1919
*May 28, 30.
*Oct. 14.

JAMES S. FULLERTON AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

ANNIE LOUISE CRAWFORD AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Company—Director—Secret profit—Ratification—Action by shareholder—Disqualification—Sale of company's land—Director acting as broker—Commission — Statute — Application—"Companies Act," R.S.O. [1914] c. 178, s. 82.

A company formed to buy land for re-sale purchased a block on which W. held an option. W. made a profit of over $11,000 which he shared equally with F. and D. promoters and directors of the company who did not disclose the fact to the other members for several months.

Held, that F. and D. had received a secret profit to which the company was entitled.

The company passed a resolution purporting to refuse to allow its name to be used and C., a shareholder and former partner of F., brought action, on behalf of himself and all other shareholders except the defendants, to recover this secret profit for the company.

Held, that the capacity of a single shareholder, against the will of the majority, to assert the right of the company to this money is doubtful; *Towers* v. *African Tug Co.*, ([1904] 1 Ch. 558) referred to; he must succeed on his own merits alone; and, Davies C.J. and Duff J. dissenting, as it was shewn that he was aware of the payment to F. and D. at an early date, and elected to treat F's portion as an asset of the partnership between them by demanding his share of it he was disqualified from bringing the action in respect to these secret profits.

D., who was a land agent, sold the property purchased from W. at an advantageous price and was paid the usual broker's commission. At a meeting of the shareholders a resolution was passed sanctioning this payment. C. claimed the return of this money also.

Held, that as D. did not receive the money in his capacity of director, sec. 92 of the Ontario "Companies Act" did not apply and a by-law authorizing the payment was not necessary.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

Held, also, that there was noting to prevent D. from serving the company as an employee and receiving proper remuneration therefor. In *re Matthew Guy Carriage and Automobile Co.* (26 Ont. L.R. 377; 4 D.L.R. 764), approved.

Per Davies C.J. and Duff J. The payment of the commission could only be legal if sanctioned by the shareholders. At the meeting when the resolution professing to sanction all the payments attacked was passed the capital of the company had been impaired by payment of a dividend without the funds sufficient therefor. The resolution, therefore, had no effect and the impugned transactions had no sanction. As to C's right to bring the action it was not pleaded nor raised in the Courts below and cannot be questioned on this appeal.

Judgment of the Appellate Division (42 Ont. L.R. 256; 43 D.L.R. 98), affirming that at the trial (37 Ont. L.R. 611), reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial (2), in favour of the plaintiff.

The material facts and the questions raised for decision are sufficiently indicated in the above headnote.

Hugh J. Macdonald for the appellants, Fullerton and the Doran Estate, referred to *In re Matthew Guy Carriage Co.* (3); *Canada Bonded Attorney Co.* v. *Leonard-Parmiter Co.* (4); and *Andreæ* v. *Zinc Mines of Great Britain*(5).

Tilley K.C. and Urquhart for the appellants the other directors.

McMaster and *J. H. Fraser* for the respondent Crawford. Plaintiff had a right of action: *Theatre Amusement Co.* v. *Stone*(6).

As to delay see *Hutton* v. *West Cork Ry. Co.*(7); *DeBussche* v. *Alt*(8), at page 315.

(1) 42 Ont. L.R. 256; 43 D.L.R. 98; sub nom. *Crawford* v. *Bathurst Land and Development Co.*
(2) 37 Ont. L.R. 611.
(3) 26 Ont. L.R. 377; 4 D.L.R. 764.
(4) 42 Ont. L.R. 141; 42 D.L.R. 342.
(5) [1918] 2 K.B. 454.
(6) 50 Can. S.C.R. 32; 16 D.L.R. 855.
(7) 23 Ch. D. 654.
(8) 8 Ch. D. 286.

1919

FULLERTON v. CRAWFORD.

Idington J.

THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Duff.

IDINGTON J.—This suit is ostensibly concerned with the rights of a shareholder in a company to keep erring promoters and directors in the path of duty, but in truth is the outcome of an unsavoury squabble between two late partners in a law firm which had been solicitors for the company and could not, on a dissolution of their firm, settle their partnership accounts without adjusting the affairs of the company.

The appellant Fullerton, an elderly practitioner of law in Toronto, took, in January, 1912, as junior partner, one Crawford, a young man who professed to have some knowledge of company law, on the understanding that he was to bear the burden of the office work.

We are not very fully informed as to the exact details of their arrangements, but we are told that they were to divide the results of the office on the basis of five to Fullerton and three to Crawford "but each to have the liberty of having business in which" he might "have a personal interest done in the office without charge."

Fullerton had a proposition made to him, by a client and personal friend named Wallace, to buy from one Bicknell a hundred and fifty-nine acres in the township of York at $725 an acre. An optional agreement was obtained by Wallace therefor, which was drawn in the said law office. To secure that, the selling agent, and one Doran, and Wallace, each contributed in nearly equal parts to a deposit of $2,500 which Wallace as buyer was required to pay.

Having in view the ultimate purpose of forming a joint stock company to carry out the speculation, a

syndicate agreement was drawn up in the office of Fullerton & Crawford whereby Fullerton was to buy from Wallace at $800 an acre the land which he had thus secured at $725 an acre.

This agreement purports to be made in duplicate, on the 4th March, 1913, between Wallace the vendor of the first part, and Fullerton as trustee thereinafter called the purchaser of the second part, and the subscribers whose names are signed, of the third part; and to provide that a syndicate is thereby formed with a capital of $75,000 divided into $100 shares to carry out said purchase by Fullerton. Doran was to be the manager of the syndicate; Fullerton to be treasurer; and it was declared to be the intention to organize a joint stock company in which each syndicate shareholder was to become a shareholder in proportion to the number of shares held by him in the syndicate.

The trustee Fullerton was then to convey the land to said company. The details were to be decided at any meeting of the syndicate.

Crawford subscribed said syndicate agreement for $5,000. An agreement of sale was entered into on same day for the sale by Wallace to Fullerton at the price of $800 an acre.

Inasmuch as Fullerton is described in both documents as a trustee I see no importance to be attached to this latter, save its being referred to in the syndicate agreement as definitely fixing the terms of purchase.

It was contended by Crawford in this suit, and by his personal representative in this appeal, that he was entitled, a year and seven months later, to bring an action against Fullerton and Doran to recover for the company which was duly formed as projected in said agreement, about six weeks later, the respective sums of $3,877.20, each which Wallace had paid each out of the profits he had thus made of $75 an acre.

1919

FULLERTON v. CRAWFORD.

Idington J.

The learned trial judge and the Appellate Division upheld such contention.

I assume for argument's sake that the company if suing might have recovered said profits.

Indeed, very early in the argument it was intimated by this court to the counsel for the representative of Crawford, that as to the said amount so received by Fullerton they might so assume also, and direct their attention to the claim made by the respondents, that Crawford had become disqualified and disentitled to bring such an action especially in face of the almost unanimous opposition of his fellow shareholders.

I have sought in vain for any decision in favour of a shareholder coming into court with so many impediments in his way, by reason of honest opposition on the part of his fellow shareholders to any assertion of such right as he claimed and with the evident disqualification attaching to him by reason of his knowledge of and acquiescence in the conduct of those accused until he had failed in an attempt to profit thereby and to extort by virtue thereof a share of such part as Fullerton had got.

The learned trial judge rejected another item of his claim which was to recover for the company moneys paid out by reason of the said payments impairing capital.

That claim was rejected, not because unfounded in law if made by the company or a proper party, but solely by reason of the plaintiff's disqualifications resulting from his sharing in such illegal payments.

The same principle as thus acted upon and as applied in the case of *Towers* v. *African Tug Co.*(1), ought on the evidence of the plaintiff to be applied to the rest of the claims in question.

(1) [1904] 1 Ch. 558.

Shortly after the events I have already related in regard to the origin of the claim for recovery of secret profits above referred to, the company became incorporated on the application by petition of Fullerton, Doran, Crawford and others who were named as provisional directors.

The papers connected with this application were all prepared by Crawford and he made the usual affidavit verifying the petition.

The papers already referred to, and those others to found this proceeding upon had been all kept in the office vault of Fullerton & Crawford and along therewith the agreement between Wallace and Bicknell which Crawford admitted seeing and handling.

The interest of Crawford evidenced by his subscribing one-fifteenth part of the whole proposed capital in the syndicate, coupled with opportunity and duty alike to know should have led any intelligent man to learn by the time incorporation was completed the fact that there was a profit going to Wallace.

We are not left to rest on these circumstances alone for Crawford in his evidence spoke of the relations between Wallace and Fullerton, as follows:—

Q.—After the 4th of March—prior to that have you any recollection of any conversation with either Doran or Fullerton? A.—Yes, some time prior to that, I think it was before the 4th of March, Mr. Fullerton told me that he was taking this deal in Wallace's name because he did not want himself to go on any covenant.

Q.—Then he was taking this deal in Wallace's name as he did not want to go on any covenants—is that the first statement that you recollect as having been made by any person about this matter? A.—So far as I know it is, although I know that I had a number of office conversations with him.

Q.—Probably prior to that time. Then do you want us to understand that Mr. Fullerton was putting Wallace forward as a stool pigeon in this matter and you knew that from the first? A.—Why, of course.

Q.—Just go the limit if you will? A.—Of course, he was putting Wallace forward.

Q.—Pardon? A.—He was taking the deal in Wallace's name so there was no liability on his part.

1919

FULLERTON v. CRAWFORD.

Idington J.

Q.—So from the first—? A.—If he was not successful in raising a syndicate——

Q.—So you want us to understand the first conversation you had with anybody about this matter you recall is one in which Mr. Fullerton represented to you that he was taking this, which was his, Fullerton's deal, in Wallace's name, so as to avoid his, Fullerton's, personal liability? A.—I would not say that was the first conversation, but that was one of the conversations."

And again

Q.—Yes? A.—And was considering getting up this syndicate.

Q.—Will you please give me something definite, is it the first conversation you recollect or not? A.—So far as I know it is.

And to his taking an interest:—

Q.—I understand you were very little interested in it at that time —where did it take place? A.—Somewhere in the office.

Q.—In your office or his? A.—I cannot say as to that. He used to walk into my office and talk to me about it and in his office and in Doran's office, and he would talk about it, it was the talk of the whole office.

Q.—Mr. Fullerton was not hiding anything under a blanket or keeping anything from you? A.—I do not believe he was.

Q.—The matter was discussed pro and con? A.—I thought so.

Q.—You were in Mr. Doran's office and took it up with him? A.—I think so.

Q.—You went in to Mr. Doran's office, any conversations about it? A.—Yes, we used to talk about it.

* * * * *

Q.—Well, you ought to remember it—when did you first make up your mind to take an interest in this proposition? A.—It would be about the 10th of March.

Q.—And you subscribed for how much? A.—$2,500.

Q.—$2,500—was that your original subscription? A.—The original subscription was $5,000 which included $2,500 of Mr. Eatons.

* * * * *

Q.—Now, tell me, Mr. Crawford, had you any other investments of a similar character to this, at that time? A.—No.

Q.—Had you any other money in any other real estate transactions at or about that time? A.—No.

Q.—Can you suggest any other investment you made in 1913? A.—No.

Q.—Had you any other investments that were of a similar amount, or to any extent in 1912? A.—No.

Q.—Had you any in 1914? A.—No.

Q.—Then so far as this was concerned, this was practically your ewe lamb in the way of investment? A.—Yes.

Q.—Your ewe lamb, and the one, therefore, in which you were particularly interested? A.—Yes.

And again as to Doran's contribution:—

Q.—When did you have the first interview with Mr. Doran about the matter? A.—Oh, I cannot say.

Q.—Can you recall any interview with Mr. Doran prior to the 10th of March, when you agreed to go in? A.—I can recollect several conversations with Mr. Doran.

Q.—Can you cast your mind back, and having regard to this, your first and most important and practically your only investment at that period of time, can you cast your mind back to any conversation with Mr. Doran, and fix that conversation in your mind with Mr. Doran, and say what took place? A.—Not previous to the signing up of the deal.

Q.—Not previous—what do you mean by signing up of the deal? A.—The agreement of the 4th of March.

Q.—What? A.—The agreement of the 4th of March.

Q.—But previous to the 4th of March, and after the 4th of March, if you recollect any conversation with Mr. Doran, what was the first you remember? A.—I remember Mr. Doran telling me that he had put up the $2,500.

Q.—The whole $2,500? A.—The whole $2,500.

Q.—Do you remember the time that Doran told you that? A.—No, it was some time shortly afterwards, and he was bragging, he bragged to me of having put one over on Boehm.

Q.—What? A.—He was—

Q.—Don't characterize it bragging—you know, give us the conversation? A.—He told me in other words that he had got ahead of Mr. Boehm.

Q.—Yes? A.—He succeeded in getting Mr. Boehm to put up a third of the deposit.

Q.—He had succeeded in getting Mr. Boehm? A.—To put up a third of the deposit.

Q.—In addition to them—was that at the same time he was discussing about having to put up the $2,500? A.—Yes.

Q.—So that you understood at that time, that in the $2,500 that was put up, Boehm had contributed one-third of the deposit? A.—Yes, from what he told me.

And again as to Wallace:—

Q.—Now, Mr. Wallace was not in this real estate business for his health, so far as you could see, was he? A.—No, I do not suppose he was.

Q.—You thought it reasonable that Mr. Wallace went into these ventures with a view to make a profit? A.—Apparently so, if he disclosed them.

Q.—I am not asking whether he disclosed them or not, so far as Mr. Wallace was concerned, he transferred by an agreement to Mr. Fullerton, certain rights and interests in that property at $800 an acre—you knew that, you knew that? A.—I knew he had an agreement with Mr. Fullerton.

1919
FULLERTON
v.
CRAWFORD.
Idington J.

Doran, who had taken an office about the 1st July, 1913, to carry on real estate business in same building and, as I understand the evidence, adjacent to those rooms occupied by the firm of Fullerton & Crawford, would seem thus to have had the opportunity of daily intercourse with Crawford as well as Fullerton in regard to the joint venture in which he put $5,000 for himself and a friend.

I cannot accept the statement he (Crawford) seems to have made that he did not know that there was a profit of $75 an acre to somebody, for it is inconsistent with what he admits in relation thereto and the exercise of ordinary common sense applied to the business he was so deeply interested in for himself and others.

His pretension was that he only became aware of the amount Fullerton got by looking at the papers in the vault in January or February, 1914, after his partnership with Fullerton had ceased, as it did in said January.

Why, or how, he should have, as it were accidentally, discovered it then and not before on the many opportunities equally good for doing so, I am unable to understand.

I prefer to think he obviously had either forgotten or had not felt the same keen interest as this suit indicates in sharing in the profits made by Fullerton.

Indeed, he puts it rather as a realization of the fact in the following evidence:—

Q.—Then you told us yesterday that you had made some discovery about this alleged property, I think you said, in February, 1914? A.—Yes.

Q.—Just tell us what the discovery was that you then made? A.—The discovery was that Mr. Wallace had made this profit of eleven thousand and some hundreds of dollars.

Q.—Yes? A.—That was the first time that I realized that Wallace had made that money.

Q.—Tell me the date on which you discovered it? A.—I cannot tell you that, but the day—

Q.—Well, about the day? A.—It would be some time about the latter end of February.

The learned trial judge expressly finds as a fact, notwithstanding Crawford's denial, that he knew a profit was being made by Wallace.

But for his omission to find also that he knew, or must be held to have known, that Fullerton and Doran were interested therein, I should not have set forth the foregoing evidence so fully as I have done.

Crawford at the trial would have the court believe that, though the facts were plain and palpable to anyone possessed of the documents as he was, he had failed to realize the actual situation in which Fullerton had placed himself by what said documents demonstrated. I do not think this improved his claim to found such a suit as this.

And still less so when we find him immediately attempting to make merchandise of his realization of the fact by the attempt to frighten Fullerton into giving him a share of what he claimed herein to be an illicit profit, as evidenced by the following letter:—

401 Crown Office Building,
Toronto, March 13th, 1914.

James S. Fullerton, Esq. K.C.,
Toronto, Ont.

Re Accounts.

Dear Sir:—

I contend that you received moneys from Mr. Edwin Wallace in connection with the purchase of Bathurst Centre, and must now ask you to account to me for the same under our partnership.

I think my share nearly amounts to $1,500.00.

Yours truly,
(Signed) J. P. Crawford.

This letter admittedly refers to the said secret profits got by Fullerton. I cannot think that a suitor who proposed, as this one in this letter did, to share in that complained of, is entitled, within the doctrine

1919
FULLERTON
v.
CRAWFORD.
Idington J.

laid down in many cases but latest in the *Towers Case* (1) cited above, to bring in support of such a claim such an action as this when he failed to intimidate and extort a division of the spoils.

His share therein as a shareholder in the company as the result of success herein in that regard might be $300, but he was willing to take $1500 if the item was brought into the accounts of Fullerton & Crawford.

The suppression of secret profits is most desirable but I submit it will never be accomplished by upholding the claim of one who thus attempted first to make use of such a club to promote his own ends, and then only months afterwards when he failed to so intimidate, resorts to an action ostensibly in the interest of the company.

To recognize such a suitor as well entitled first to attempt such a levy and then entitled, despite his failure therein, would be productive of evils far surpassing those springing from a single successful reaping of secret profits, especially when the latter has been maintained as rightful by nearly all those concerned but himself.

On that ground the appellant Fullerton is entitled, in my opinion, to succeed as to this item of the claim made.

I am, moreover, very far from holding the opinion that a single shareholder can insist, against an overwhelming majority of fellow shareholders who have no interest adverse to the claim for recovery in such a case, save the honest purpose of allowing him who has received such compensation to retain it, though so ill advised as to have kept his doing so secret instead of manfully proclaiming the fact.

In such a case the question of *ultra vires* or fraud in

(1) [1904] 1 Ch. 558.

the sense used in the decision bearing upon such an issue may not arise and the matter be within the competence of a disinterested majority of the shareholders to deal with.

What is clear from the latest decisions such as *Alexander* v. *Automatic Telephone Company*(1), is that shareholders in maintaining an advantage for themselves not shared by others, cannot be permitted to accomplish the wrong merely on the pretence that it falls within the internal management of the company.

This decision followed the judgment in the case of *Menier* v. *Hooper's Telegraph Works*(2), wherein, as also in *Gray* v. *Lewis*(3) at page 1051, Sir W. M. James L.J. expressed comprehensively what I may be permitted to think is still the law governing such cases as this when the question raised may not present some act merely *ultra vires* the company and the test have to be applied whether or not a fraudulent use is being made of its powers by the majority of the shareholders or directors as the case may be.

In the case at bar the plaintiff fails, I think, to bring himself within the principles there laid down not only as to the first item but also the other remaining items of his claim when we consider, as I think we must, the action of the shareholders at the September meeting which was called at his instance.

The other items I refer to are Doran's share of the profits made by Wallace and Doran's commission on the resale. As to the former, all I have said and set forth, relative to the claim against Fullerton, applies.

It may be observed that though there was no demand made upon Doran for a share, yet the obvious

(1) [1900] 2 Ch. 56. (2) 9 Ch. App. 350.
(3) 8 Ch. App. 1049.

1919

FULLERTON

CRAWFORD.

Idington J.

purpose of the litigation was the same improper one in its origin, and suit was taken after long knowledge and acquiescence.

As to Doran's commission on the resale I think there was beyond a doubt present to Crawford's mind the knowledge that it was Doran's effort that produced the resale, that he knew Doran would be expecting a commission and was the only man entitled to commission and whose claim could alone be that referred to in the circular letter of the 22nd of April, 1914, to him and all other shareholders, announcing the sale and referring to the year's operations and the paying of commissions on sale, could refer to nothing else than Doran's commission.

Yet in face thereof he not only refrained from objecting thereto but actually participated in the distribution of the moneys as therein suggested, and I hold must be held to have assented thereto.

Inasmuch as he drew the misleading by-law of the company which provided as follows:—

> 6. Except in so far as the remuneration of the directors shall be fixed by this by-law the directors themselves shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so.

upon which no doubt the directors may well have imagined they had a right to act in fixing the commission, I do not think he was entitled to complain of the result.

Under all the foregoing circumstances I am of the opinion that he had no right to complain of this commission and was not entitled to override the action of the shareholders by the bringing of this action though other shareholders may have had such right by virtue of the statute.

I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting).—The liability of the appellants in respect of three sums at the suit of the respondent in a representation on behalf of the shareholders is to be determined on this appeal: The sum of $3,867.36 for which the appellant Fullerton has been adjudged responsible and the like sum for which the Doran estate has been adjudged responsible and the sum of $8,121.22 for which all the appellants have been adjudged responsible.

The question raised, whether Crawford, the original plaintiff, was entitled to maintain the action, whether, that is to say, he had not lost any right he might otherwise have had by acquiescence or estoppel, would naturally come first in order of consideration but the discussion of it may conveniently be postponed until after the discussion of the substantive question of responsibility.

The learned trial judge, Masten J. gave judgment against the appellants and the Doran estate respectively for the sums first above mentioned and against all the appellants in respect of the sum of $8,121.22. This judgment was sustained by the Appellate Division and that court was unanimous as regards all points except in respect of the liability of the defendants Murray, Gibson and Brian, in relation to which there was some difference of opinion.

The first two sums were paid to Fullerton and Doran respectively by Wallace out of the purchase money, which, on the same day, had been paid to Wallace by Fullerton on behalf of the syndicate, and constituted in each case one-third of Wallace's profit by the sale, which amounted in all to $11,601.75. It seems to be

1919
FULLERTON
v.
CRAWFORD.
Duff J.

unnecessary in regard to this transaction to say more than that Fullerton and Doran were both in the position of promoters of and consequently of trustees for the syndicate, and in that character incapable of retaining any profit derived in this way from the transaction. These moneys, therefore, which they received from Wallace remained the property of the syndicate and later of the company in their hands. In passing it may be noted that these moneys were, of course, part of the proceeds of the original subscriptions, that is to say, of the original capital of the syndicate.

The substantive defence of the appellants in respect of these sums rests upon certain resolutions, which were passed on the 4th November, 1914, by the shareholders of the company, professing to take effect as a release of the company's claim to them. I concur with the view of the learned trial judge that, in the situation in which the company found itself on the date mentioned, it was not competent to the shareholders to transfer without consideration a title to these moneys to Fullerton and Doran.

The company made a sale of its lands in the spring of 1914 and, at the end of May, the directors, after paying a commission of $8,000 odd to Doran, proceeded to distribute $36,000 odd in dividends; and the resolutions of the 4th November already alluded to professed to ratify this payment to Doran and to secure a title to Doran in respect of this sum as well as to deal with the sums distributed by Wallace already referred to.

In May, 1914, the profits arising from the company's transactions (treating Doran's claim for commission as a liability of the company) had reached $25,000 odd on the assumption, and this is rather important, that a third mortgage of $50,000 odd given by the purchasers of the land sold in the spring of 1914 was worth its

face value, and on the further assumption that in respect of the two mortgages, one assumed and the other given by Wallace, the company was under no contingent responsibility. Thus the directors in paying the dividend mentioned as well as the Doran claim had disposed of at least $11,000 in excess of the moneys available for distribution among the shareholders.

On the 4th November, therefore, the capital of the company had actually been diminished by a considerable sum and the principle of *Newman's Case*(1), forbade any further distribution of its assets among the shareholders until the statutory proceedings had been taken. *In re Newman & Co.* (1); *Paton's Case*(2), at page 406; *Hutton* v. *West Cork*(3); *Flitcroft's Case* (4), at pages 534-5.

Now the sums in the hands of Fullerton and Doran which had been paid to them by Wallace were assets of the company, just as the moneys standing to the credit of the company in the bank were; and the attempt on the 4th November, to hand this property over to Fullerton and Doran was just as illegal, and inoperative in point of legal effect, as would have been a resolution authorizing the directors to transfer any asset, *e. g.*, the mortgage above mentioned into the name of any one of them and to sell and dispose of it for the benefit of the directors.

As to the Doran commission. I am disposed to agree with the view of section 92 of the Ontario "Companies Act" advanced on behalf of the appellants; I am inclined to concur in the view that this section does not contemplate special payments of the character here in question which are not made by way of remuner-

(1) [1895] 1 Ch. 674.
(2) 5 Ont. L.R. 392.
(3) 23 Ch. D. 654.
(4) 21 Ch. D. 519.

1919
FULLERTON
v.
CRAWFORD.
Duff J.

ation for services of a director as director, but a special allowance made on some other ground.

Our attention has not been called to any other provision of the Ontario "Companies Act," and I assume that if there had been such a provision our attention would have been called to it, that in any way weakens the force of the rule by which directors, trustees of their powers for the shareholders, are incapacitated from retaining as against the company any profit arising from a contract made between themselves and the body of directors of which they are members, unless the company knows and assents. *Imperial Mercantile Credit Association* v. *Coleman*(1), at page 566; *James* v. *Eve*(2), at page 348; *Gluckstein* v. *Barnes*(3); *Boston Deep Sea Fishing Co.* v. *Ansell*(4). The application of the principle does not appear to be affected by the provisions of by-law 6 of the company's general by-laws. The power given thereby to the directors is a power to fix their own remuneration as directors or as officers of the company; and, no doubt, it would have been competent to the directors acting thereunder to attach a salary to the office of director or to the office of vice-president, or to the office of general manager, but it is impossible to suggest that what is alleged to have been done here in order to support the payment to Doran, is or bears any kind of resemblance to any of these things. What is alleged is a contract between the company and Doran through the instrumentality of the board of directors of which he was a member, allowing him a specific fee for a specific service—a service given in the ordinary course of prosecuting his calling as land agent. That would be a transaction which could not be brought within the authority given

(1) 6 Ch. App. 558.
(2) L.R. 6 H.L. 335.
(3) [1900] A.C. 240.
(4) 39 Ch. D. 339.

by this by-law. Doran, it may be noted, on the 4th November was still vice-president, director, general manager. The fee which had been illegally paid to him was the property of the company in his hands. It is quite true it required only the assent of the company to give him a title and the resolution of the 4th November is relied upon as furnishing adequate evidence of that assent.

The first objection which is taken to the proceedings on the 4th November is based on the fact already mentioned, namely, that in paying the dividend of the 29th May the company had more than disposed of all its available distributable assets, and that objection seems to be fatal.

It is quite true that if the company had possessed itself of the moneys in Fullerton and Doran's hands, amounting to $15,000 odd, then, assuming always that the third mortgage on the lands disposed of should be counted at its face value, it would appear that there would be a small surplus, $4,000 odd; but on the closest calculation the retention of neither the Wallace donations nor the Doran fee could be sanctioned without obliterating this surplus and there is, I think, no escape from the conclusion that these proceedings of the 4th November, which were virtually simultaneous, must on this account be held to be without legal effect.

There is another grave objection, moreover, to these proceedings which I should have preferred not to mention and which I should have passed over in silence had it not been that it has material weight in considering the important question of the right of the plaintiff to maintain the proceedings.

It is unfortunately too clear that knowledge of the participation in the Wallace profit was industriously withheld by Fullerton and Doran from the shareholders

1919
FULLERTON
v.
CRAWFORD.
Duff J.

—until in the autumn of 1914 the curiosity excited by Crawford's activities, left them no other choice than disclosure. At the trial Fullerton still maintained the attitude that these payments were bonuses and any suggestion of impropriety in the non-disclosure of them was treated rather contemptuously as a quibble. I am referring, of course, to Fullerton's own attitude, not to that of his counsel. In view of this state of mind, one is not surprised to discover in a letter written on the 11th September to Mr. Ruckle, for the information of persons from whom proxies were to be obtained, the statement that Wallace came to him, Fullerton, as any other client would have come, and told him that he had an option on this property at $800, that no other price was ever mentioned and that "the deal was put through" at that price; and again in a letter of the 6th of July, addressed to the shareholders generally, this statement: "Edwin Wallace's option was at the price of $725 per acre and he offered it to the syndicate at $800 per acre, whereby Mr. Wallace made a profit of the balance." Mr. Fullerton's attitude is perhaps best brought out in some parts of his own evidence:—

Q.—Then you say that you first knew that you were going to get something on what date? A.—Oh, my recollection now is that it was on the 14th day of March.

Q.—On the 14th day of March? A.—Yes.

Q.—That you first knew that you were going to get something? A.—Yes—or rather I did not know that I was going to get something until I got it, but on the 14th day of March Wallace spoke to me about it.

Q.—Wallace spoke to you about it and then you did not know what amount you were going to get then? A.—I did not.

Q.—And when did you find out what amount you were going to get? A.—When I got the cheque.

Q.—When was that? A.—I cannot say whether it was the afternoon of the 14th or the morning of the 15th. I can only state that I deposited it on the 15th or that it was deposited for me on the 15th. In my examination I was speaking from the deposit, and I thought it was on the 15th I got it, but further recollection the 14th or 15th—

Q.—The 14th or 15th—now up to that date you did not know yourself you were going to get anything? A—I did not.

Q.—And any knowledge Mr. Crawford could have acquired up to that date could not have conveyed that information to him? A.—No.

Q.—Is that right? A.—That is right.

Q.—He could not have found it out if he had known all about Wallace's profit? A.—Yes.

Q.—He could not have told you were getting anything and he could not have told Doran was getting anything? A.—I cannot tell you.

Q.—You cannot tell that then when you did get something, Mr. Fullerton, why did you not disclose it to your friends and associates? A.—I am not much in the habit of disclosing to my friends and associates what my deals are or what was done.

Q.—I mean your associates in this particular deal—why did you not disclose it? A.—I did not disclose it but I have no particular reason except that I am rather reticent about my business and I did not intend to disclose it at that time.

Q.—Now, Mr. Fullerton, on the 18th Sept. when all the checks were spread out before you and when apparently Mr. Crawford had all this time information for the $11,000 cheque was there, now why—come to the time when he knew about the $11,000 odd cheque—it was there before you? A.—Yes.

Q.—And Mr. Crawford said "Mr. Fullerton and Mr. Doran are you getting any share of that?" A.—Yes.

Q.—And you heard Mr. Wallace say that he would not say how he had distributed it, that that was his own business, do you remember that? A.—Yes.

Q.—Why did you not then say you got a part of it? A.—Because I was calling a meeting of the company I intended calling a meeting of the company and intended to make disclosure there in regard to the whole matter and I knew that Mr. Crawford was seeking information at that time for the purpose of his suit, and I did not intend to give it until I called my own meeting.

Q.—You did not intend to give it? A.—Until I called my own meeting. That was absolutely the reason why. Mr. Crawford had written me a letter in which he had demanded $1,500 on the belief and sole belief that he was considering whether to bring an action against me in the partnership or on the other, and I did not propose to assist him at that meeting if I could avoid it.

Fullerton and Doran, as directors and officials of the company, were under a duty to the company and to the shareholders as a body to see that the fullest information was laid before the shareholders regarding the transactions under review at the meeting of the 4th November. *Cook* v. *Deeks*(1).

(1) [1916] 1 A.C. 554; 27 D.L.R. 1.

1919
FULLERTON
v.
CRAWFORD.
Duff J.

It is regrettable that no effort was made to perform this duty; that these gentlemen considered themselves entitled to act within the spirit of the communications and the evidence just set out; and that the members represented by proxy at the meeting of November 4th seem to have remained in ignorance of the facts to the very end. In these circumstances I think the resolution of the 4th November cannot be treated as satisfactory evidence that a majority of the shareholders with knowledge of the facts approved these transactions of which Fullerton and Doran were the beneficiaries: *Cook* v. *Deeks*(1); *Pacific Coast Coal Mines* v. *Arbuthnot*(2).

As to Crawford's right to maintain these proceedings. The status of a single shareholder to attack an *ultra vires* proceeding is, as a rule, unquestionable, in the absence of evidence disclosing conduct making it unjust that he should be permitted to go forward with his attack.

As regards the Doran commission: It is not, I think, seriously argued that Crawford did anything to preclude him from impeaching that payment.

As regards the sum given by Wallace to Doran I have heard no suggestion requiring discussion pointing to any conduct of Crawford's precluding him from taking steps to impeach that.

As to the sum received by Fullerton from Wallace. It is now said, 1st, that Crawford knew of the distribution of the Wallace profit from the beginning, and 2nd, that in March, 1914, he wrote a letter to Fullerton calling upon him to account for the sum received from Wallace as part of the partnership proceeds and that this last mentioned act constituted such a participation in the conduct of Fullerton as to make it inequitable

(1) [1916] 1 A.C. 554; 27 D.L.R. 1.

(2) [1917] A.C. 607; 36 D.L.R. 564.

and contrary to justice to permit Crawford now to complain of it.

It is necessary to keep clearly in view two things, 1st, that the moneys in question, as I have already said, in Fullerton's hands constituted an asset of the company; 2nd, that the general rule is that a single shareholder is entitled to impeach an *ultra vires* or illegal act of a company without using the name of the company subject to the qualification that the right of a single shareholder to proceed where the majority refuse to allow the name of the company to be used, in such case rests upon the proposition that justice requires the sanction of the proceeding. *Russell* v. *Wakefield Waterworks Co.*(1), at page 480.

It follows of course that if in a particular case it would be unjust to permit a single shareholder to take a proceeding, the right is denied him and virtually the point to be determined at this stage is this: In view of the circumstances mentioned would it be unjust to permit Crawford to maintain the action? Consider the conduct of Fullerton as disclosed by the communications and the evidence above referred to; he was a promoter, not technically merely but actively engaged in soliciting subscriptions and support from all quarters. He deliberately and with set policy withheld the fact that he was making a substantial profit out of the promotion. This fact he withheld until at the very last he was virtually forced to disclose it. He says that as late as September, 1914, Crawford was searching for information to enable him to take proceedings and that he was resisiting his attempts to get it.

Crawford, as the learned trial judge found, understood that Wallace was making a profit at a comparatively early stage, but the evidence of Fullerton read

(1) L.R. 20 Eq. 474.

1919
FULLERTON
v.
CRAWFORD.
Duff J.

with that of Crawford is convincing upon the point that as regards Fullerton and Doran, Crawford had nothing more than a suspicion down to the middle of 1914, and Crawford's explanation of the letter, namely, that it was written with the object of getting information is virtually accepted by Fullerton himself.

Crawford's delay in actively pressing his inquiries may perhaps be accounted for by the fact that it was only after the dissolution of the partnership with Fullerton that he decided to press his claim; but in truth it is hardly disputable that until months after the dissolution Crawford was not in possession of information which would have justified him in charging Fullerton and Doran with participating in Wallace's profit. This is evident from Crawford's own course and is virtually asserted by Fullerton himself. And when one considers the course of conduct deliberately pursued by Fullerton and Doran, the persistent determination to conceal the facts touching their relations with Wallace and the actual destination of the profit derived by Wallace from the sale to the syndicate, it seems an extreme view that by writing the letter of March, a letter which was never acted upon, which affected nobody's conduct, nobody's rights or interests, Crawford was doing something making it unjust that he should institute legal proceedings to compel these fiduciaries to account to the shareholders for the property of the shareholders in their hands.

It should be noted perhaps at this point that the trial judge in declining to accept Crawford's testimony to the effect that he did not know the price at which Wallace bought, acquits him of any intention to misstate the facts.

The question for disposition here has little analogy to that which arose in *Towers* v. *African Tug Co.*(1), where

(1) [1904] 1 Ch. 558.

an action was brought by a shareholder against directors seeking to hold them responsible for moneys distributed among the shareholders which were not available for distribution. The shareholder who was plaintiff in that action had received his share of these moneys knowing the facts and brought the action with the proceeds of the distribution in his pocket; in other words, he had made himself a party to—he had participated in—the very act he was complaining of. Crawford, on the other hand, received nothing and moreover did nothing which could have precluded him from saying to Fullerton, if in response to his letter Fullerton had offered to divide his profit with him—the money is not yours to divide.

In *Towers' Case*(1), each one of the Lords Justices dwells upon the fact that when the action was brought and when it was tried Towers still had in his pocket his share of the proceeds of the *ultra vires* act of which he was complaining. Vaughan-Williams L.J. at page 565; Stirling L.J. at page 569; Cozens-Hardy L.J. at page 572. Moreover, the transaction in *Towers' Case*(1), was not impugned as a transaction in which directors or trustees had tried to benefit themselves at the expense of their co-adventurers; it was a case in which there had been an equal distribution among shareholders, by the consent of every one of them, of a small part of the company's capital not legally distributable; and the Lords Justices (see especially Lord Justice Sterling at page 570) emphasize the fact that no one had ascribed fraud or dishonesty to anybody concerned in the distribution.

There is another and fatal objection to the contention of the appellants on this point and that is that it is not raised in the pleadings as originally framed, nor by

(1) [1904] 1 Ch. 558.

1919
FULLERTON
v.
CRAWFORD.
Duff J.

any amendment, nor is there anything in the course of the proceedings at the trial to justify the inference that the pleadings were treated as amended in such a way as to make this defence available. The cross-examination by counsel for the defendants was, after repeated objections, allowed to proceed in deference to the contention that Crawford's conduct, with regard to all these matters, was material on the question of credit and the cross-examination of Fullerton proceeded on much the same lines. The point now contended for, namely, that the letter of March plus the delay was an act precluding Crawford from taking these proceedings, is not noted in the judgment of the trial judge who, it is to be observed, deals with the issue raised by the allegation in the defence—the narrow issue raised by paragraph 10 of Fullerton's defence and paragraph 4 of Doran's defence—that Crawford knew that Wallace had made a profit. The trial judge deals with this issue and finds that Crawford became aware of this profit having been made. He also deals specifically with the defence set up in answer to another claim, a claim in relation to the moneys distributed as profits, the defence that, having received his share, he was precluded, under the authority of *Towers' Case*(1), from disputing the regularity of the distribution. He deals with this and gives effect to the defence, but there is not a word in his judgment from the beginning to the end countenancing the idea that any such defence as that I am now considering was put before him. There are, moreover, discussions reported in the appeal book which seem to shew affirmatively that this defence, if it was in view, was never in any way put forward at the trial.

(1) [1904] 1 Ch. 558.

I refer specifically to two examples only of this. At page 171 the following occurs:—

Q.—If Mr. Doran pledges his positive oath against your uncertain memory of other matters that that conversation did take place, will you undertake to contradict him? A.—I certainly will. I asked particularly about that commission at the meeting in September. I did not know then about the commission.

Mr. McMaster: Surely my Lord, the right to commission does not turn on his knowledge or lack of knowledge. Surely this is wasting a lot of time—his knowing has nothing to do with Doran's right to take commission.

Mr. Dewart: It is a matter of his right to take commission of 5%. It may have an important bearing on the evidence we will offer, my Lord.

If the defence I am now discussing was to be relied upon it is quite impossible to suppose that this colloquy could have taken place in these words.

Again at pages 340 and 341 there is the following:—

His Lordship: I might say to counsel frankly, my own idea is that all that long discussion and great conflict of testimony in regard to what was done, and what was not done, and various things of notice to Mr. Crawford, makes no difference. I think that the subject—I am not giving judgment, understand, at all, by any means, and I am entirely prepared to hear what everybody has to say, and I may be entirely wrong, but my present view is these moneys were promotion moneys and these people were originally in the position of having received promotion moneys and were promoters and that it all becomes a question, the whole question comes down to the effect of what we have been recently discussing. Now, as to the subject of ratification, that is on that original part, that is my view—I do not want at all to interfere with your elaborating just as fully as you choose for the benefit of any court of appeal, on the different view.

Mr. Rowell: Of course, as the whole matter has been raised in issue, we want to get all the facts in this connection with the transaction.

His Lordship: I am not interfering in any way.

Mr. Rowell: That is my only reason for mentioning now, until we get in the contents of this note book, and have Mrs. Dack called, I cannot ask Mr. Fullerton in reference to a point I want to ask him.

Mr. McMaster: What I mean, is the great conflict there was whether Mr. Crawford knew that Mr. Wallace was getting something—now how can it effect this case against the other two directors whether he did know that or did not know it? Just simply I want to get through with the case as early as possible, that is all.

Mr. Dewart: The evidence directs itself solely to a different branch than that.

1919

FULLERTON v. CRAWFORD.

Duff J.

If the defence of knowledge of the Fullerton and Doran participation and condonation of that was to be raised in this court (the defence not having been pleaded) it should have been specifically brought forward at this point.

It is not the practice of this court to allow an appellant to reinforce his hand with cards he has hitherto been concealing in some part of his habiliments.

The defence, as one would expect, is not referred to in any of the judgments of any of the learned judges of the Appellate Division.

It should be added that the status of the respondents to maintain the proceedings rests upon two grounds, 1st, the illegality of the proceedings of the 4th November. 2nd, a recognized exception to the rule that the company is the only proper plaintiff in an action to recover company property is that where misconduct on the part of the company and one or more of its officers is to be investigated the arm of the law is not stayed by the rule. *Cockburn* v. *Newbridge Sanitary Steam Laundry Co.*(1), at page 258; *Cook* v. *Deeks*(2).

For these reasons the appeal should, in my judgment, be dismissed with costs

ANGLIN J.—As the syndicate acquired the Bicknell property merely to hold it pending the incorporation of the projected company and its members became shareholders in that company in proportion to their respective interests in the syndicate, I do not distinguish between rights of the company and rights of the syndicate.

At the outset I should state that I entertain no doubt that upon the receipt by the defendants, Fullerton and Doran, of their shares in the Wallace

(1) [1915] 1 I.R. 237. (2) [1916] 1 A.C. 554; 27 D.L.R. 1.

profit liability to account for them to the company immediately arose. *Archer's Case*(1).

But it is not so clear that this is one of the exceptional cases, referred to in *Towers* v. *African Tug Co.*,(2) in which a single shareholder, suing on behalf of himself and of shareholders other than the defendants, may, against the will of the majority, assert a right of the company to recover its property and compel its enforcement (Lindley on Companies, 6 ed., 779, 781; Buckley on Companies, (1909) 612-14), or that the plaintiff in this action had not disqualified himself from maintaining it. On this branch of the case I find it necessary to pass definitely only upon the latter question.

The learned trial judge expressly found, contrary to the testimony of the plaintiff Crawford, that he was fully apprised of the profit made by Wallace on the sale to Fullerton as trustee for the syndicate, adding, however, that neither he nor any of the subscribers of the syndicate were aware of the division of that profit with Fullerton and Doran. A study of the evidence, all of which I have found it necessary to read with care, has satisfied me that little reliance can be placed on the plaintiff's testimony. His cross-examination is most unsatisfactory. His witness, Eaton, seems to be even less reliable; and there is practically no other corroboration of the plaintiff's story on controverted points. The evidence of Fullerton and Doran, while not entirely satisfactory, is, in my opinion, much more reliable than that of Crawford.

While Crawford may not have known of the actual payments by Wallace to Fullerton and Doran at the time they were made, with great respect I think the evidence leaves no room for any real doubt that

(1) [1892] 1 Ch. 322.
(2) [1904] 1 Ch. 558.

1919
FULLERTON
v.
CRAWFORD.
Anglin J.

he knew at a comparatively early date that the defendant Fullerton had shared in Wallace's profit and I cannot believe that he remained long in ignorance of the actual division made of it. His reiterated statement that Fullerton had told him from the first that he (Fullerton) was the real purchaser from Bicknell and that he had taken the agreement to purchase in Wallace's name merely to escape liability on covenants, coupled with his letter of the 13th of March, 1914, in my opinion puts Crawford's knowledge as to Fullerton's share beyond question His admitted knowledge that Doran had furnished one-third of the deposit of $2,500 made by Wallace with Bicknell to secure the property, another one-third of it having been obtained from one Boehm (Bicknell's agent for sale), and his familiarity with all the details of the purchase by Wallace, of his sale to Fullerton as trustee, of the formation of the syndicate and of the incorporation and organization of the defendant company, which I think the evidence establishes, warrant the inference that he also knew of Doran's receipt of one-third of the Wallace profit. With that knowledge he determined to treat the $3,877.20 received by Fullerton as money properly obtained by him for which he should account as partnership assets of the firm of Fullerton and Crawford. By his letter of the 13th of March, 1914, he distinctly demanded from Fullerton an accounting "under our partnership" of the "moneys received (by him) from Mr. Edwin Wallace in connection with the purchase of Bathurst Centre"—the property in question. That, in my opinion, amounted to such acquiescence in the receipt by Wallace of the profit on the sale to the syndicate and its distribution between himself, Fullerton and Doran, that the plaintiff is disqualified from complaining of it individually; and

he cannot get any greater right of complaint because his action is in form an action by himself and all the other shareholders of the company. In fact, he must succeed by his own merits and not by the merits of the other shareholders.

Towers v. *African Tug Co.*(1), at page 572, *per* Cozens-Hardy L.J.

On this ground the action, in my opinion, fails as to the two sums of $3,877.20 each claimed respectively from Fullerton and Doran.

Moreover, the receipt by Fullerton and Doran from Wallace of part of the latter's profit—their sharing that profit with him on the understanding which the learned trial judge found had existed from the inception of the project—was neither something which it was *ultra vires* of the company to sanction, nor something *in se* illegal and therefore not susceptible of ratification by the shareholders. It was not within the "Secret Commissions Act" (8 & 9 Edw. VII. (D) ch. 33, sec. 3), because not accepted or obtained *corruptly*. Had the Wallace profit, and the interest of Fullerton and Doran in it, been fully disclosed to the shareholders from the first its payment and distribution could not have been successfully challenged. It was the concealment and secrecy of the payments to Fullerton and Doran that made them fraudulent against the company and entitled it to recover them back. *Shipway* v. *Broadwood*(2), at page 373, *per* Chitty L.J. Viewed as a fraud on it carried out by a breach of duty on the part of the defendants Fullerton and Doran, who occupied a fiduciary position in regard to it, the company had the option to elect to ratify what had been done or to demand an accounting from Fullerton and Doran.

There is not a little to indicate that a majority of the shareholders not in anywise implicated or interested

(1) [1904] 1 Ch. 558. (2) [1899] 1 Q.B. 369.

1919
FULLERTON
v.
CRAWFORD.
Anglin J.

in the payments to Wallace, Fullerton and Doran have been prepared to ratify those payments and are opposed to the plaintiff's attempt to compel Fullerton and Doran to account to the company for their shares. The shareholders' meeting of the 4th of November, 1914, appears to have been fairly called. From the plaintiff himself and in the directors' notice calling the meeting they had received full information of the transactions of which he complains and of which their sanction and approval were sought. The defendants, Fullerton and Doran, made the mistake, however, of allowing proxies procured for an earlier meeting, held in September, to be used in the voting of the 4th of November. When those proxies were given it is not at all clear that the shareholders had been fully apprised of the payments to Doran and Fullerton now in question. Although Crawford had notified them in a circular letter of the 4th of July that there had been "a secret profit of $11,601.75 made by some of the promoters of the syndicate," it was only in his circular letter to them of October 23rd that he distinctly charged Fullerton and Doran with having in this way obtained $3,867.20, each, and Doran with having been paid $8,121 as a commission. With that knowledge, however, the shareholders who had given proxies in a most general form to Fullerton, Doran and Ruckle apparently allowed them to stand unrevoked and available for use at the November meeting called expressly to ratify and confirm these payments. While, under these circumstances, there is not a little to be said for the view that they intended to have their votes recorded in support of the proposition made by the directors in the notice calling the meeting of the 4th of November, on the whole, apart from any question to which the impairment of capital then existing gives

rise, I think it would not be safe to treat what occurred there as a sufficiently certain expression of the views of shareholders whose votes were cast under the September proxies. *Pacific Coast Coal Mines Co.* v. *Arbuthnot*(1).

But for this difficulty in regard to the votes cast by proxies, in the absence of any ground to question the good faith of the action of the majority in sanctioning and approving what had been done, the right of a minority shareholder to maintain this action to compel repayment to the company—to recover its property—to enforce its rights—would be at least questionable. The corporation is *primâ facie* the only proper plaintiff in such an action. Had the use made of the proxies at the November meeting been beyond suspicion, this would not appear to be one of the exceptional cases in which a dissentient shareholder should be permitted to exercise the company's right against the will of the majority—cases which, to quote Sir George Jessel's observation in *Russell* v. *Wakefield Water Works*(2), cited by Stirling L.J. in the *Towers Case*(3),

> turn very much on the necessity of the case; and that is the necessity for the court doing justice.

I rest my judgment for the defendants on this branch of the case, however, on the plaintiff's disqualification to maintain the action.

The $8,121.22 paid to the defendant Doran as a commission on the very advantageous sale of the company's property to Robins, Limited, undoubtedly effected by him, stands on a different footing. While there was some delay after the plaintiff had knowledge of the actual payment to Doran in bringing this action and he accepted a dividend which he knew had been recommended and passed on the basis that it represented a

(1) [1917] A.C. 607; 36 D.L.R. 564. (2) L.R. 20 Eq. 480.
(3) [1904] 1 Ch. 558.

1919
FULLERTON
v.
CRAWFORD.
Anglin J.

balance divisible amongst shareholders after payment of the outstanding unsecured liabilities of the company, including a commission on the sale to Robins, Limited, there is not in regard to this item the evidence of unequivocal acquiescence which the plaintiff's letter of the 13th of March, 1914, affords as to the distribution of the Wallace profit. I therefore prefer not to rest my judgment in regard to it on personal disqualification of the plaintiff by acquiescence.

The reasonableness of the amount paid, if Doran was entitled to a commission, is not questioned and I find nothing to justify the suggestion that either his employment or the payment to him was in any sense secret or surreptitious. On the contrary, the fair inference from the evidence is that all who were interested in the company including the plaintiff, knew that upon the lapse of the Sorley option the sale of the property was placed in the hands of Doran, whose business was real estate brokerage. The suggestion now made that he negotiated the sale as the general manager of the company acting without remuneration, is one which I cannot accept. His expenditure out of his own pocket in endeavouring to effect the sale is utterly inconsistent with any such view of the footing on which he was proceeding.

The objections made to the payment of this commission are that since Doran was a director of the company any payment to him must, under section 92 of the Ontario "Companies Act," be authorized by a by-law confirmed by a general meeting of the shareholders; that it was not proved that he was employed to make the sale; and that the payment to him was made out of capital.

The commission was not paid to Doran as a director of the company, but as an agent employed by it to sell

its property. I think such a payment does not fall within section 92 of the Ontario "Companies Act." I agree with the view expressed by Middleton J. in *Re Matthew Guy Carriage and Automobile Co.*(1), at page 379, that this section does not extend to a payment to a director at the ordinary market price for a service rendered by him in his capacity of a mere employee of the company. After reviewing the authorities in *Canada Bonded Attorney and Legal Directory Co.* v. *Leonard-Parmiter Co.*(2), Mr. Justice Riddell, dealing with section 92, says, at page 144:—

> There is no reason, however, why one who happens to be a director should not serve the company in another capacity, as servant, clerk, bookkeeper, mechanic, etc., and receive reasonable remuneration therefor. It is of course the duty of every director, a duty which he owes to his company and to the other shareholders, to see to it that he does not receive too great a remuneration for such service as he does render.
>
> If the services are such that only a director can perform them, *e. g.*, attending board meetings or acting in other regards as a director, he can recover compensation, payment for such services, only by complying with the statute; but, if he is employed in a subordinate capacity and at a reasonable figure, there is no necessity for a by-law confirmed at a general meeting.

Ferguson J.A. concurred in this judgment; Rose J. while differing on some of the facts, concurred in Mr. Justice Riddell's statement of the law; and Lennox J. concurred with Rose J. I think a by-law was not necessary to authorize the defendant Doran to act as agent of the company for the sale of its lands. Nor was a by-law confirmed by a general meeting required to authorize his being paid for services rendered in that subordinate capacity. They were not services rendered in the government of the company. *Mackenzie* v. *Maple Mountain Co.*(3), at page 621, *per* Meredith J.A.

(1) 26 Ont. L.R. 377; 4 D.L.R. 764, at 765.
(2) 42 Ont. L.R. 141; 42 D.L.R. 342.
(3) 20 Ont. L.R. 615.

1919
FULLERTON
v.
CRAWFORD.
Anglin J.

Mr. Justice Rose summarizes the evidence on this branch of the case—very fairly, if I may be permitted to say so—as follows:—

> Mr. Doran swore, and Mr. Fullerton's evidence seems to support his statement, that it was understood amongst the directors that he should not be given a regular salary for acting as vice-president and general manager, but should have the opportunity of finding a purchaser for the land and, if he succeeded, should be paid the usual land agent's commission, and should accept that as his "recompense" for performing the duties of his office.

At a meeting of shareholders, he was instructed, informally, to endeavour to find a purchaser. He did make a sale, and he managed to induce the purchasers to add to the price first offered by them, which price some, at least, of the shareholders and directors were in favour of accepting, a sum practically equivalent to the amount of the commission; and apparently, all the members who knew about the matter were content. It was paid and the question is whether there was legal authority for paying it.

At the meeting which was held on May 29th, 1914, and which seems to have been a directors' meeting, although the minutes called it a meeting of the company, the secretary-treasurer is reported to have put in a statement of liabilities shewing the solicitor's charges in connection with the sale, a commission to Doran of $8,121.22, small sums for fees of the several directors, and a small salary to the secretary-treasurer. The statement ended with the following memorandum:

> The amount at present in the bank is $45,014.48. The disbursements as above are $8,829.22, which will enable us to pay a dividend of 57% and leave the balance in the bank of $161.76 to the credit of the company.

Resolutions were passed that the directors be paid $10.00 per meeting for meetings attended by them; that the secretary be allowed the sum mentioned in the statement as owing to him; and that a dividend

of 57% be declared and be paid to the shareholders forthwith. On the same day cheques were issued for the commission and for the dividend.

There was no resolution referring to the commission or to the solicitor's charges.

While there is no doubt a lack of proof of a by-law or resolution formally authorizing Doran to act as the company's selling agent, the impression left on my mind by the whole of the evidence bearing on this issue is that he was authorized at the shareholders' meeting of the 27th of March, 1914, at which Crawford admits he was present, to sell the company's property as a real estate broker on commission, and that acting on that authorization he proceeded in good faith to procure and did procure a purchaser for the lands at an advantageous price. While the absence of a minute of this action of the shareholders affords ground for adverse comment, it by no means conclusively establishes that Doran was not in fact so authorized. *Bartlett* v. *Bartlett Mines Co.*(1); *In re Fireproof Doors Co.*(2). I accept Doran's uncontradicted statement, partly corroborated by Fullerton's testimony, that he was. The company had the benefit of what he did and was, in my opinion, liable to him for a commission. Doran's employment as selling agent being established, the amount of the commission paid him is readily defensible on a *quantum meruit* basis.

I incline to think that it was only because they deemed it unnecessary to do so that the directors did not at their meeting of the 29th of May, 1914, pass a formal resolution for the payment to Doran of his commission of $8,121.22. Payment of the item for solicitor's charges shewn in the secretary-treasurer's statement submitted to the meeting was likewise not

(1) 24 Ont. L.R. 419. (2) [1916] 2 Ch. 142.

1919
FULLERTON
v.
CRAWFORD.
Anglin J.

covered by any specific resolution. That statement admittedly shewed this commission as an outstanding liability of the company and it was on the footing of its being paid that it proceeded to indicate that there would be enough money left in the bank to warrant a distribution of 57% of the amount of the company's capital as a dividend amongst the shareholders—leaving $161.76 still in bank to the credit of the company. It was on that statement, as the minutes shew, that the directors resolved to pay the 57% dividend. I have no doubt (as Masten J., Meredith C.J.C.P. and Lennox J. appear to have thought) that it was intended at this meeting to recognize the Doran commission claim as a liability of the company and to authorize its payment. Otherwise the dividend there directed to be paid would have been not 57% but 69%. The purpose was to act on the memorandum submitted by the secretary-treasurer and to leave in bank the comparatively insignificant sum of $161.76 to meet current petty expenses—not $8,300. The $8,121.22 was paid to Doran on the same day (May 29th, 1914) by the company's cheque, signed by J. A. Murray, president and Jas. S. Fullerton, secretary-treasurer and it is reasonable to assume that this payment preceded the payment of the 57% dividend. If so, the capital was intact when and after it was made and, however irregularly made, it was not *ultra vires* of the company.

What I have said as to the proceedings at the shareholders' meeting of the 4th of November applies to this branch of the case. While upon the whole evidence I have little doubt that the majority of the shareholders approved of the payment of a 5% commission to Doran and would have ratified and confirmed the action of the directors in making it, the uncertainity as to the

use at the November meeting of the September proxies having been quite legitimate prevents the resolutions passed at it from being given whatever effect they might otherwise have had. But without the aid of this attempted ratification, the payment of the commission to Doran may be upheld as the liquidation of an honest debt by the company which it was within the authority of its officers to make.

No one suggests any fraud or dishonesty on the part either of Doran or of the directors. All that was done, if done regularly, would not have afforded a scintilla of ground for complaint. Mistakes may have been made and foolish courses adopted; but fraudulent intent has not been established.

I would, for these reasons, allow this appeal with costs here and in the Appellate Division and would dismiss the action with costs.

BRODEUR J.—This appeal should be allowed and I concur with my brother Idington.

Appeal allowed with costs.

Solicitor for the appellants Fullerton and the Doran Estate: *Hugh J. Macdonald.*

Solicitors for appellants Murray, Gibson and Bryan: *Urquhart, Urquhart & Page.*

Solicitors for the respondent Crawford: *McMaster, Montgomery, Fleury & Co.*

Solicitor for the respondent the Bathusrt Land Co.: *J. Earl Lawson.*