contract, and they had accepted that invitation, then he would, by the terms of his offer, and by their acceptance of that offer, have made himself their agent as from the date of that contract, and any bye or collateral contract made for his own benefit would be a contract by a trustee for the company or partnership.

(1) 11 Ch. D. 918. (2) 1 Ch. D. 182.

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In the same case Lord Justice Bramwell puts the pith of the judgment of the court in a very few words. He says:—

Here Mappin entered into the contract, not as promoter but as intending to be so.

The doctrines promulgated in this case of Gover's in which Lord Justices James, Mellish and Bramwell concurred have never been displaced but have been recognized as sound, and acted upon in all subsequent cases. The distinction to which I have adverted was also acted upon and was the groundwork of the judgments of Pearson J. (1) and the Court of Appeal (2) in *Re Cape Breton Co.* Lord Justice Cotton in the course of his judgment in that case says :—

Numerous cases have been brought before the Court, but none of them are like the present, because in all the cases where relief was given the case was that of a trustee or a director who had sold to the company, at an enhanced price, property which he had acquired when he was a trustee or director, and he was held to be liable for the difference on the ground that at the time he acquired his interest in the property he was in the position of a trustee. The principle of those cases is very clear. It is this: That having bought the property while he was a director, and so in the position of a trustee for the company, and having afterwards made it over to the company without disclosing his interest, he was estopped from saying that he originally bought the property on his own behalf, or otherwise than for and on behalf of the company. When, therefore, he pays a large additional sum of money out of the coffers of the company for the property, he is putting into his own pocket a sum of money by way of purchase money paid by the company for that which was already their own.

Lord Justice Fry in the same case makes some observations peculiarly apposite to the present case. He says :—

It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it is bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal against the will of his agent to enter into a new contract with the agent, a thing which is

(1) 26 Ch. D. 221. (2) 29 Ch. D. 796.

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plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand.

This case of the Cape Breton Company was not one of an action to rescind but was a proceeding under the 165th section of the Companies Act, 1862, to make a director account for a profit he had made on the sale of certain properties to the company. It was held by the Court of Appeal that he was not so answerable, and further, that the property having been in the course of winding-up proceedings sold so that the company could not restore it if the contract were set aside it was too late for rescission. The House of Lords (1) affirmed the judgment of the Court of Appeal upon the ground that the shareholder who made the application had not any interest sufficient to give him a *locus standi* being a holder of fully paid-up shares in a limited company which had become insolvent. The law as laid down in the judgments of the Lords Justices Cotton and Fry has, however, never been questioned nor could it be, since it conforms in all respects to the decision of the House of Lords in the New Sombrero case. In *Re Ambrose Lake Tin and Copper Mining Company* (2), Lord Justice Cotton, dealing with an order similar to that made by the master in the present case, which had been made by the Vice-warden of the Stannaries Court in a winding-up proceeding, thus forcibly and clearly stated the true doctrine:—

> The principle of the order must be this, that the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time

(1) 12 App. Cas. 652, sub nom. Bentinck v. Fenn.

(2) 14 Ch. D. 390.

when the so-called vendor acquired the property he either acquired it for the company, or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. In that case what the Court does is to go back to the original purchase made by the person who afterwards purports to sell to the company at an advanced price, and to say this was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing, which you are not entitled to retain. * * * * * * * * * I can quite understand an action to set aside the contract altogether, but that is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract, "We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company, which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it."

I may be excused for making this long quotation since every word of it has a direct bearing on the case before us, and it is besides a very clear exposition of the doctrines which prevailed in the Erlanger case. It shows that the master's order was in the very teeth of existing authority and is conclusive of the present appeal.

The last case which I shall refer to is that of the *Ladywell Mining Company* v. *Brookes* (1) the circumstances of which have a remarkable resemblance to those in evidence here. There it was again held that the fact that the parties who sold the property to the company were the promoters of the company, and had the company in contemplation when they acquired the property, did not make them trustees for the company of the property itself. And further, that although as promoters they stood in a fiduciary relation to the

(1) 35 Ch. D. 400.

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company when they afterwards sold to it, and that not having complied with all the obligations incumbent on them as fiduciary vendors the contract might for that reason have been rescinded, yet that it was too late for rescission as the landlord of the property (which was leasehold) had entered and avoided the lease for a forfeiture. Lord Justice Cotton in his judgment entirely adheres to what he had stated in his former judgments in the cases already cited on the point of there being no trust *ab initio*, and he also confirms what he had said in the Cape Breton case (1), as to its being too late for rescission. The opinion of Lord Justice Lindley is to the same effect, and this is worthy of note inasmuch as that very learned judge has always shown a disposition to go further in giving relief in this class of cases than other judges have thought possible. Upon the point that there can be no rescission without a re-conveyance of the property Lord Justice Lindley is very distinct. He says:—

> There might be a case for rescission if rescission were possible, but rescission is not possible because the property acquired by the company does not belong to the company any longer. The landlord has taken possession and rescission is out of the question.

The judgment of Lord Justice Lopes is also in entire accordance with those of the other judges on both points. I am therefore justified in saying that this case is another conclusive authority against the present appellant. Many other reported cases might be added to those I have specifically mentioned; those cited, however, are so distinct in their terms, so exactly applicable, and are decisions of courts of such high authority, that no further citations are necessary to establish the propositions of law upon which the judgment of the Court of Appeal is founded. I admit that there are *dicta* by text writers attributable, I think,

(1) 29 Ch. D. 795.

to confounding cases which merely establish that a promoter stands in a fiduciary relation to the company with those which hold that he is to be considered as a trustee of property which he actually acquires for the company, but these *dicta* cannot possibly outweigh the judgments of the House of Lords and the Court of Appeal which proceed entirely on a recognition of a difference between the two cases.

I consider, therefore, that it is fully established that Dr. Sloan was never a trustee for the company of the property which he conveyed to it by the conveyance of the 21st of March, 1890; that, therefore, the master was wrong in his adjudication that the respondent was a holder of 126 unpaid shares and liable to contribute as such; and that this order would have been also erroneous even if it had been established that Dr. Sloan had acquired the land at West Toronto Junction as a trustee for the company since there had been a large expenditure on that property, either by Dr. Sloan or by those he represents (it matters not which), which if the master's order was allowed to stand the company would get without any consideration, thus making it operate as nothing short of confiscation of the money which the evidence shows the wives of the Messrs. Hess had honestly expended in the improvements; a result as unwarrantable by any doctrine of courts either of law or equity as it is repugnant to one's notions of justice and fairness.

There can of course be no rescission, which is the only remedy where there has been non-observance by a fiduciary vendor, such as a promoter who sells property to the company, of the rules of equity governing such sales, for the property has been sold (1) and cannot be restored, and in any event relief by way of rescission is beyond the jurisdiction of the master in a

(1) See appellants factum p. 15.

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winding-up proceeding under the Dominion statute. Then, it is not competent in such cases to the master, not having jurisdiction to rescind, to make the vendor account for any profit which may have accrued to him or to those whom he represented. This is made apparent by a passage in the judgment of Lord Justice Cotton in the Cape Breton Company case (2), and by Lord Cairns in the New Sombrero case, where the question is passed upon in the following terms:

> That part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the re-sale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the judges in the courts below.

It is therefore out of the question to say that the master's order is to be supported because the $6,300 which is represented by these 126 shares was an amount less than or equal to a profit which was derived by the sale to the company. Further, in point of fact, even if it was open to the master, proceeding under the winding-up act, to give such relief as that last alluded to, the facts would not warrant it, for it is, I think, sufficiently established that the $25,000 which the respondent received for the conveyance was not in excess of the value of the property which the company acquired under that deed. This is, I think, a fair conclusion from the evidence, even if we assume the shares to have been worth their par value in the market, but I have shown in an early part of this judgment that where it is said that shares must be paid up in money or money's worth, that by no means involves the proposition that the property must be equal to the nominal value of the shares; on the contrary, decided

(2) 29 Ch. D. 804.

cases show that the courts will not inquire into the value in the absence of fraud.

Therefore from every point of view the order made in the master's office is unsustainable.

This being the proper disposition of the case it is of course extra judicial to say anything about what might have been the result of an action for rescission had the same facts been presented in that form; I do so, however, to prevent any misapprehension, so that it may not be supposed that in anything I have said I have presumed to detract in any way from the salutary rules which have been laid down by the English courts as governing the contracts of promoters with the companies they have brought into life. Of course an action for rescission must have failed for the reason before mentioned that in consequence of the sale of the property the parties could not be put *in statu quo* (1). But if it had not been for that circumstance I think such an action must have succeeded. Disinterested as was the conduct of Dr. Sloan throughout these transactions, which resulted in a loss to him of some $275 besides infinite trouble and annoyance, and free as he has been from first to last from the imputation of any selfish object, he has still, I think, been wanting in his duty as a person who at the time of the sale stood toward this company in a fiduciary relation, that is to say as having been one of its promoters.

Without undertaking to give an exhaustive description of these duties I will say that they at least include the obligations before stated, viz., those of selling for a price not exorbitant; concealing nothing that it was proper the directors of the company should

(1) See as further authorities on this point *Great Luxembourg Railway Company* v. *Magnay* 25 Beav. 586. *Lindsay Petroleum Company* v. *Hurd* L. R. 5 P. C. 221.

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know in order to form a fair judgment as to the value of the property; and making no misrepresentations of facts material to the purchase. All these requirements, I think, Dr. Sloan sufficiently complied with. There remains, however, another duty which the respondent did not perform. It is in such cases as the present the duty of one who has been a promoter of the company to see that his contracts with it are made through the medium of a board of directors who are entirely independent of him, that is a board comprised of persons who are entirely free of his influence; men who are not mere instruments subject to his dictation and subservient to his interests; and with such a board he must deal at arm's length. This obligation was not properly fulfilled in the agreement for sale of the 27th of January, 1890, nor when the conveyance was afterwards executed on the 21st of March, 1890, for no one can for a moment suppose that the board, composed as it was, was an independent body unsusceptible to the influence of Dr. Sloan and the *cestuis que trust* whose interests he represented. The object of requiring that the board of directors should in case of this kind be independent persons, free from any control or influence which the promotor could exercise over them, is the protection of the shareholders, and as this includes the protection of future shareholders as well as those who have already become such no ratification by the existing body of shareholders can so confirm the transaction as to make it free from impeachment by one who has not been an actual party to the confirmation. That this is the law is also established by *Erlanger* v. *New Sombrero Phosphate Company* (1).

I make these last observations not with any view of reflecting on Dr. Sloan but in order to guard against

(1) 3 App. Cas. 1260.

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any inference that I had taken it upon myself to disregard rules of law laid down by very great lawyers in deciding a case in the House of Lords.

For these reasons, which are in the main the same as those given in the judgments in which the majority of the Court of Appeal have recorded their opinions, I have come to the conclusion that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Dewart & Raney.*

Solicitors for the respondent: *Haverson & St. John.*