1922

*May 9, 10.
*Oct. 10.

CAMPBELL RIVER LUMBER COMPANY (DEFENDANT)..... } APPELLANT;

AND

N. A. McKINNON AND A. McKILLOP (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale—Vendor and purchaser—Contract—Sale by vendor through third party to real purchaser—Increase of price—Difference to be paid by vendor to real purchaser—Concealment from third party—Fraud—Advance in cash by purchaser to vendor—Conditions of agreement not fulfilled—Claim for reimbursement—Indivisibility of transaction.

The respondents were owners of timber licences and timber lands, standing in the name of McKillop, which the appellant wished to purchase and for which the respondents asked $165,000. The appellant, being unable to make the cash payment required by the respondents, suggested that the transaction could be financed through one Rounds. It was finally agreed between the appellant McKillop that the respondents should sell to Rounds for $230,000 and that the appellant should receive in cash the difference of $65,000. The respondents were to be paid by Rounds $100,000 in cash, $90,000 in shares belonging to Rounds of the par value of $80,000 in a lumber company in Maine and $40,000 in five yearly instalments. The appellant was to buy the property from Rounds at the same price, $230,000. The appellant also agreed to purchase the shares from the respondents within four years at $85,000 with interest at 6% the respondents agreeing to pay the appellant in advance $65,000 in cash out of the $100,000 received from Rounds. The respondents consented to the increase in the price of sale and to conceal the fact from Rounds. The latter was also kept in ignorance of the payment of $65,000 by respondents to appellant and of the agreement by appellant to purchase the shares. These trans-

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault.

actions being all carried through, the respondents paid the appellant $65,000 in cash. At the end of four years, the respondents called upon the appellant to purchase the shares. The appellant repudiated the transaction as *ultra vires* and on that ground successfully defended an action for specific performance. The respondents then brought this action to recover the $65,000 advanced to the appellant, with interest.

Held, Idington J. dissenting, that the payment of the $65,000 cannot be separated from the rest of the transaction; and, such transaction being infected with fraud in which McKillop participated, the respondents cannot recover.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 549, 556) reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of Gregory J. at the trial and maintaining the respondents' action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

The trial judge dismissed the respondents' actions; but on appeal, it was held, Macdonald C.J.A. dissenting, that the fact that the agreement was *ultra vires* of the company was not a defence to the action, since the $65,000 had been used by the company for its benefit in paying debts.

The respondents, by their action, also claimed interest on the $65,000. The Court of Appeal (1) held that the respondents were not entitled to the interest. A cross-appeal was taken to the Supreme Court of Canada by the respondents against this ruling.

Craig K.C. for the appellant.

Martin K.C. and *Lafleur K.C. for* the respondents.

(1) [1922] 2 W.W.R. 549, 556.

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IDINGTON J. (dissenting):—This is an appeal from the Court of Appeal for British Columbia which reversed the judgment of the learned trial judge dismissing the action and gave judgment for the respondents for sixty-five thousand dollars without interest, but with costs in both of said courts.

The case is rather remarkable in many ways and if I were to attempt to follow and write its full history in all its varied sinuosities I fear the true aspects of law and fact, upon which the appeal should turn, would be lost sight of.

The respondent McKillop being possessed of timbered lands in British Columbia, the appellant entered into negotiations with him for the purchase thereof. His price was finally put at $165,000 cash, or such a large part thereof in cash as to render it if carried out practically a cash transaction.

The appellant could not raise the necessary cash and in the last resort the unhappy thought struck someone connected with the management of appellant company that it might induce a relation of his named Rounds to help the appellant to finance the transaction if some shares held by him in another company were taken into consideration as apparently part payment of the price.

To make that scheme practically operative, and satisfy the respondent McKillop's firm demands as to price of sale by him, the officer of the appellant, who unfolded it, suggested calling the price two hundred and thirty thousand dollars instead of the $165,000 dollars price which the said respondent, McKillop, was determined to adhere to and be paid. This was acted upon, but it required the said McKillop's assent as the conveyance must come from him and,

after some hesitation, and doubts expressed by him to the parties acting for the appellant as to the propriety of such an expedient, he reluctantly assented.

It seemed from the way it was presented to him that he would be amply protected for the shares at par value of $80,000 would be, for the most part at least, covered by the increase of price. And so he should have been if such a devious scheme had been honestly observed by its inventor the appellant or its officers.

It had been promised McKillop by those acting for appellant that a mortgage would be given him by appellant on a valuable mill the company had recently erected, as well as other property to cover the balance that would be due him, after crediting the money he would receive, apart altogether from the shares Rounds was to assign him.

The first result was a transfer by him to the said Rounds expressed on its face to be for the said consideration of $230,000, of which $100,000 was to be in cash and $90,000 in said shares of the par value of $80,000 and $40,000 in five yearly instalments.

And then a re-transfer was made by Rounds to appellant on terms which do not seem identical but may work out the same result in price. The friend Rounds had got rid of his stock by the first step in the deal.

The adroit management which brought that result about was successful in so handling McKillop as to get by one excuse or another a large share of the cash part of the said price which he was to be paid by Rounds, to be advanced by him to the company, and then when it came to the execution of the promised mortgage which was to be the last step in the plan or programme, the further excuse was set up that a

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mortgage would so impair the appellant's credit at the bank that some other agreement equally assuring McKillop of the payment of the balance due him should be substituted for the promised mortgage.

He was induced by such blandishments to modify the promise of a mortgage into accepting the following agreement:

> This agreement made and entered into this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and fourteen by and between:
>
> Albert McKillop of the city of Vancouver, in the province of British Columbia, lumber merchant, hereinafter called the party of the first part
>
> and
>
> Campbell River Lumber Company Limited, a company duly incorporated under the "Joint Stock Companies Act" of the province of British Clumbia, and with its head office at White Rock in the said province.
>
> Whereas the said Albert McKillop is the owner of 800 shares of the capital stock of the North American Lumber Co. a corporation duly incorporated under the laws of the State of Maine and with its head office at the city of Portland in the said state of Maine, of the par value of $100.00 per share, and the said Albert McKillop has agreed to sell the same to the party of the second part and the said party of the second part pursuant to a resolution of the Directors thereof has agreed to purchase the same,
>
> Now this indenture witnesseth that the said Albert McKillop for and in consideration of the sum of one dollar of lawful money of Canada to him paid this day by the party of the second part (the receipt whereof is hereby acknowledged) agrees to sell to the party of the second part the eight hundred shares of the capital stock of the said North American Lumber Company and the said party of the second part agrees to purchase the same and pay therefore the sum of eighty-five thousand ($85,000) dollars within four years from the date of this indenture with interest thereon from this date until paid at the rate of 6½% per annum, payable half yearly, all payments to be made to the Royal Bank of Canada, east end, to the credit of the said Albert McKillop, and upon completion of the said payments of $85,000.00 and interest as aforesaid the said Albert McKillop agrees to transfer the said stock to the said party of the second part.
>
> And it is further agreed between the parties hereto that the said party of the second part shall not sell, mortgage or dispose in any way of their lumber mill and premises at White Rock, B.C. until the said $85,000.00 and interest shall have been fully paid without the consent in writing of the said Albert McKillop thereto.

In testimony whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

ALBERT McKILLOP (Seal)
Campbell River Lumber Co. Ltd.

Signed, sealed and delivered in the presence of
"N. A. McKinnon,
H. W. Hunter, Pres.
F. G. Fox, V. Pres.

The appellant having got into financial difficulties after the respondent McKillop had transferred said agreement to the said respondent, McKinnon, and the former had gone as a volunteer to do service in the recent war, some litigation took place in his absence between the assignee of appellant and McKinnon whereby the last named sought a declaration against the estate, but that was dismissed, the court holding, it is said, that the bargain in said agreement was *ultra vires* the appellant.

That case does not seem to me to present the actual case which should have been made, as I view the transaction in light of the history which I have outlined, and hence is not though pleaded along with everything else imaginable as *res judicata*, actually such, so far as McKillop and said agreements are concerned, as to govern the decision herein.

Indeed it is hardly argued that it does, but is only faintly suggested.

What is set up by way of argument in appeal may be fairly treated as presenting two legal problems.

On the one hand it is said that there was no total failure of consideration and hence no action can lie to recover the consideration.

The other branch is that this agreement was but part of a whole transaction involving much else and the doctrine of total failure of consideration is not applicable.

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With great respect the view taken that on the latter ground the respondent must fail seems obviously to rest upon a failure to grasp the actual situation created by the parties, or rather by the appellant, which was the purchase by it of the respondent's, McKillop's, property at a price named and never departed from by him, and cannot be heard to set up, after contriving all the machinery its officers invented as means of financing and carrying out the bargain made with him for the purchase thereof, to defeat his recovery of the balance of the price agreed upon.

The subterfuge appellant resorted to and induced respondent McKillop to assent to, did not prove injurious to Rounds or we should likely have had another aspect presented, certainly not to the credit of the inventor thereof.

Hence nothing herein can turn upon its peculiarities in such a way as to defeat the respondents. Nothing in the scheme or the mode of its execution can change the actual bargain between the parties thereto now concerned herein.

All the documents executed were, so far as honestly intended, but a means of securing payment to the respondent McKillop of the balance of the purchase money which is yet due. The covenant by appellant in the said agreement to pay the sum of $85,000 is absolute in terms and still stands good and respondents entitled to recover thereon notwithstanding the obvious incorrect recitals.

But it is contended that cannot be because it would be *ultra vires* the appellant's corporate powers to take shares. So much the worse for it if it entered into a scheme involving the existence of such a power. That scheme was its own and it is now too late to set up such a pretence as means of cheating the respondent

McKillop of the balance of his price. Moreover I do not agree that it cannot obtain all the expected benefit of the shares even if it cannot vote as share-holder.

It was, I repeat, the clear intention of the parties to secure the balance of the purchase money and the solicitor who drew the agreement having suggested the question of *ultra vires* was answered by appellant's agent that the appellant had the power.

Hence such a mistake cannot be allowed to frustrate what was the actual purpose of the parties.

I agree with the contention of the appellant that this agreement was only part of the whole. The pretence of want of power in the appellant to carry out the ultimate intention of the parties reminds one of the analogous pretence set up in the case of *Brown* v. *Moore* (1), wherein the majority of this court held that such pretence should not avail and against the judgment so declared the pretending party sought leave to appeal to the Judicial Committee of the Privy Council, but was refused leave.

The foregoing was, together with my conclusion that the appeal herein should be dismissed with costs, and cross appeal allowed with costs, written last June shortly after argument. I was surprised to learn, some three months later, that the majority of the court had agreed to allow the appeal on the ground of the illegality of the conduct of appellant's officers in inducing Rounds to believe that the lowest price respondents would take was $230,000, instead of $165,000, and, which I am unable to understand, so tainted the later dealing now in question as to render it impossible for the respondents, or either of them, to recover.

(1) 62 Can. S. R. 487.

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Such a defence was not pleaded, nor, so far as I can see, argued, either at the trial or in the Court of Appeal; or before us, if my memory serves me.

The appellant's factum, which relates the facts in the way it contends they are, incidentally thereto refers to some of the history of the rise in purchase price but not in any way does it make the point now made by the majority of this court.

I, most respectfully, therefore, submit such a view should not now be entertained.

The erroneous allegation that all these agreements were in fact one, has been the source of much confusion.

It is not correct. It is correct that all three in a sense arise out of the same subject matter, but the actual consideration involved in each is not the same. And the taint that may have existed in the consideration of the agreement with Rounds, cannot extend to the future of any dealing with the fruits or resultant assets derived therefrom.

We must bear in mind that the learned trial judge expressly and decidedly accepted in its entirety the evidence of respondent McKillop and his story is that he assented to the part he took in the bargain with Rounds on the distinct understanding that he was not to have any stock given him as part of the price; that the sixty-five thousand dollars of the cash to be got from Rounds was to be handed over to the appellant upon a mortgage for that amount being given by it to McKillop upon the appellant's mill.

That was the basis upon which the parties worked pending the closing of the deal with Rounds which, as already stated, took place on the 31st of March, and results turned over by him on the 3rd of April to the appellant on terms agreed to between them and with which he had nothing to do and was no party to.

Three weeks or more later, on the 24th April, the appellant, by a separate and different transaction entirely, was induced to abandon his right to a mortgage, as promised on appellant's mill, and to give the $65,000 he held of the cash to appellant in consideration of the agreement sued on.

The appellant's officers and counsel sometimes seem to me to try to make out that the $65,000 was paid before the new agreements, respectively between the appellant and Rounds, and between appellant and respondent McKillop now in question, but fortunately respondent McKillop was able conclusively to prove by the production of the cheques making such payments of the said sum, that they were paid after the deal between appellant and Rounds had been closed on the 3rd of April; one for $15,000 on the 14th of April, apparently pending negotiations for the abandonment of the right to a mortgage; and the other for $39,939.00, after the agreement now in question was executed.

The balance apparently was accounted for by a transfer of a cheque given by them to Rounds and handed back by McKillop to the appellant.

In lieu of all these the abortive sale of the stock to the appellant was substituted, and that has failed on the ground of its being *ultra vires* and hence a complete failure of consideration.

How then can it be said this collateral or supplemental contract is tainted with any illegality of which Rounds alone could complain?

It was a quite independent contract with which he had nothing to do and could not have complained of in any way.

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He alone could have complained of the imposition practiced upon him, and he has neither done so nor been injured in any way, but, on the contrary, got a bonus out of his dealing.

In short, he has got (what he wanted) rid of his stock as he desired, at a price, I suspect, far beyond its value; and succeeded in helping the boys (as he expressed it) to finance the deal, which were his two objects.

So long as he acquiesed in the results no one else has a right to complain.

This is not a case of contravention of a statute in which resultant contracts in the promotion of an illegal purpose might be such as to render it the duty of the court to intervene, even if the parties concerned should refrain from pleading its violation.

As to the merits of the case as between the parties hereto, I imagine that if respondents had found the stock to be double the estimated value instead of only 25% thereof, and had attempted to hold on to it as their own, in disregard of their duties as trustees, and retain also the cash got, we would have heard some exclamations of surprise if told the law such as about to be declared.

I submit, most respectfully, that is *not* the law, and that the appeal should be dismissed with costs.

A cross-appeal is taken by respondents as to interest disallowed below. I cannot help thinking that the actual terms of the above agreement, as well as what led up to it, overcome the objection taken below, and that interest was specifically agreed upon. And hence I think that the cross-appeal should be allowed and interest added to the $65,000.00 at 6½%, in accordance with the terms of the agreement.

DUFF J.—In 1914 the plaintiff, McKillop, was the holder of certain timber licences in which his co-plaintiff McKinnon had some interest and which they wished to sell at the price of $165,000. Through Hunter and Fox, who may be considered as the owners of the capital stock of the appellant company, McKillop had negotiations with the company with a view to a sale. The company was not financially in a position to purchase on the terms upon which McKillop was willing to sell; but a relative of Hunter by marriage, Rounds, was approached by Hunter and found willing to assist Hunter and Fox by providing the necessary financial assistance to enable the company to acquire the property. With this in view Rounds consented, if the property on examination should be equal to expectations, to become (as he ultimately became) intermediary in an arrangement by which he should purchase from McKillop and in turn sell the property to the company for the same price but upon terms suitable to the company's position—substantially upon the condition that the purchase price should be paid out of the proceeds of the timber as sold.

Two features of the arrangement in which Rounds was willing to participate and which was substantially put into effect are of capital importance. Rounds was interested in a lumber concern in Maine, The North American Lumber Co., and held shares in it of the nominal value of $80,000 and it was a condition of Rounds' participation as well as an inducement that in the purchase from McKillop, these shares should be accepted approximately at their face value. The other feature was this. Hunter and Fox, pressed by the embarrassments of very limited working capital, conceived the idea that Rounds should pay $230,000

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for the property and that they should exact from McKillop a cash payment of $65,000 as their remuneration for bringing about the sale. McKillop eventually agreed to the proposal that the shares should be accepted as part payment of the purchase money to the extent of $85,000 on the understanding that he should be satisfactorily protected against the risk of loss by the shares proving to be worth less than that sum and he at the same time agreed to pay to the company out of the purchase money the commission excated by Hunter and Fox.

Rounds believed that McKillop's price was $230,000. This he was told by Hunter and Fox and their statement was confirmed explicitly by McKillop. He was in truth kept in ignorance both of the fact that a substantial part of the cash he handed to McKillop ($100,000) was in turn to be passed over to Hunter and Fox and of the fact that the shares which he supposed he was disposing of to McKillop were to be taken off McKillop's hands by the company. Both facts were from the business point of view of the most obvious materiality. The timber was Rounds' security; he was virtually advancing for the benefit of Hunter and Fox the sum of $230,000 in the belief that this was the price that was demanded for it, when in truth the owners were willing to sell and in fact were selling it for $165,000. The borrower (virtually from his point of view the transaction was an advance) was at the same time assuming a contingent obligation of $85,000 of which he was not informed.

It is impossible, I find, to acquit McKillop of complicity in the manœuvres of Hunter and Fox. He admits that he assured Rounds in express terms that his price was $230,000 while at the request of Hunter he carefully avoided any reference to the collat-

eral arrangements. Further he did this after being informed by Hunter that knowledge of the facts on Rounds' part would be disastrous to their plans. He says, indeed, that he protested, thinking their conduct was "not straight" but played his part in the plot under the belief that Rounds would suffer no detriment.

I do not in the least doubt that McKillop's assent to the sale was procured by the promise that he would be satisfactorily secured in relation to that part of the purchase money which was represented by the shares; and that he was to be indemnified fully in respect of any difference between the sum named ($85,000) and their actual selling value when he came to realize upon them; that is made very plain and indeed is overwhelmingly established by the admissions of Hunter and Fox.

Were it not that the respondents have disqualified themselves from maintaining this action by their co-operation in the machinations of Hunter and Fox there would, I think, be no difficulty whatever in sustaining the judgment in their favour. It is really not disputed that an undertaking was given to them in consideration of the sale and of the payment to the appellant company of its share of the proceeds that they should receive, after all deductions were made, the sum of $165,000 as their purchase price. Their acceptance of the shares was only a temporary measure; it was distinctly understood that they were to be relieved of the shares and the sum of $85,000 with interest substituted for them. This I say is not disputed; the agreement prepared by Mr. Carter took the form of a sale because for some reason which I cannot profess to understand he supposed the company to be incapable of binding itself in the manner the parties intended.

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The execution of that document is no obstacle in the way of the respondents; it has been conclusively held as between the parties to be inoperative. It was not an instrument executed by the company and consequently as a bilateral instrument it can have no effect whatever. Nor is the judgment in the action in which the respondents sought to enforce that instrument an obstacle. There is no estoppel because the cause of action arising under the actual oral agreement is not the cause of action asserted in the action in which judgment was given. That was an action brought upon the supposed written agreement. In that action evidence proving the oral agreement would not have been admissible. In form therefore the two causes of action are not the same nor are they the same in substance. The former action was an action upon an agreement held to be *ultra vires;* the oral undertaking deposed to was certainly not *ultra vires* and the proposition that the oral undertaking was within the powers of the company is in no way inconsistent with the allegation affirmed by the former judgment, namely, that the agreement embodied in the writing sued upon was beyond their powers.

But there is a fatal obstacle to the respondent's success in the action. Look at the whole transaction from any point of view and it is impossible to escape the hard fact that it all hinged upon getting Rounds to pay to McKillop and McKinnon $65,000 more than McKillop and McKinnon were to receive as the selling price of the property and getting him to do this under the belief that he was paying the vendors their price and nothing more than their price. In order to accomplish this there was the agreement which was actually executed that the parties to this litigation should co-operate in the deception of Rounds. The case

is within the principle that the courts will not enforce an agreement involving the perpetration of a fraud such, for example, as an agreement forming part of a scheme for promoting a company in which the object of the promoters is to defraud the shareholders. *Begbie* v. *Phosphate Sewage Co.* (1). An apt illustration of the principle is to be found in the decision of the Court of King's Bench in *Jackson* v. *Duchaire* (2). There the defendant had applied to his friend to advance certain moneys, the price of goods which he intended to buy of the plaintiff. The friend arranged with the plaintiff for the sale and paid the sum agreed upon. Secretly it was agreed between the plaintiff and the defendant that the defendant should pay an additional sum. This last agreement the court refused to give effect to as a fraud upon the third party whose intention, known to all parties, was to relieve the defendant from paying any part of the price.

The facts disclosed in the present appeal shew a state of circumstances in which all parties would naturally, on the assumption that they were acting honestly with one another, give and expect to recieve the fullest disclosure with regard to the character of the transaction. Rounds no doubt had a monetary interest to serve in the transaction as he desired to dispose of his shares; but one of his actuating motives unquestionably was the desire to assist his relative; and he would naturally expect, and this was quite understood by McKillop as well as by Hunter and Fox, to be dealt with in a manner befitting the circumstances and character of his intervention in the business. All parties fully realized that in the concealment of the facts concerning the collateral dealings in relation to the shares and to the purchase money

(1) L.R. 10 Q.B. 491 at p. 499 (2) 3 T.R. 551.

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Rounds was misled in a manner savouring of dishonesty though no doubt they all fully believed that in the end Rounds would lose nothing. It is impossible to escape the conclusion that the parties united to commit a fraud upon Rounds, a fraud which at Rounds' instance would have nullified the whole transaction. That being so, it follows that the company's undertaking with regard to the shares which was integral part of the entire transaction and was given in consideration in part at least of McKillop's undertaking to divide the price with the company is an unenforceable undertaking.

I have very carefully considered the question whether it is possible to separate this undertaking from the rest of the transaction but, as intimated above, I am forced to a negative conclusion. Had the agreement drawn by Mr. Carter been operative it is possible that the sale might have been enforced on the principle of the *Odessa Tramways Co.* v. *Mendel* (1); but as the respondents must rely upon the oral agreement it is essential to their case to prove the consideration for it which necessitates examining its relation to the transaction as a whole. It is at least gravely questionable whether the respondent can support the judgment on the ground that the consideration has wholly failed for the payment of the moneys they seek to recover; but it does not improve their position to put their claim in that form. In substance they are seeking to enforce the agreement that they were to receive no less than $165,000 as the net selling price of their property. See *Begbie* v. *Phosphate Sewage Co.* (2).

The appeal must be allowed.

(1) 8 Ch.D. 235. (2) L.R. 10 Q.B. 491.

ANGLIN J.—I have had the advantage of reading the opinion of my brother Duff.

With some regret because in the deception practised on Rounds the directors of the defendant company, Hunter and Fox, were in my opinion distinctly more culpable than the plaintiff McKillop, I have come to the conclusion that the transaction out of which the plaintiffs' claim arises is so infected with fraud, in which McKillop participated, that this action cannot succeed. Whether that transaction should be regarded as evidenced exclusively by the instrument prepared by Mr. Carter and as involving the taking over of the shares in the North American Lumber Co. by the defendant company, or should be deemed open to proof in the somewhat different terms of the oral testimony, including an undertaking that the plaintiff McKillop would be indemnified against loss in respect of these shares if their value should prove to be less than the $85,000 at which he accepted them from Rounds on account of the purchase price of the timber, the contamination by fraud is the same. The payment of $65,000 by McKillop to the defendant company and its undertaking either to take over the North American Lumber Co. shares or to indemnify him against loss in respect thereof cannot be segregated from the purchase of McKillop's timber by Rounds at the price of $230,000. It was all one scheme—all one transaction—and the fraudulent taint affects every element of it.

Although McKillop, Hunter and Fox all believed that Rounds would ultimately sustain no loss—as proved to be the fact— he was none the less induced by the misrepresentation to which they were all privy, that McKillop's price for his timber amounted to $65,000 more than it actually was, to assume the risk

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that the moneys which the defendant company would realize out of the sale of that timber would be sufficient to enable it to repay his advances.

I incline to think that the defence that the failure of consideration alleged as its basis was partial only would also be fatal to the plaintiff's claim. I deem it better, however, to rest my judgment on the effect of the deceit practised on Rounds.

For these reasons I am, with respect, of the opinion that the judgment dismissing this action was well founded and should be restored.

BRODEUR J.—I am of the opinion that this appeal should be allowed and I concur with my brother Duff.

MIGNAULT J.—A brief statement of the facts in this case will naturally lead up to the conclusion I have adopted.

The respondents held certain timber rights of which they were anxious to dispose and their last price was $165,000 on which they required a substantial payment to be made in cash. They stated this price to one Harold W. Hunter and to one F. G. Fox, respectively president and vice-president of the appellant company, who were very desirous of purchasing these timber rights for the company, but the latter, being financially embarrassed, could not make the cash payment required and could only purchase the timber on a logging basis, which the respondents would not accept. Hunter appears to have been an adroit and certainly not over scrupulous schemer, and in effect told the respondents that he could get a relative of his to purchase the timber and re-sell it to the company on easy terms. But this relative was to pay $230,000 instead of $165,000, the respondent's price, and the

respondents were told by Hunter that as part of this price they would have to accept, as cash for $90,000, eight hundred shares of the North American Lumber Company (a Maine corporation) of the par value of $80,000. The respondents demurred at this, saying that they wanted money and not shares, but Hunter told them that the deal could not otherwise be carried through. And he added that his company would agree to purchase the shares from the respondents in four years for $85,000 (the difference, $5,000, Hunter was to apply to pay the commission of the agent who had brought the parties together) at six and one-half per cent interest, and would give a mortgage on its mills to secure the payment of the $85,000 and interest. Although the purchase price for the sale proposed by Hunter was to be $230,000, the respondents were not to receive more than their own price, $165,000; the difference, $65,000, they were to hand over to the appellant company. To carry out this transaction Hunter went to Kansas and returned with one Rounds, an uncle of his wife, but he cautioned the respondents against letting Rounds know that their price was only $165,000, whereas he was being made to pay $230,000, adding that if Rounds ever found it out both he and Fox would go to jail. The respondents weakly consented to this scheme, which was a palpable fraud on Rounds, relying on getting rid of the stock which Rounds insisted they should accept as part of the purchase price by selling it to the appellant company. And when Rounds stated that he understood that their price was $230,000, McKillop replied that it was the price that had been arranged.

By a first agreement dated March 31st, 1914, the respondents, acting by Albert McKillop, sold the timber rights to Rounds for $230,000 of which

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$100,000 was paid in cash or equivalent, $90,000 in the shares of the North American Lumber Company, and the balance $40,000 Rounds was to pay within five years.

By a second agreement of April 3rd, 1914, Rounds agreed to sell these timber rights to the appellant company for $180,000, which was to be paid within a term of years on a logging basis, and for $40,000 which was to be paid by the assumption of the payment of the like sum to the respondents for the balance of price due to them by Rounds. The latter was also to receive a bonus on the lumber cut by the appellant company.

I have said that Hunter had promised the respondents to give them a mortgage on the company's mills to secure the payment of the shares which the company was to take over from the respondents at the price of $85,000. Subsequently he represented to McKillop, with whom he dealt, that to grant a mortgage on the mills would injure the company's credit, and he proposed instead that the company should guarantee to the respondents the value of the shares, and McKillop allowed himself to be persuaded to accept this change in Hunter's proposal. With matters in this state, McKillop, Hunter and Fox went to a solicitor in Vancouver, Mr. Carter, to have an agreement drafted and signed. Mr. Carter inquired whether the appellant company had the power to purchase the shares of another company and was assured that this was all right. He, however, raised the objection that even if the company could purchase the shares, it might not have the power to guarantee their value, and McKillop thereupon consented to accept a straight agreement to purchase the shares, without any guarantee of their value, but with a stipulation that the company would not mortgage its property until the $85,000 was paid, and this third agreement whereby

the company undertook to purchase these shares within four years for $85,000, with interest at six and a half per cent, was signed by McKillop and by the company acting by Hunter and Fox on April 24th, 1914.

After this last agreement, McKillop, who had previously paid over a portion of the $65,000 to the company, completed the full payment, so that the respondents had received $100,000 in cash or equivalent, the obligation of Rounds to pay them $40,000 and the 800 shares of the North American Lumber Company, accepted for $90,000, and which the appellant company was to take over from them for $85,000, and they had paid to the appellant company $65,000. This left them in money $140,000, less $65,000, to wit $75,000, and in order to get their full price of $165,000, less the $5,000 commission, they relied on the promise of the appellant company to take over for $85,000 the shares they had received from Rounds.

But it turned out that the appellant company had not the power to make this promise or to purchase these shares, and this was determined in a previous suit between the parties. As a consequence, the appellant company has the $65,000 it had received from the respondents and it has the timber rights sold to it by Rounds whom it has now fully paid. The respondents have $75,000 in money and the shares which are testified to be now worth only 25 per cent of their face value, and they cannot force the appellant to take and pay for these shares.

Under these circumstances, the respondents seek in this action to recover from the appellant company the $65,000 paid to it, placing their case on the basis of a total failure of consideration for the agreement of the appellant company to purchase the shares. But it must be observed that the payment of the

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$65,000 was in no wise the consideration of the agreement to purchase the shares. McKillop admits in his testimony that there was but one transaction carried out by means of the three agreements I have mentioned. It may well be that McKillop would not have paid the $65,000 to the company had he not relied on its promise to take over the shares he had unwillingly accepted from Rounds and to pay $85,000 therefor. But I am forced to the conclusion that the real transaction between the parties was that the respondents would agree to make Rounds pay for the timber rights $65,000 more than their price and hand over this money to the company whose officers, Hunter and Fox, had practised this fraud on Rounds. And as to the shares, the respondents had accepted them from Rounds as representing $90,000 in money, and these shares were to be purchased by the appellant for $85,000. It is true that the respondents are now saddled with these shares, and cannot force the appellant to take them off their hands, but this is because they made an *ultra vires* contract with the company, for which they are surely to blame, for they should have obtained their solicitor's advice as to the appellant's right to purchase the shares, the more so as Mr. Carter put them a question which he would have no doubt solved for himself had not his clients assured him that there was no doubt as to the company's power to hold the shares of another company. It is impossible for me to think for a moment that there was a failure, total or otherwise, of consideration for the transaction between the parties, which was one transaction carried out by three agreements, and had not one of these agreements been void this controversy would probably not have arisen. And I must find that in truth and in fact a fraud was

practised upon an innocent purchaser who was induced to pay, over and above the real selling price of the respondents, this sum of $65,000, which McKillop handed over to the instigators and perpetrators of this fraud. I cannot come to the conclusion that because one of the agreements entered into to carry out this fraudulent design is now found to be *ultra vires*, the respondents can recover the illegal premium which they exacted from Rounds and paid to the company. And as I am clearly of opinion that they cannot place their case on the basis of a total failure of consideration, but that they allowed themselves to be drawn into a fraudulent transaction at the suggestion of Hunter and Fox, my conclusion is that this Court should not assist the respondents in their attempt to recover a sum which they should never have demanded from Rounds and which they paid over to the appellant company merely, as I must hold, in furtherance of the fraudulent scheme concocted by Hunter and Fox.

I would allow the appeal and restore the judgment dismissing the respondents' action, but in my opinion, and speaking for myself alone, in view of the fraudulent character of the transaction, there should be no costs either here or in the court below.

The cross appeal of the respondents against the refusal of the Court of Appeal to grant them interest must of course be dismissed, but I would grant no costs.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

Solicitors for the appellant: *Mayers, Stockton & Smith.*

Solicitors for the respondents: *Martin & Murray.*