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 \*March 9.  
 \*April 6.  
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BEACH ADONIJAH LASELL } APPELLANT;  
 (PLAINTIFF) . . . . . }

AND

ADAM HANNAH (DEFENDANT) . . . . . RESPONDENT;

AND

THE THISTLE GOLD COMPANY . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH  
 COLUMBIA.

*Company law—Illegal consideration for shares—Fraud—Breach of  
 trust.*

With a view to concealing the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for a new company to be organized in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the old company and he agreed that he would not reveal this understanding to the other shareholders.

*Held*, affirming the judgment appealed from (11 B.C. Rep. 466) Sedgewick J. dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded.

**A**PPEAL from the judgment of the Supreme Court of British Columbia(1) reversing the judgment of Martin J. and dismissing the plaintiff's action with costs.

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\*PRESENT:—Sedgewick, Girouard, Davies, Idington and Mac-  
 lennan JJ.

(1) 11 B.C. Rep. 466.

The action was to recover 12,500 shares, being one-eighth of the capital stock in the Thistle Gold Mining Company, under the following circumstances:—

In 1899 and 1900 the plaintiff was manager and owner of 62,500 shares, being one-eighth of the capital stock, of the Sutherland Gold Mining Company. A Mr. Sutherland was president of the company, was largely interested therein, and had induced some residents of Minneapolis, Minn., also to become largely interested in the company. The defendant Hannah was a banker in Minneapolis, and it was through his influence that a large number of persons had been induced to become shareholders in the undertaking. Largely through mismanagement by Sutherland the company got into difficulties and became discredited and embarrassed. Towards the end of 1900 Hannah, in order to rehabilitate the company's credit and to secure everyone interested therein, including the creditors, conceived the idea of re-constructing the company. After discussing the matter with Sutherland and his attorney he was advised to adopt the following plan:—He was to advance a sufficient sum for the purpose of acquiring all the outstanding obligations of the company, except \$1,600 due to the plaintiff, to obtain judgment on one of these obligations for \$3,000, and, after purchasing the company's properties at sheriff's sale, to organize another company and distribute the shares of the new company, in proportion to the shares held by them, to such of the shareholders of the old company as were entitled to them.

At this time the plaintiff was a creditor of the old company to the extent of \$1,600, and owned one-eighth of the capital stock, 62,500 shares. He was at the mines in Cariboo, B.C., and Hannah and Sutherland were in Minneapolis. On 16th November, 1900,

1906  
LASELL  
v.  
HANNAH.  
—

1906  
LASELL  
v.  
HANNAH.  
—

Hannah wrote to the plaintiff setting out his views regarding reconstruction, and the method by which he proposed to accomplish that end, and asked the assistance of the plaintiff, at the same time promising to protect his interests. On 28th November he sent him a telegram stating that he had already written him, explaining everything. A few days later the plaintiff instructed his solicitor to commence an action against the company for \$1,600 due to him, but as he then contemplated leaving British Columbia he assigned his claim to a Mr. Wendell, as a matter of expediency and convenience only, Mr. Wendell being the nominal plaintiff. Hannah had also commenced an action against the company to recover a sum due on notes which he had purchased with the intention of re-constructing the company. Hannah's action having been served upon the plaintiff as manager of the company, he immediately travelled to Minneapolis for the purpose of informing and consulting with Sutherland, the president of the company. There they discussed the position of the company's affairs, and Hannah reiterated the request to refrain from pressing his claim, but to keep the arrangement secret and to speed the proposed sale of the company's property for the purpose of re-construction. To this the plaintiff agreed, upon consideration of receiving a proportion of shares in the new company equivalent to those he then held in the old company, as well the assurance of payment, at a deferred date, of the \$1,600 due to him.

The plaintiff thereupon stood by and permitted Hannah to proceed with the sale, assisted him therein, abandoned the proceedings to recover the \$1,600 and took no steps in respect of his own shares in the old company. Hannah sold the property of the old com-

pany under execution, purchased it himself, organized the Thistle Gold Co. and conveyed the assets of the old company to the new company issuing to himself, *inter alia*, the shares which he had promised to transfer to the plaintiff. All the debts of the old company were paid and discharged, including the debt due to the plaintiff, but Hannah did not deliver the shares as promised.

1906  
LASELL  
v.  
HANNAH.  

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On these facts the trial judge ordered judgment to be entered for the plaintiff for 12,500 shares in the Thistle Gold Company, or their value, and the action against the Thistle Gold Company was dismissed. An appeal to the Full Court was allowed, Mr. Justice Morrison dissenting.

*Wilson K.C.* for the appellant.

*Ewart K.C.* and *George A. Morphy*, for respondent.

SEDGEWICK J. (dissenting).—In my opinion the learned trial judge, Mr. Justice Martin, was right in maintaining the action in respect to the allotment of shares claimed by the plaintiff for the reasons then stated by him; I also agree with the view taken by Mr. Justice Morrison, who dissented from the majority of the court below. For these reasons I think that the present appeal should be allowed with costs in this court and in the court below and that the judgment of the learned trial judge should be restored.

GIROUARD J.—This appeal should be dismissed with costs for the reasons given by Chief Justice Hunter.

DAVIES J.—A careful perusal of the evidence and correspondence between the parties satisfies me be-

1906  
LASELL  
v.  
HANNAH.  
—  
Davies J.  
—

yond any reasonable doubt: (1) That there was no sufficient evidence of any such contract having been entered into between the parties as that sued upon; (2). That if it was possible to spell out or infer the existence of such a contract from the letter written by defendant to plaintiff wherein he stated

I purpose to take care of you and to take care that your interests are properly protected,

it seems decisive that such letter was not received by plaintiff or its contents known to him until long after he had his interview with defendant in Minneapolis when he alleged he made the contract sued on.

I think that, apart from this letter, the correspondence between the parties after the Minneapolis meeting is conclusive against such an agreement having been come to orally at such meeting; that such correspondence is also conclusive that there was no consideration for such alleged agreement arising in any way whatever out of the debt which the Sutherland Gold Mining Co. owed plaintiff; that if there was any consideration whatever for the alleged promise or agreement it was an illegal one, namely, that plaintiff, who was superintendent and manager of the Sutherland Gold Mining Co., should conceal from the directors and others of the company interested the proceedings which the present defendant for the benefit and on the behalf of Sutherland, the president of the company, had instituted for the purpose of obtaining judgment against the company, and selling all its assets and property and then re-organizing the company under a new name with the result of "freezing out" those shareholders who were objectionable to Hannah, the defendant, and Sutherland, on whose behalf he was acting.

It was argued by Attorney-General Wilson that there was nothing illegal in what Hannah had done to sell out the assets of the Sutherland Gold Mining Co., and leave it a company in name only. Mr. Ewart did not controvert that position by itself, but submitted that Hannah by his own statement to the plaintiff Lassels was avowedly acting in the proceedings he took for and on behalf of, and for the benefit of the president, Sutherland. That he knew and so informed Lassels, the superintendent and general manager of the company, that absolute secrecy was an essential element of the success of their plans, and "in order not to give Mr. Sutherland's claimants any advantage," and that "rapid action was actually necessary."

1906  
 LASELL  
 v.  
 HANNAH.  
 ———  
 Davies J.  
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In fact on the 6th December, 1900, Hannah writes to Lassels from Minneapolis, the headquarters of the Sutherland Gold Mining Company, saying:

It has evidently got out that you have been here. Should there be any leak about the proceedings we are taking, we might be caused considerable trouble and the affairs of the company would again fall back into the quagmire in which they were before.

It simply came back to this, that proceedings were being taken against the company by Hannah for Sutherland, the president's benefit, and the general manager and superintendent on whom the writ was served and who, of the company, alone knew of the proceedings, was to maintain absolute secrecy, and not let the secretary or directors know anything about them until the sale had been completed and the company's assets sold.

If this was the construction, and I see no other possible, then I agree with the Chief Justice in the court below that the agreement was a fraud on the part of the plaintiff as superintendent and general manager

1906  
LASELL  
v.  
HANNAH.  
—  
Davies J.  
—

of the company, as against the company, and its shareholders, which the courts will not lend their aid to have consummated.

IDINGTON J.—I think, for the reasons assigned by Chief Justice Hunter in support of the judgment appealed from, this appeal should be dismissed with costs.

MACLENNAN J.—I agree that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Wilson, Senkler & Bloomfield.*

Solicitor for the respondent: *George A. Morphy.*

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