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*Nov. 16.
*Dec. 22.

OSLER WADE, LIQUIDATOR OF THE PAKENHAM PORK PACKING COMPANY, LIMITED (PLAINTIFF)..... APPELLANT;

AND

JOHN KENDRICK AND RACHEL E. FORSYTHE (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Act of directors—Unauthorized expenditure—Liability of innocent directors.

The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm of which two directors were members carrying on business of a similar character continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire and declared that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor $30,000 and receiving assets worth $12,000, and having eventually gone into liquidation the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal held that K. and F. were not liable though their partners were.

Held, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial against the respondents.

The plaintiff is liquidator of the Pakenham Pork

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

Packing Co., Limited, which purchased and took over a pork packing business carried on at Stouffville under the name and style of the Pakenham Pork Packing Company. This business had been carried on for some years by the defendant James Pakenham, under the above mentioned trade name, and was so continued until the 2nd of December, 1901. On that day a partnership was formed between the defendants for the carrying on of the business, the partnership to continue for six months subject to an earlier determination in case of the consummation of certain arrangements between the defendant Pakenham and two trustees for the Pakenham Pork Packing Company, Limited.

The Limited Company was incorporated on the 13th of June, 1901, by letters of incorporation under the Ontario Companies Act.

Among the incorporators were the defendants Pakenham, Byer and Kendrick, and one H. J. Morden, who was then the local manager of the Standard Bank at Stouffville. The company was empowered to carry on the business of packing, curing and dealing in pork and other meats and the various products thereof, and for these purposes to acquire the plant, business, assets and good-will of the partnership. There were five provisional directors, of whom Pakenham, Byer and Morden were three.

At this time the partnership business was being carried on by Pakenham alone, and he had on the 20th of May, 1901, entered into an agreement with Messrs. Stouffer & Coulson, of Stouffville, brokers, as trustees for the limited company to be formed, to sell, assign and transfer to the limited company all the machinery, plant and good-will of the partnership business, and to transfer the lease of the premises in which the

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business was carried on in consideration of $20,000 in cash, and $10,000 in fully paid up stock in the limited company.

The limited company did not organize until the 2nd of April, 1902. On that day the shareholders held their first meeting, elected directors and transacted other business.

Before that date, however, a partnership had been formed between the defendants Pakenham, Byer, Kendrick and Mrs. Forsythe, upon terms contained in articles of partnership dated December 2nd, 1901, and executed by all the parties. The purpose was to carry on the existing business in the same premises under the same name, but apparently there was no grant to the partnership of any of Pakenham's property engaged in the business further than that he agreed to give them the use of the machinery in the factory free of charge.

The capital of the firm was declared to be $10,500, represented by a line of credit arranged with the Standard Bank, to be secured to the bank by a joint note of the parties, and for such other sums as might be agreed upon. The profits and losses were to be divided and borne in equal shares.

It was further agreed that the partnership should continue for six months, unless terminated under a provision whereby, when the limited company so requested, the firm would hand over to the company the factory, plant, business and good-will of the business, free and clear of all cost and charge, and thereupon the partnership should be wound up and after payment of debts the profits, if any, should be divided among the partners share and share alike.

It appeared from the agreement, and was further shewn by the testimony, that all that the partnership possessed when entering into business was the right to

use the premises and machinery in and with which Pakenham carried on his business, and that the partnership was arranged and the three other persons brought in, in order to secure advances on a line of credit from the Standard Bank to enable the business to be carried until such time as it was expected that the limited company would be in a position to take it over.

The arrangement was brought about by the joint efforts of Pakenham and Morden, who was then manager of the bank and one of the provisional directors of the limited company. The partners other than Pakenham were really only partners as to profits and losses. The partnership assets would be the stock in trade, book debts, moneys and other property derived or acquired in the prosecution of the business. The partnership liabilities would consist of all debts or obligations incurred during the continuance of the term of partnership. The partnership capital was the line of credit in the Standard Bank.

The business was being carried on in this way at the date of the shareholders' meeting. At that meeting the shareholders approved of, adopted, ratified and confirmed the agreement of the 4th of May, 1901, and ordered that an agreement be executed to give effect thereto. By-laws were adopted and the defendants Pakenham and Byer were elected directors along with H. J. Morden, W. C. Renfrew and N. Clarke. Pakenham was appointed managing director with a salary of $2,500 per annum, and a percentage of profits for five years.

The first meeting of the directors was held on the 7th of April, at which all the directors except Kendrick were present. Pakenham was elected President; Renfrew, Vice-President, and A. Low, Secretary.

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The next meeting of importance was held on the 30th of May, the same four directors being present. Among other business transacted a resolution was passed directing the Secretary to put the company's seal on Pakenham's agreement.

These steps were probably taken in view of the near approach of the expiration of the term of the partnership which occurred on the 2nd of June.

But when that time arrived the limited company was not in a position to take over the business. And at a meeting of the directors held on the 4th of June, at which Pakenham, Byer, Morden and Renfrew were present, a resolution was passed "that in consideration of the Pakenham Pork Packing Company, comprising Messrs. Byer, Kendrick, Pakenham and Mrs. Forsythe, continuing and carrying on the present partnership business until such time as the business can be taken over by the Pakenham Pork Packing Company, Limited, that the said Pakenham Pork Packing Company, Limited, do indemnify and save harmless the said Pakenham Pork Packing Company from all loss occasioned by the continuation of said business by said partnership company."

Kendrick and Mrs. Forsythe did not assent to the terms of this resolution. On the contrary they both took the ground that they would not continue longer in the partnership, and of this Pakenham and Byer were made aware, as was also Morden.

Pakenham prepared a statement of the affairs of the partnership and submitted it to Kendrick and Mrs. Forsythe, from which it appeared that the assets amounted to $34,490, while the debt due to the Standard Bank amounted to $33,600, leaving a surplus of $890.

This was on the 6th of June, and on the same day

Mrs. Forsythe wrote letters in the same terms to Pakenham and Morden. That addressed to Pakenham was submitted to the Board of Directors on the 10th of June, and on motion of Morden, seconded by Byer, it was resolved that Pakenham write to Mrs. Forsythe and ask her to meet Byer and Kendrick in reference to her letter. There was a meeting, with the result that Mrs. Forsythe and Kendrick adhered to their resolution not to continue longer in the business.

At the trial it was shewn that the letter to Pakenham was lost, but that addressed to Morden was proved. It stated that after consideration of the statement of affairs of the partnership she had decided to withdraw therefrom, and that she would not be responsible for any further advance or liability in any way, and that from the statement furnished by the partnership their affairs appeared to be in a prosperous condition, and she, therefore, expected a cheque for $222.50 and a release signed by all the members of the partnership from further liability. She repeated that she would not be responsible for any further advances, and concluded, "from the statement you furnished me the company's affairs appear to be in a prosperous condition, and no doubt you will be able to get Mr. Renfrew or some other stockholder in the new company to take the position in the present company which I now vacate."

Thus the limited company as well as the Standard Bank, through the manager, Morden, had full notice of Mrs. Forsythe's position, and neither she nor Kendrick ever receded from their position in this respect.

At a directors' meeting in November, 1902, there were present Pakenham, Byer, Renfrew and Morden. On motion of Renfrew, seconded by Morden, it was resolved, that the limited company now take over

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from the partnership, the plant and premises in accordance with the agreement made, the limited company to take from the partnership an assignment of all book debts, choses in action and rights of the partnership in connection with the business of the limited company; also to take and receive from the partnership all the stock in the factory and in transit, also to receive an assignment of the existing lease of the present premises—the limited company to indemnify the partnership against all its outstanding debts in connection with the business, according to a list to be furnished and attached to and form part of the agreement embodying the arrangement as hereinbefore set out, and the agreement with list of debts attached to be submitted to the directors for approval before being finally executed.

The transfer was subsequently effected and the company paid over the sum of $30,094.63 to the partnership. It was proved at the trial that the assets so transferred were worth only $12,000.

The court of appeal held that the respondents Kendrick and Forsythe were not liable for this amount. The liquidator appealed.

W. M. Douglas K.C. and *S. B. Woods* for the appellant.

Shepley K.C. for the respondent Forsythe.

John W. McCullough for the respondent Kendrick.

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be allowed.

DAVIES J.—This is an appeal from the judgment of the Court of Appeal for Ontario reversing, so far as the two respondents herein are concerned, a judgment

of Street J. whereby an agreement made between a partnership company of which the respondents were two of the members and an incorporated company of which the appellant is liquidator was set aside and all the members of the partnership, including respondents, held liable for $18,363.66, the difference between $30,736.65, the amount paid out of the funds of the incorporated company for certain property and assets of the partnership, and $12,372.99, the admitted full value of such assets.

So far as Kendrick and Forsythe, two members of the partnership, are concerned they were held by the judgment appealed from not to be liable for this sum of $18,363.66, while their two associate partners, Pakenham and Byer, were held liable and the judgment of the trial judge so far as the latter were concerned confirmed.

These two, Pakenham and Byer, filled the dual positions of members of the partnership which sold its assets to the company, and directors of the company which bought those assets and paid the money for them. The court of appeal understood "that the trial judge did not set aside the transaction of the bargain and sale, but permitted it to stand and reduced the amount of the consideration to what he found to be the value taken by the limited company," and while holding this to be the appropriate form of relief as against Pakenham and Byer, the Appeal Court held it was not as against the other two, Kendrick and Forsythe.

The Chief Justice delivering the judgment of the court says:

> They were not directors of the company, they received no part of the moneys paid or deposited on the 31st October and they were guilty of no act which can render them personally responsible to the Limited Company in respect of the two items in question.

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It is true that Kendrick and Forsythe were not directors of the company and were not personally guilty of any improper or fraudulent act towards the company. But I am quite unable to accept the conclusion of the Chief Justice that

> they received no part of the moneys paid or deposited on the 31st October ($30,094.63)

or that they were not responsible for the acts and representations of their co-partners who were also directors of the company.

This money was not actually paid into their own hands it is true, but it was taken by their partner Pakenham from the funds of the limited company of which he was president and manager, and paid into the bank to discharge and pay the $30,094.63 which, on that day, 31st October, the partnership of which they were members owed the bank and which, of course, they were personally liable for. The judgment appealed from relieves these respondents from their unquestioned liability on the 31st October for the amount of the debts of this partnership which exceeded the assets by $18,000, and it could only be sustained by holding the appropriation of the limited company's moneys to have been legally defensible, and such as a court of equity could sanction. Nor do I understand the judgment of the trial judge as understood by the court of appeal. His formal judgment does not in so many words rescind the agreement dated in November, 1902, and executed in January, 1903, for the bargain and sale of the partnership assets to the limited company. But the result of the judgment substantially is to do so, and in his reasons for judgment it is quite plain that what he intended to do was to rescind this agreement. After referring to the agreement he goes on to say:

Of course that was an absurd, outrageously absurd, agreement to make on behalf of the partnership. The assets—what are called assets—as distinct from the plant and buildings, belonged to the partnership. The plant, buildings, etc., belonged to Mr. Pakenham himself, so that is an easy way of separating them. And *because of the absurd nature of the agreement, it is a matter that cannot possibly stand, where the managing portion of the buyers, the incorporated company, were the principal partners in the partnership.* So that an account should be taken there of the moneys paid by the Limited Company in debts of the partnership in the shape of book debts and stock in trade, and the partnership should pay the difference between these two sums, and they should not have got it.

I fully concur in the conclusions of the trial judge as to "the absurd, outrageously absurd" character of this agreement. It does not seem to me to be so much an improvident or a questionable agreement as one utterly indefensible and unjust, if not actually fraudulent. It was not an agreement dealing with a speculative property or with property about which one might charitably imagine large differences of opinion could honestly exist, but one dealing with property and assets about the real value of which, if there had been no misrepresentations or concealment of material facts, there could not exist any substantial difference. In determining such value the trial judge with consent of counsel accepted the nominal or face value of the debts as given though it is well known they were not of such face value, and the value of the other assets as claimed by the defendants in the action. The counsel for the liquidator chose to accept this rather than go to a reference, and the difference between such value and the amount actually paid for these assets, viz., $30,094.63, was $18,000, the sum now in dispute and which the partnership benefited by and the limited company lost.

By such consent and such action of the court with respect to it the respondents are effectually answered when they suggest that rescission could not take place

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because they could not be restored to their former position. As a matter of fact they were placed by the judgment of the court in a much better position than they possibly could have been in if the stock and book debts were handed back to them, for they were allowed more than their highest value.

The court of appeal agree that the transaction is one which so far as Pakenham and Byer, the two partners who were also directors of the limited company, are concerned, cannot stand, and the whole question is whether it can stand as regards the other two members of the partnership, Kendrick and Forsythe, the now respondents, because they were not directors of the company or active participants in the transaction impeached.

The contention is that the agreement has not and ought not to be set aside, but that so far as Pakenham and Byer are concerned they must not, being alike vendors and purchasers, benefit from the transaction, but must be held liable for the $18,000 improperly taken from the limited company while their partners for whom they acted and who, as a consequence of their action, are benefited to the extent of the $18.000 cannot be held liable for it.

I am not able to accept such reasoning. The agreement made by Pakenham and Byer, directors of the company, with themselves as members of the partnership is not and cannot be defended.

It could only have been accepted by a disinterested director under misrepresentation or concealment of the facts, and it is plain to me that such was the case with respect to the director Clark. It does appear to me that if from the nature of their dual positions these two men, Pakenham and Byer, could not be permitted to benefit at the expense of the company and its share-

holders from such an agreement as they attempted to make between the partnership and the company, neither should their co-partners for whom they acted be permitted so to benefit.

If because of misrepresentation of material facts or failure to disclose them or the outrageous character of the bargain or the dual character of their positions or all or any of these things combined the benefits which Pakenham and Byer would have derived as members of the partnership if the agreement was maintained is denied them, surely it must on the same grounds and for the same reasons be denied to those partners of theirs for whom they acted. I cannot understand how these other two partners, the respondents Kendrick and Forsythe, can be permitted to escape liability for a sum of $18,000 while their partners, who consummated and carried out the transaction by which the escape is effected, are held liable for the same sum on the ground that under the circumstances the principles of equity will not permit them to reap and enjoy such unrighteous profits and advantages. The reasoning of the court proceeds, of course, on the ground that the agreement was not and could not be set aside, and that only the active participants in the wrong should be punished, but it omits the vital and cardinal facts that the active partners were the agents of the silent partners throughout the transaction, and that the result of the judgment would be to permit the latter to enjoy the fruits of an unrighteous contract made for them by their active agents and partners.

Pakenham was the one ruling active managing partner in the partnership, and also the ruling active managing director of the limited company. In this dual capacity he sold or attempted to sell the assets of

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the partnership to the limited company at a time when their extreme value was $12,000 for a price so outrageous and absurd ($30,000) that so far as he is concerned it is agreed on all sides and by all the courts it must be set aside and he be held liable for the unjust and improper benefits or profits he attempted to obtain. And so also with regard to Byer. But it is said that because Kendrick and Forsythe were not active participants in the wrong done to the shareholders of the company they are entitled to enjoy the fruits of such wrongful action which they equally shared with Pakenham.

Stripped of all irrelevant matter the facts become plain and simple. Without authority or justification Pakenham on the 31st of October took $30,094.63 of the money belonging to the shareholders of the limited company and paid it to the bank to extinguish the partnership company's debt.

It is contended that in the following month of November the transaction was ratified at a meeting of the directors of the company, four of them being present and two of the four being Pakenham and Byer, and the assets of the partnership agreed to be accepted as consideration for the money paid.

It is quite plain that these two latter were not disinterested or competent directors to bind the company to such a transaction, and it is equally plain that the resolution of the directors at such meeting was not an authority to carry out the transaction, or even a confirmation of it, because it expressly provided that a most important part of the transaction was to be determined upon at a further and subsequent director's meeting.

Such other meeting was, it is contended, held on Jan. 21st, 1903, at which five directors, Pakenham,

Byer, Clark, Morden and Renfrew were present, when it was resolved, Renfrew dissenting, that the agreement in question "should be approved and executed by the different parties."

But Clark, one of the directors, states explicitly, that he voted to approve because he thought he could not help himself being misled by the assurances given him by Pakenham and his solicitor that the limited company was bound to carry the agreement out in furtherance of a previous resolution which the directors had come to in the preceding month of June. It is clear beyond argument that the previous resolution referred to in no sense bound the company or the directors to any such approval or ratification, and that Clark's vote and adhesion were obtained by a clear misrepresentation of the facts.

Then, again, it is equally clear that if Pakenham did not deliberately misrepresent the material facts which the directors ought to have known he failed to disclose those facts to them.

The mischief, however, had at that time been done, the misappropriation of the funds had already taken place, and if the parties to it then desired to obtain the ratification of the company either at a meeting of the directors or of the shareholders of the company, such ratification could only be obtained on a full and plain statement of the true facts being laid before them.

No ratification by the shareholders ever took place. The matter was never laid before them, and the resolution of the directors relied upon as sufficient was passed, not with the facts truly laid before them, but under clear misapprehension and suppression of those facts, if not specific misrepresentation.

Such a resolution so obtained could not operate to

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bind the shareholders or the limited company to any transaction so inequitable, unjust and outrageous as the one now in question, and to me it is inconceivable that any disinterested director with the true knowledge of the facts would have voted such ratification. Renfrew dissented. Pakenham and Byer from their fiduciary relationship to the partnership and the company were disqualified. Clark was misled, and the only remaining director was Morden, the manager of the bank which had advanced the money and to which it was owing.

It must be remembered that while Kendrick and Forsythe had at the expiration of the partnership articles given the clearest notice that they would not be bound for further advances made to the partnership and that they desired to terminate it and put an end to it, they still remained liable for the then existing debts of the partnership of which this $30,094.63 formed part. No notice or determination on their part could avail to relieve them of such liability. The partnership remained in liquidation during the summer and autumn months, and on the 31st of October when the moneys of the limited company were applied by Pakenham in paying off this partnership debt to the bank the liability of the partners existed.

Such appropriation as I have already shewn was quite illegal and improper. It was not, in my opinion, at any time subsequently approved of or legally ratified by the company either in meeting of the directors or shareholders, and that being so I am at a loss to conceive on what principles Kendrick and Forsythe can be held to be released from their liability for this partnership debt or that liability fastened upon the limited company. All parties agree that it was not until the 1st November, 1902, that the incorporated com-

pany took over the property. Up to that time at least the partnership was in liquidation.

Some observations of the Chief Justice of the court of appeal were called to our attention as implying a doubt in his mind whether the rule in *Clayton's Case*(1) could not be invoked to relieve the partners from their liability for the debt to the bank. But it seems to me quite clear that as between the parties to this suit, the shareholders of the limited company acting through the liquidator and the partners of the partnership company, no such rule could have any application. No juggling with figures on the part of the bank and no method of keeping their accounts adopted by them could possibly affect the liabilities, as between themselves, of the parties to this suit. The point was mentioned by counsel, but not pressed or elaborated, and was practically disposed of at the argument, it appearing to be clear from the record that at the trial the liability of the several partners to the bank for the $30,094.63 paid with the money of the limited company was admitted.

The last and remaining contention of Mr. Shepley was that rescission could not be granted in this case, because the parties could not be restored to their original position. There was no dispute as to the general proposition, but its application to the facts of this case was denied, and I have already partially dealt with it. The full value of the assets of the partnership at the date when the $30,094.63 was paid over was allowed to the respondents. They were not prejudiced nor placed in a different position with regard to these assets. Their value was agreed to at the trial and the partnership was allowed full credit for them. The respondents, therefore, are not in a posi-

(1) 1 Mer. 572.

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tion to invoke the application of the principle referred to.

The appeal should be allowed with costs here and in the court of appeal, and the judgment of the trial court restored.

IDINGTON J.—The defendants, Pakenham, Byer, Kendrick and Mrs. Forsythe, were partners in a pork packing business.

The Pakenham Pork Packing Company was a joint stock company incorporated under the Ontario Joint Stock Companies Act and organized in April, 1902.

The partnership was heavily indebted to the Standard Bank and relieved themselves by improperly using, in May, 1902, seven thousand dollars of the corporate company's money.

This was done by the simple process of drawing a cheque signed by the hand of Mr. Pakenham upon the corporate company's bank account, and placing it to the credit of the partnership account.

On the 31st October, 1902, the process was repeated, but this time the cheque was for $30,094.63, and was signed by the same Mr. Pakenham's hand in the name of "Pakenham Pork Packing Company, Limited," *per* "Jas. Pakenham, managing director."

In neither case was there any transaction between the partnership and the company that lent any colour of right to such a proceeding. There was nothing but audacity,—or should I say kind philanthropy to aid a hard pressed concern—to justify such an action.

The company went into liquidation and the plaintiff, as liquidator, sued to recover from the partners these moneys.

Mr. Justice Street, who tried the case, gave judgment for the plaintiff, for both sums less a sum of

$12,372, that the parties at the trial agreed had come to the hands of the company, from the goods of the partners, by a later proceeding to which I will refer presently.

The Court of Appeal held he was right in respect of $7,000, but wrong as to the second sum as regards the respondents Kendrick and Mrs. Forsythe.

This is an appeal by the liquidator from such judgment of the Court of Appeal.

It seems that the right of action as to both sums was on the first of November, 1902, complete.

I have abstained thus far from referring to aught else in the case in order that the matter may appear clearly in what I believe to be its true light. It was conceded by the counsel for respondent, Mrs. Forsythe, that there was no bargain by which these takings of the company's money could be justified, at least up to the 31st October, 1902, and possibly the 19th November, when there took place what, with steps following it, he relied upon.

Counsel for Kendrick took the position that, on the 4th of June, 1902, at a meeting of four directors of the company of whom defendants, Pakenham and Byer, were two, a resolution was passed that the company, in consideration of the partners named continuing and carrying on the partnership business until such time as the business could be taken over by the company, the company indemnified and saved harmless the partnership from all loss occasioned by such continuation.

This curious resolution passed at such a meeting of directors composed of two of the men thus indemnified, and only two other directors, when the business of the Board could only be conducted by a quorum of three, needs only these facts to be stated to shew how

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little in law it is worth considering here. No agreement followed it then, or was founded upon it.

The beneficent document was not considerate enough even to promise that the company should get the benefit of the profits, if any, earned by the carrying on of the business.

The company had no more to do with that partnership business than with any other, had never promised to buy it or become bound in any way in regard to it. Proximity and a common parentage were all that lent a colour to the confused notions of the business relations of the partnership and company.

The partners, however, on the 31st of October, 1902, got from the bank their securities which they had given for the partnership debt, and this, undoubtedly, as the result of Mr. Pakenham giving, as already stated, on that date the cheque of the company for $30,094.63.

It was faintly suggested in argument that this man Pakenham was the managing director of the company and hence his co-partners could deal with him in making a bargain such as implied by this transaction.

But there was no bargain nor any pretence of bargain till 19th November following. He had no authority from the company to do what he did on the 31st October, 1902. He had authority from the respondents, as their partner, though in liquidation only, and their adoption of his acts by accepting the results completed a confirmation thereof, if it were needed. The reliance placed upon the later acts of the company's officers as binding, indeed, the only alleged binding thing relied on, presupposes want of authority in Pakenham on 31st October. Yet the respondents held, in the meantime, their surrendered securities, and I repeat thereby confirmed if needed be the

authority of Pakenham to get for, and bring to them, such valuable documents.

Both respondents rely upon what took place on 19th November, 1902, and at later meetings, when an agreement professing to be an assignment pursuant to a bargain of the previous July, used in its operative part the words

> of the partnership business now being operated by the company as a going concern, together with all the stock in trade in and upon the said premises or in any way the property of the said parties of the first part in connection with the said business, and doth also assign, transfer and set over unto the said parties of the second part all the book debts, claims, demands and choses in action of them and the said parties of the first part arising out of or in connection with the said business carried on under the name of the Pakenham Pork Packing Company other than and except any rights as against the parties of the second part, and the intention and agreement being that the said parties of the second part shall in all respects occupy the position of the parties of the first part in respect of the said business so carried on.

It proceeded to bind the company to pay all the debts according to schedule "A" attached.

No one seemed able to specify these debts and the matter stood over till January, 1903.

The learned trial judge properly, as I think, characterized this as an absurd, outrageously absurd, agreement.

I do not think it necessary to consider it further than to say that I fail to see in it anything that released or in any way abrogated the right of action that had enured to the company the moment their money was on the 31st October, 1902, wrongfully taken from them.

The agreement of July was so amended by consent at the trial as to take away any basis for resting this agreement upon that.

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It does not profess to be a ratification of what Pakenham had presumed to do on the 31st October.

It was sanctioned only by Pakenham, Byer and Clark, of the directorate. The meeting of directors consisted of only four directors. One of them opposed its adoption. Clark explains how he was improperly led by Pakenham to believe the company already bound by the July agreement which obviously they were not.

It required three directors to make a quorum.

I am unable to understand how the action of Pakenham and Byer, sitting as directors and personally interested in the matter, could give vitality thus to what had been done by Pakenham on 31st October even if, though it does not profess to relate back thereto, it could, by intendment of law, be made so to relate back. In fact Pakenham had already presumed on 31st October to take over the stock in trade and all that this professes to assign.

Could he do so? The whole board were by the by-law of the company only authorized

> to make or cause to be made for the company any description of contract *which the company may by law enter into.*

That certainly would not have rendered a contract made by all the directors for themselves with the company lawful, without the express sanction of the shareholders.

Nor do I think the resolution of January, 1903, brought about by imposing upon Clark, as he explains, or supported by Morden, under circumstances I need not enlarge upon, but which made him a person deeply interested in not discharging his duty as a director, remedies or rectifies the matter.

I am unable to see how this case where the

directors, or a majority of them, acting, were doing it for themselves, stands any higher that where they all may have done so, in such a supposed case.

And when the result sought is to set up a bargain for $30,000 and for what it was admitted was then worth only about $12,372, one is not apt to infer, in law, any authority, in the minority of one or two disinterested directors to form for fellow interested directors a contract.

It is to be noted that the Ontario Joint Stock Companies Act as amended expressly forbids directors voting on sales by or to themselves, and emphasizes thus what possibly was law before in most cases one can conceive of. I think, however, it may well be held as going beyond the law as it stood before and render *ipso facto* void all contracts resting upon such voting so as to need no rescission.

In this view there is no need of setting aside this agreement. It is, however, as I hold, only necessary to find that it failed in law to set up or place on any legal basis the acts of 31st October, 1902, which cannot be supported.

And as to the supposed difficulty of putting the parties respondent here in the same position as they were before that time, the only difficulty is that created by these respondents and their partners putting assets they had in the control of the officers of the company, and such mistake is easy of remedy by allowing the value of those assets, which was done by the judgment of the learned trial judge.

The disposal of their partnership goods was what respondents say they awaited, and hence less difficulty in this part of the case.

They have disposed of, at no doubt a good price,

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$12,372 worth of what they wanted to sell and dispose of.

The appeal should be allowed and judgment of trial judge restored with costs here and below.

MACLENNAN J. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *S. B. Woods.*

Solicitor for the respondent Kendrick: *James McCullough.*

Solicitor for the respondent Forsythe: *W. S. Ormiston.*