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*March 3, 4.
*Oct. 14.

JAMES J. DENMAN (PLAINTIFF) .... APPELLANT;

AND

THE CLOVER BAR COAL COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Company law—Agreement by directors—Onerous contract—Non-disclosure to shareholders—Breach of contract—Damages—Settlement of accounts—Appeal—Jurisdiction—Reference to master—Final judgment.

After some subscriptions for stock had been received and the company was about to offer other stock for public subscription, a meeting of the directors was held at which the plaintiff, then one of the directors and the company's manager, resigned his office as a director and was appointed sales agent for the company's output of coal for five years from that date, at a liberal scale of remuneration, with the exclusive right to make such sales in Alberta, Saskatchewan and Manitoba. At the same time an arrangement was made by which the other directors derived advantages in regard to certain matters in dispute, respecting the affairs of the company, between them and the plaintiff. The material facts and circumstances connected with these arrangements were not disclosed to the shareholders who then held stock in the company nor to other persons who subsequently subscribed for shares of its stock.

Held, affirming the judgment appealed from (7 D.L.R. 96; 2 West. W.R. 986; 22 W.L.R. 128), that, as the plaintiff and his co-directors were in a fiduciary position and complete disclosure of the circumstances in regard to the making of the contract had not been made to all the shareholders, present and future, the agreement was not binding upon the company.

The order in the judgment appealed from directing that, on taking the accounts between the parties, an allowance should be made to the plaintiff, on the basis of *quantum meruit*, for services rendered by him while in the employ of the company was not disturbed.

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*PRESENT:—Sir Charles Fitzpatrick C.J., and Idington, Duff, Anglin and Brodeur JJ.

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Per Fitzpatrick C.J., and Idington, Anglin and Brodeur JJ.—Where the judgment sought to be reviewed has finally disposed of one of the issues, forming a distinct and separate ground of action, the Supreme Court of Canada has jurisdiction to hear and determine the appeal. *La Ville de St. Jean* v. *Molleur* (40 Can. S.C.R. 139), and *McDonald* v. *Belcher* ([1904] A.C. 429), followed; *Hesseltine* v. *Nelles* (47 Can. S.C.R. 230), referred to.

APPEAL from the judgment of the Supreme Court of Alberta (1) by which the judgment of Stuart J., at the trial, was set aside in respect to the damages awarded thereby, the plaintiff's claim therefor disallowed, and the judgment varied in certain other respects.

The action was brought by the appellant against the company and A. W. Denman and H. E. R. Rogers, shareholders and directors of the company, to recover damages for breach of an agreement granting him the exclusive rights as agent for the sale of the company's output of coal, in the Provinces of Alberta, Saskatchewan and Manitoba, and also to recover moneys expended by him, as manager, on behalf of the company in the management of its business. The circumstances in which the agreement was made are stated in the head-note and in the judgments now reported.

The judgment, at the trial, in favour of the plaintiff ordered re-payment of the moneys expended by him as manager on the company's account and directed a reference for the ascertainment of the amount of the damages. On an appeal by the defendants, the Supreme Court of Alberta reversed the trial court judgment in respect of damages, disallowed the plaintiff's claim, and varied the order as to re-payment of the moneys expended by directing that the amount should

(1) 7 D.L.R. 96; 2 West. W.R. 986; 22 W.L.R. 128.

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be included in the general accounts between the parties and that an allowance, on the basis of *quantum meruit,* should be made for services rendered by the plaintiff while in the employ of the company.

On the 18th February, 1913,

W. L. Scott, for respondents, moved to quash the appeal, for want of jurisdiction on the ground that the judgment appealed from, though final in regard to some of the issues, left other issues undecided upon the reference to the master for taking accounts and assessment of damages. At the same time, in case it was held that there was jurisdiction, Mr. Scott moved for an order giving him leave to amend the cross-appeal by the respondents on their counterclaim against the appellant.

O. M. Biggar opposed the motion, and judgment thereon was reserved.

The appeal was heard on the merits on the 3rd and 4th March, 1913.

The plaintiff appealed to the Supreme Court of Canada from that portion of the judgment of the Supreme Court of Alberta which disallowed his claim for damages. The respondents cross-appealed on the ground that, in taking the accounts, the moneys alleged to have been expended on behalf of the company by the plaintiff should not be credited to him against the claims of the defendants, also as to the manner in which it was directed that the conveyance of certain coal lands assigned by him to the company should be dealt with, and, likewise, in regard to the credit to be given to the plaintiff, on the basis of *quantum meruit,* for services rendered by him during the time he was acting as sales agent for the company.

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The Chief Justice.

S. B. Woods K.C. and *O. M. Biggar* for the appellant.

J. H. Leech K.C. and *W. L. Scott* for the respondents.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J.—The contract of the 27th of June, 1908, between these parties, sued upon herein, was negotiated for and verbally concluded whilst appellant was one of the three directors of the respondent company, and its manager. He had been its promoter and, with his fellow directors, its founder. They had got others to subscribe for stock and were seeking subscribers for that as yet unallotted and open to be taken by the public.

These men having, under such circumstances, reached an agreement between themselves met as a board on said date and what they did is tersely stated in the appellant's factum, as follows:—

> A meeting of the directors was held on the 27th June, 1908, at which the sales agreement was ratified, the plaintiff's resignation as director and secretary-treasurer accepted, the transfers of shares approved and resolutions passed that one Finch, an employee of Rogers in Winnipeg, be appointed secretary-treasurer, and that Rogers be empowered to employ some one to keep the books. This he never did and they continued to be kept by the plaintiff until the following February.

The contract thus produced gave the appellant for five years from the following 1st September the unusual commission of fifty cents a ton upon the sales of all the company's output of coal from a mine near Edmonton which could be sold in the Provinces of Alberta, Saskatchewan and a large part of Manitoba.

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The other terms did not of necessity impose any very formidable risk on the part of the appellant, and he had the option of terminating the contract on two months' notice. The company could not end it unless appellant made default in carrying out his part of its terms for two months.

The proposition that such a contract made by one holding the position of a director is voidable does not seem to permit of much doubt; unless the power to do so has been expressly given by its charter, or unless and until the shareholders concerned have been consulted, and ratified it.

Nor could the resignation of the directorship add much to the strength of such a contract when the proceedings relative thereto were had upon the express understanding that the resignation was to be contemporaneous with the formal execution of the contract.

And when, as here, the whole business, including the execution of the contract, depended upon a compact between the directors whereby those remaining such were, as the price of their assent, to get satisfaction from the appellant for claims he had repudiated up to then and the purpose of all was then to invite new subscriptions for stock and unload the burthen of this contract upon the public, I do not think it could be maintained against the will of a single shareholder then in existence or who might have become such pursuant to such contemplated invitation, without full disclosure having been made to him of the facts.

Yet such seems, on the admitted facts, to be so clearly appellant's position in this case that it might have simplified matters and saved laborious analysis

of evidence relative to the chief ground taken by the respondent to have had this simple proposition briefly taken and maintained.

I think, possibly, it is within the exact ground taken, which is that there was a fiduciary relation between the appellant and the company, and between him and his co-adventurers, which made it incumbent on him to shew that the contract was fair and reasonable and the result of full disclosure on his part of all he knew which might, if known, be reasonably supposed to have influenced the minds of those contracted with.

A director has been often said to stand as a trustee, and, if any quarrel has been made with the application of that term and "agent" is substituted, he so stands that if a contract made by him with his company is, as I have already said, unless in the excepted cases which have been referred to, voidable, and not one of which he can claim a profit. The appellant has, therefore, having failed to bring himself within any of the exceptions, including the fairness of the contract to which I am about to advert, no right to the damages he claims.

That alone should answer his action and this appeal.

He claims, however, with a certain degree of plausibility, that there were only himself and his fellow directors concerned, and that they each got substantial advantages as the result of the compact made between each of them and him, and, as we cannot herein restore him that which they got from him, we ought not to give relief.

I answer — that is just what renders his case the

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more offensive, and looks so like the bribery of his fellow-directors, inducing them to enter upon the negotiations for this contract, and, indeed, the causal reason or motive for its existence, and its manifest advantages in favour of the appellant, and its features detrimental to the company's interests; and all intended to be unloaded upon the public invited to subscribe.

They were all anxious for new subscribers, and got them we are told; and, having got them according to their plans and desires, they, as part of the respondent, must be protected, whatever happens appellant or his fellow delinquents. They all forgot the duty a director owes in such cases to the future as well as to the existent shareholders.

I incline to think it is impossible by any evidence in this case to overcome the vicious nature of the transaction upon which the contract sued upon must rest. We have, however, not to rest upon that alone, which was, perhaps, not fully argued, but upon the failure of the appellant to justify himself within the narrower ground taken.

The appellant lived in the neighbourhood of the mine, had managed the business throughout from the time he had got, prior to the incorporation, a personal option for the purchase of the property, and the others lived at great distances from the scene of operations. He represented, amongst other things, to his fellow directors that the expense of producing the coal from the mine had been for the years 1907 and part of 1908, anterior to April of last year, from ninety-six cents to $1.05 a ton.

The respondent charges that the contract was in-

duced by this representation and that the cost had been and continued to be much greater.

I think the weight of evidence goes to shew that this representation, which it was practically admitted had been made, but is presented in another light, was a most material consideration under the circumstances, was not well-founded, and, hence, so unfair that a fiduciary agent relying upon a contract, evidently based thereon, cannot maintain it.

It may be that the estimates which appear in the judgment of Mr. Justice Beck, and adopted by at least one judge in the court below, may be such as might be varied by a close and exhaustive analysis of the evidence. I do not propose to enter upon such an exhaustive inquiry as would settle exactly which view was right, for it would, in any event, leave a material difference at best, doubtful and unexplained or inexplicable between the actual cost and that so represented.

The burden of explaining rested upon the appellant. He, while practically admitting the representation, ought to have been able to shew in a more satisfactory manner than his evidence discloses exactly what the cost of production had actually been, and to justify his representation much better than he has done. The time in question was not long. The quantity of coal in question, which was only a little over thirty thousand tons, rendered the problem comparatively easy to solve in a better or clearer way than the appellant has done, especially seeing he had remained in charge for months of the time after that period up to which his representation extended.

The learned trial judge, though disposed to minimize the nature and effect of the representation, does

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not find the charge unfounded. He chiefly proceeds on the ground that there was not prompt repudiation, and that, in fact, there was such acquiescence as to debar the respondent from complaining.

The operations of the contract ran from 1st September, 1908, to 1st March, 1909, when it was repudiated.

Having regard to the fact that those most concerned lived at great distances from the mine and seat of business and, in reason, might only have become alive to the actual facts from the results discovered when the appellant's managership ceased, it seems to me there is no such evidence of acquiescence after discovery as to form a bar to the present complaint. Indeed, there was no discovery, or likely possibility thereof, save from the experience got from results which proved how delusive the representation must have been. And the long period over which appellant seems to have acquiesced in the repudiation, even if conditional, renders it difficult to restore him to such rights as he might have had under the contract.

Meantime, whilst he was acquiescing in this repudiation, others were taking stock in the company and must be entitled to some sort of consideration, and presumed to have acted upon the objectionable contract having been put an end to.

Surely they are entitled through the company to say that one who rested content for nearly a whole year without giving any sign of warning to them, or urgent insistence in regard to his rights under what seems to have been an onerous contract cannot now be restored to his original position.

The application of the principle of acquiescence may not, on either set of facts, settle the rights of

either party herein arising out of the peculiar condition of things the evidence discloses, but, certainly, cannot help appellant.

The learned judge properly points out that Rogers seemed almost to have forgotten the representation. If he alone were to be considered that might have furnished an effectual answer.

The recklessness, to put it mildly, of such an influential director, is neither proper basis of a contract nor helpful in supporting it, when otherwise unsupportable, by reason of others being interested.

The second or tentative bargain substituted for the one I have dealt with is properly found terminable at will.

The appeal should be dismissed with costs. The cross-appeal, or notice of motion therefor, ought to share the same fate, for the judgment below seems to give no more than is right, if, indeed, so much.

The costs of the motion to quash, which must be dismissed, should be fixed at fifty dollars and deducted from the costs allowed respondent.

DUFF J.—I concur in dismissing the appeal and cross-appeal with costs.

ANGLIN J.—If Rogers, A. W. Denman, Robertson and the plaintiff had been the sole shareholders in the defendant company when the agreement of the 27th June, 1908, was made, and if there had then been no intention to bring in other shareholders, or if other shareholders had been brought in only after full disclosure of all the material facts and circumstances connected with the making of that agreement, I should hesitate before rejecting the view of Stuart J. that

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the company had not the right to repudiate it when and as it did.

But that agreement was made between persons standing in a fiduciary relation to the company. It was made concurrently with, if not as part of, and in consideration for a transaction by which Rogers and A. W. Denman obtained personal benefits from the plaintiff. It gave to him, at the expense of the company, an extravagantly advantageous bargain. It was admittedly obtained upon representations of fact made by him, which were unquestionably most material, and which, if not proved by the defendants to have been false, as I rather think they have been, have certainly not been satisfactorily established to have been true by the plaintiff, on whom that burden of proof clearly lay. There were other shareholders at the time the bargain was made some of whom, no doubt, have ceased to be interested in the company. It was then intended that shares should be offered for public subscription and, in fact, a very considerable amount of the company's stock has since been disposed of. There is no suggestion that there was, either to the persons (other than the plaintiff and the interested directors) who held shares when the agreement was made, or to the persons who subsequently acquired shares, such full disclosure of the circumstances surrounding the making of it and such express or tacit ratification by them as would be necessary to render it binding upon them.

Whatever might be urged, were the question one between Rogers, A. W. Denman and Robertson on the one side and the plaintiff on the other, I have not been convinced that as between the plaintiff and the company the temporary and tentative arrangement made

by Robertson with the plaintiff in May, 1909, to replace the arrangement of June, 1908, had lost that character and had become binding as a permanent agreement.

It is not necessary or desirable to enter upon a discussion, or to attempt an analysis of the voluminous evidence in the very bulky record before us, a great deal of which might well have been omitted. I agree with much that the learned trial judge said in condemnation of the conduct of Rogers and A. W. Denman as directors and of their negligence and indifferent attitude to the affairs of the company. But, upon what are the crucial issues of fact as between the plaintiff and the defendant company, my study of the record has not satisfied me that wrong conclusions were reached by the majority of the learned judges who sat in the court *en banc*.

I prefer, however, to rest my opinion that the judgment in appeal should not be disturbed on the ground that the first agreement made by the plaintiff cannot, having regard to his fiduciary position, be held binding on the company, because he failed to prove full and complete disclosure to all the then present and to the future shareholders of the material circumstances surrounding the making of his bargain with the personally interested directors, and that, as against the company, he failed to establish that the temporary arrangement with Robertson had become permanent.

I have not found any ground for disturbing the judgment of the full court in regard to the Bush transaction, as to which the view of the learned trial judge has been practically affirmed. Neither has a sufficient case been made, in my opinion, to justify interfer-

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ence with the direction of that court that, on the taking of the accounts between the parties, an allowance should be made to the plaintiff, on the basis of a *quantum meruit,* for his services while in the employment of the company.

I would dismiss the appeal and the cross-appeal, both with costs.

By the judgment of the court *en banc* the plaintiff's claim to recover damages for breach of contract was finally disposed of. That was "a distinct and separate ground of action." Under the authority of *La Ville de St. Jean* v. *Molleur*(1), and of *McDonald* v. *Belcher*(2), there applied, which is not affected by the judgment in *Hesseltine* v. *Nelles*(3), the plaintiff had a right of appeal to this court from the judgment dismissing his claim for damages for breach of contract. He is, therefore, entitled to his costs of the motion to quash, which should be fixed at $50, to be set off against the costs of the appeal which he is ordered to pay.

BRODEUR J.—I concur in the opinion of my brother Anglin.

Appeal and cross-appeal dismissed with costs; motion to quash dismissed with costs.

Solicitors for the appellant: *Short, Cross, Biggar & Cowan.*

Solicitors for the respondents: *Parlee, Freeman & Abbott.*

(1) 40 Can. S.C.R. 139. (2) [1904] A.C. 429.
(3) 47 S.C.R. 230.