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* Feb. 15.
* Mar. 6.

ANDERSON, GREENE & COMPANY, LTD. (DEFENDANT) ..... APPELLANT;

AND

WILLIAM S. KICKLEY (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Contract—Dispute as to nature of agreement—Documents—Course of dealing—Evidence—Reversal of findings of trial judge—Trust—Moneys impressed with trust—Implication—Repudiation—Failure of object of trust—Responsibility—Resulting trust.

Under an arrangement, the nature of which in certain respects was in dispute, respondent delivered to appellants certain certificates of shares belonging to him in G. Co. Under the arrangement, appellants sold the shares and, after the sale of them, remained accountable for $2,250 as part of the proceeds. Respondent sued appellants for said sum. His action was dismissed at trial, on the ground that the certificates of shares were delivered by respondent, who was president of G. Co., to appellants as the property of G. Co., having been lent by respondent to G. Co. for that purpose, to carry out a G. Co. transaction, and that appellants were accountable to G. Co. only (against which company they had an alleged, but disputed, counterclaim, not connected with the transaction now in question). The Manitoba Court of Appeal reversed the judgment, holding that respondent personally held the shares, personally dealt with appellants, and was entitled to recover from them.

Held: The judgment of the Court of Appeal should be affirmed.

From the documents, the course of dealing, and the broad features of the situation as disclosed by the evidence (to which matters, it was held, in view of his reasons, the trial judge had failed, in respect of the

* PRESENT:—Duff C.J. and Rinfret, Lamont, Crocket and Hughes JJ.

cardinal issues of the case, to give sufficient weight), the dealings between respondent and appellants were with respondent personally. Even assuming (as appellants contended) that the moneys for which appellants were accountable were to be paid to respondent as president of G. Co., in other words, to G. Co., to be applied by it in payment of shares to be issued to respondent to replace respondent's shares delivered to appellants, then such moneys, being moneys to be devoted to the payment of the purchase price of shares to be issued to respondent, were impressed with a trust in favour of respondent; and the implication arose (applying the principles enunciated in *The Moorcock*, 14 P.D. 64, at 68, and *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, at 491) that it would be a violation of respondent's rights, a breach of the trust under which the moneys were held, to apply them in payment of any claim of appellants against G. Co., arising, at all events, out of matters not connected with the transaction in question. Appellants, by their long retention of these moneys under a claim of right to apply them against their alleged counterclaim, had repudiated the trust. Also, by reason of appellants' wrongful retention, the trust had become impossible of fulfilment because, before the trial, G. Co. went into liquidation. The moneys which, under the arrangement, were to be paid to respondent, whether as president of G. Co. or not, could no longer be applied in execution of the trust. The legal result was that, the object of the original trust having failed in consequence of repudiation by appellants and present impossibility of performance, a resulting trust attached to these proceeds of the sale of respondent's property, in favour of respondent.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba which, reversing the judgment of Adamson J., held that the plaintiff was entitled to recover from the defendant the sum of $2,250 as being the balance owing for shares of stock in the Gem Lake Mines Ltd. placed by the plaintiff in the hands of the defendant under an arrangement, the nature of which in certain respects was in dispute. The material facts of the case and the questions in dispute are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

A. M. S. Ross K.C. for the appellant.

J. A. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The appellants are brokers in Winnipeg. They appeal from a judgment against them, pronounced by the Manitoba Court of Appeal, in an action brought by the respondent, claiming $2,250 as moneys payable to him by them, under an arrangement by which he put in their hands certain shares of the Gem Lake Mining Company;

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one term of the arrangement being that 15 cents per share of the proceeds received from the sale of the shares should be paid to the respondent. The Court of Appeal upheld the claim, reversing the judgment of the trial judge, who had dismissed the action.

It is not open to question on the evidence that the shares placed by the respondent in the hands of the appellants were the property of the respondent. It is not disputed that the whole of these shares (75,000), so placed in the appellants' hands, were sold by them; or that the appellants have not paid the sum of $2,250, for which, in July, 1930, and in November, 1930, they admitted they were accountable, as part of the proceeds of such sales.

In their defence, the appellants contented themselves with what must now be treated as a denial of the allegations in the statement of claim; although, strictly read, the defence would involve an admission of the primary facts alleged with the single exception of an averment that the appellants held the money in their hands in trust for the respondent.

The defence to which the trial judge gave effect is not hinted at. That defence was this: that the shares—(75,000)—delivered to the appellants, were the property of the Gem Lake Mining Company; and were deleivered by the respondent in his capacity as the president of that Company; that they were accountable for the proceeds of sales to the Company only; and that as against the Company they had a counterclaim. The view upon which the learned trial judge acted was that the shares were the property of the Mining Company as well as the proceeds of the sale of them.

The proper inferences from the documents in evidence and the admitted facts appear to be that the Court of Appeal rightly reversed the judgment of the trial judge.

It will be convenient, at the outset, to outline the facts as they are admitted, or indubitably established, by the evidence. As early as January, 1930, the people interested in the Mining Company, which included the two members of the appellant firm (an incorporated company) and the respondent, were concerned to find that the market for the Company's shares was very dull. While they had hoped to sell them at not less than 20 cents a share, the shares were then offering at a price as low as 11 cents, in considerable quantities.

In the latter part of February and the beginning of March, the respondent and Mr. Anderson, of the appellant firm, in the absence of the other directors, decided to secure the services of one Lott, a share salesman, in order to endeavour, as the witnesses say, " to make a market " for the Company's shares. It was accordingly arranged with Lott that, if he would devote himself to procuring purchasers of the Company's shares through the appellants as brokers, the Company would undertake to " protect " him to the extent of 75,000 shares to be paid for by him at 15 cents a share, the shares to be allotted and delivered upon payment. The two directors had no authority to bind the Company to this arrangement; but, as it appeared to be necessary in the common interest, they felt assured that their action would be approved and ratified; as it was.

We pause to point out the precise character of this arrangement with Lott. It is evidenced by several documents; the first in which it is explicitly recognized being this letter of the 19th of March, 1930,

March 19, 1930.

Messrs. Anderson, Greene & Company, Limited,
Notre Dame Avenue,
Winnipeg, Manitoba.

Gentlemen,—This is to advise that we are protecting Mr. Lloyd Lott up to seventy-five thousand (75,000) shares of Gem Lake Mines Limited stock at fifteen cents (15c.).

Yours very truly,
GEM LAKE MINES LIMITED.
" W. S. KICKLEY "
President.

The arrangement was ratified at a meeting of the Board of Directors of the Mining Company, held at the office of the appellants on the 10th day of April, 1930, the respondent and Mr. Anderson being present, as well as two other directors, Mr. Donaldson and Mr. Roe. The arrangement which had been made by the respondent and Mr. Anderson, without the concurrence of the other directors, who, as already mentioned, were then absent from Winnipeg, was, as the minutes disclose, reported to the meeting by the respondent thus:

Accordingly on the 3rd of March, 1930, an arrangement was made by the President and Mr. Anderson with R. E. Lloyd Lott of Winnipeg under which Mr. Lott undertook if given a position, to create a market provided the Company would make delivery to him of 75,000 shares of stock on payment by him to the Company of 15 cents per share.

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A resolution was passed which is recorded in the minutes in these terms:

On motion of Mr. Roe seconded by Mr. Donaldson it was unanimously resolved that 75,000 shares be allotted and delivered to R. E. Lloyd Lott or his nominee or nominees on payment into the treasury of 15 cents per share.

It is most important to notice and to emphasize the fact that the arrangement with Lott, to which Mr. Anderson was a party, as reported by the respondent to the directors, of whom Mr. Anderson was one, was to the effect that Lott was to receive 75,000 shares of stock, on payment by him to the company of 15 cents a share; and that, under the resolution sanctioning the arrangement, allotment and delivery were both to be conditional upon payment.

Then there is this letter in evidence, dated the 17th of November, 1930, from the Mining Company to the appellants:

November 17, 1930.

Anderson, Greene Company, Limited,
Winnipeg, Manitoba.

Gentlemen,—This will confirm once more arrangements made by us last winter with R. E. Lloyd Lott where he was to have a call on 75,000 shares at 15 cents and a call on a further amount at 19½.

These arrangements were confirmed at Directors' Meeting and there has been no other arrangement made.

Yours very truly,
GEM LAKE MINES LIMITED.
W. S. KICKLEY,
President.

The arrangement between the Company and Lott in respect of the 75,000 shares, with which alone we are concerned, was that confirmed at the Directors' meeting of the 10th April set forth in the passage quoted above from the minutes. There is no evidence of any authority to the respondent to vary this arrangement by placing the Company's "treasury stock" in the hands of Lott or the appellants before receiving payment for it. The respondent says he had no such authority; and there he is plainly right.

Now, the terms of this arrangement with Lott—the only terms authorized—were never, in fact, carried out. Lott admittedly had no money, and the respondent says that the appellants were unable to furnish the funds necessary to pay for the shares in advance of the sale of them. At all events, the 75,000 shares delivered to the appellants

were the personal property of the respondent, and were delivered by the respondent to the appellants to enable them in turn to make delivery to purchasers. What is most significant is that, in fact, they were not paid for by the appellants on delivery, but, as to the 15 cents a share of the purchase price, were only accounted for after sale on receipt of the purchase money by them. Apart altogether from the oral evidence, the documentary evidence leaves no doubt that this was the invariable course of business and, indeed, that is not disputed.

The appellants' account with the respondent in connection with this transaction is in the appellants' books, and was produced in evidence. The entries are on two pages. On one page there is a series of entries under the caption "Stock received from Mr. W. S. Kickley"; on the second page there are entries under the heading "Account with Mr. W. S. Kickley." These entries show that, on the 12th March, five certificates for 25,000 shares in the aggregate, were received by the appellants. Deliveries were made at various dates down to the 21st of March; and payments to "W. S. Kickley" were made by cheque on succeeding dates. On the 7th of April the appellants had completely accounted to the respondent for his share of the proceeds of the sales between the 12th and 21st of March inclusive. This course of business continued until the end.

The respondent used the term "loan" in describing the transaction between himself and the appellant. The learned trial judge was much impressed by the use of this term, and his judgment largely turns upon it. It is clear enough, however, that the word was used without reflection, and, when the learned trial judge suggested that the transaction was rather in the nature of a sale, the respondent agreed that "sale" would be the better term.

"Sale" does not, however, give a true picture of the transaction as carried out. It is evident that the respondent did not intend to say that the appellants had purchased these shares from him on delivery; but that they were placed in their hands to enable them to fulfill their contracts of sale, and that, out of the proceeds of sales, they were to pay him 15 cents a share. Greene, who is the manager of the appellants, in a letter to which we shall have to refer, describes the arrangement as an "option." It

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was, in a sense, an option, because it is clear that the appellants were only bound to pay for shares as they were sold, and the purchase money received. From another point of view, the transaction might, in layman's language, be described as a "loan"; since unsold shares would, of course, be returned to the respondent.

Nomenclature is really of no importance. The critical point is that the arrangement between the respondent and the appellants, as evidenced by the conduct of the parties, and the delivery of shares pursuant to it, was, in its essence, inconsistent with the essential terms of the Company's arrangement with Lott. The respondent says that this arrangement was concluded between himself and Greene, a partner and the manager of the appellants; who proposed it with the very object of enabling the appellants to complete sales made by them without being obliged first to pay to the Company the purchase price in order to obtain allotment and delivery of certificates, as the undertaking of the Mining Company required. This view of the nature of the arrangement was accepted by the Court of Appeal. It may be added that the profit, which proved to be a little over $3,000, on the sale of the 75,000 shares, was to be, and was, divided between the appellants and Lott, in the proportion of two-thirds and one-third. It was understood, no doubt, that $11,250 (15 cents a share for 75,000 shares) was to pass into the treasury of the Mining Company from the respondent, as the price of certificates to be delivered to him by the Company, in recoupment for the shares placed in the hands of the appellants by him, or to enable him to provide such shares.

The respondent produces two cheques of $10,000 and $5,000, both of which were paid to the Mining Company, as the Court of Appeal finds, as the price of shares purchased by him to carry out this understanding.

At this point, it is not without interest to consider the position taken by the appellants. They have sold the respondent's shares and received payment for them, and the sum of $2,250, the balance of the purchase money, has been in their hands since July, 1930, when they sent the respondent a statement of account showing that balance due to him. They have refused to pay the respondent, and counsel for the appellant stated explicitly that they

deny liability to the Mining Company. They have retained this money in their hands. Their excuse for refusing to pay the Mining Company is based on a claim against it arising out of matters which occurred after the sum of $2,250 became payable, and which, the evidence seems to show, has little substance.

Thus, from the respondent's point of view, he delivered his shares under this arrangement, by which Lott and the appellants were to divide the profits over 15 cents a share, and 15 cents a share was to be paid to him out of the proceeds of his shares sold by the appellants; and to this day he has received neither money nor shares. The appellants have refused to pay him his share of the proceeds, and they have refused to pay it to the Company as the price of shares to be allotted to him by the Company. The appellants have kept both shares and money; the respondent, having given up his shares, has received neither shares nor money in return.

It is admitted by the appellants that it was one of the terms of the arrangement between the parties that the 15 cents a share, for which, after the division of profits between themselves and Lott, they would be accountable, was to be paid to the respondent. The appellants contend it was to be paid to the respondent only in his character as president of the Company; in other words, it was to be paid to the Company. The respondent said it was to be paid to him personally, as part of the proceeds of the sale of shares which were his property, and which had been sold by the appellants under the arrangement with him already indicated.

The learned trial judge has found, as already mentioned, that the shares delivered by the appellants were the shares of the Company, that is to say, shares "loaned" by the respondent to the Company for the purpose of enabling the Company to give effect to their agreement to protect Lott; and he held, notwithstanding the evidence of the respondent and of the documents, that the moneys paid and to be paid to the respondent were paid and to be paid to him for the Mining Company. These two findings can be most conveniently discussed together.

Ex facie, the dealings between the respondent and the appellants were dealings with the respondent personally.

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We have already mentioned the account kept by the appellants. The first part of the account shows a list of share certificates received from "Mr. W. S. Kickley". These share certificates admittedly were "street certificates" in the personal possession of the respondent, and his own private property. The other part of the account headed "Account with Mr. W. S. Kickley" shows a list of cheques. In this account "Mr. W. S. Kickley" is charged with these cheques. Each of the cheques is payable to "W. S. Kickley". Each of them was deposited in the respondent's own private banking account, as the appellants must have known. It should be observed, in passing, that the Mining Company had a banking account of its own, into which the sum of $10,000 was paid to the Company by the respondent by cheque for the purchase of shares on the 29th of March. The learned trial judge says that the Company had no authorized banking account, treating that, apparently, as an explanation of the fact that the respondent had paid these moneys into his own personal account. But the truth is that there was an account with the Bank of Toronto during all this time, and there is not the slightest evidence to show that the account was not authorized. In point of fact, Mr. Anderson, a member of the appellants' firm, countersigned cheques drawn upon it.

Then, for each lot of share certificates delivered by the respondent to the appellants, there is a receipt which, in every case but one, is addressed to "Mr. W. S. Kickley" personally. Again, there is an account of the 29th of July delivered to the respondent by the appellants in response, as the respondent says, to a request by him, in which there is an acknowledgment of a balance of $2,250 due to "Mr. W. S. Kickley" in respect of the "purchase" of these 75,000 shares. At this date, it should be noted, the shares had all been disposed of, and the completed transaction might, very naturally, be treated by a book-keeper as a purchase. Then, there is the latter of November 20, 1930, written by Mr. Greene, the manager of the appellants, and addressed to "Mr. W. S. Kickley" in which there appears this sentence:

> Reference our conversation we beg to state that at the present time we owe you for 15,000 shares of Gem Lake Mines Ltd. at 15 cents, a total of $2,250 in relation to our option.

Comment perhaps naturally arises from the use of the term "option". That has already been sufficiently discussed.

On the face of it, this letter affords substantial corroboration of the respondent's account of the arrangement.

Turning for a moment to the finding by the learned trial judge that the certificates received by the appellants from the respondent had been lent by the respondent to the Mining Company, and, as the property of the Company, delivered by him as its president, to the appellants. First of all, as already observed, the respondent had no authority on behalf of the Company to vary the terms of the arrangement with Lott as set forth in the minutes of the Directors' meeting of the 10th of April. He had no authority from the Company to deliver any shares, the property of the Company, to the appellants, or to anybody, except upon the terms of payment on delivery. The arrangement between him and the appellants, as to the delivery of shares, and as to the terms of payment, as actually carried out, was not authorized by the Company, and he speaks with substantial accuracy when he intimates that, if he had been delivering the Company's shares, he would have been acting illegally.

Then, Mr. Anderson was a director of the Company, was a party to the arrangement with Lott, was present at the Directors' meeting at which the terms of the arrangement were reported and ratified. He and the respondent both knew that the actual course of dealing between the appellants and the respondent was not in compliance with anything authorized by, and that it had not, in fact, been authorized by the Company. That, no doubt, is the reason why the transaction appears in the books of the appellants, and in all the communications between the appellants and the respondent, not as a transaction between the appellants and the Mining Company, but strictly, in its proper form, as a transaction between the appellants and the respondent personally.

Then, there is no trace of authority, disclosed or suggested, under which the respondent could have been empowered to enter into an agreement, as president of the Company, with himself personally, for lending his shares to the Company. It could hardly be suggested that he was making a gift of his shares. If there was not a gift, there must have been some consideration. He had no authority to agree, on the part of the Company, to give to himself any consideration for handing over these shares.

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Turning to the observations of the learned trial judge upon the evidence. First of all, he accepts the explanation of the book-keeper of the appellant firm as to the manner in which the account was kept. We do not think it necessary to dwell upon that, because we agree with the Court of Appeal that the explanation, so-called, does not really meet the point. It does not account for the fact that the account, instead of being kept in the name of the president of the Mining Company, or of W. S. Kickley as president of the Mining Company, was kept in the name of "Mr. W. S. Kickley". This same observation applies to the attempts to explain the receipts, the statement, the letter written by Greene, and, above all, the cheques. The book-keeper says the cheques were made payable to the respondent as president of the Company. In point of fact, they were payable to "W. S. Kickley" with no addition, and we have already pointed out how they were dealt with. The book-keeper says she knows they were payable to the respondent as president because they were given in payment for "treasury shares". It is plain enough that she was speaking with no knowledge of the facts bearing upon the ownership of the shares; and, indeed, with no very precise appreciation of the words she was using. We agree with the Court of Appeal that no great weight can be ascribed to these explanations.

There is another point which influenced the judgment of the learned trial judge. He says, in effect, that the significance of the course of business between the respondent and the appellants, which, as we have seen, on the face of it indicates so plainly that the respondent was considered by all parties as acting for himself, and not for the Company,

is quite nullified as evidence of a debt due him by the defendants by what took place later. Kickley made no claim, or demand, for his money until March, 1932.

His view is: the fact that the respondent made no claim during two years, justifies the inference that he had no belief in the existence of such a claim; or so little belief in it, as to destroy the value of all the documentary evidence pointing to the recognition by the appellants of the validity of the claim.

Now, as we have already observed, at the end of July, an account was delivered showing a debt due to "Mr. W. S.

Kickley" in respect of the "purchase" of these 75,000 shares by the appellants. The respondent says that account was delivered in response to a request from himself.

Again, on the 20th of November, there is the letter from which we have already quoted, which the respondent likewise says was sent at his request; the terms of the letter itself corroborate this statement.

Then there is the evidence of the respondent and of his solicitor, Mr. Hart Green. The respondent says that in the spring of 1931 he instructed Mr. Green to sue the appellants. There is a telegram from Mr. Green to the respondent, at that time, which corroborates this statement. The evidence of Mr. Green, whose veracity is not attacked, is that he received instructions from the respondent to press for payment of the claim; that he interviewed Mr. Anderson and Mr. Greene in respect of it, and that he finally advised the respondent against proceeding, for the reason that, if he recovered judgment, it was improbable that the judgment could be collected.

The learned trial judge deals with this last mentioned evidence in this fashion. He says,

> It is true he communicated with his own solicitor at this time about this claim, but this is not evidence against the defendants. The significant fact is that he did not say anything to the defendant at the time concerning this claim.

Here, in the first place, the learned trial judge quite overlooks the evidence of Mr. Hart Green that he had interviewed the appellants' manager with respect to this claim; and, in the second place, it seems difficult to understand the view that, in answer to the contention that the respondent's forbearance to press his claim established his disbelief in the existence of it, he was not entitled to prove that he had instructed his solicitor to sue. In this matter, we think, with great respect, that the learned trial judge has based conclusions that greatly influenced his decision upon serious misconceptions of the evidence adduced.

At the end of his judgment he reiterates his statement about the absence of any claim. He says,

> It is unfortunate that this claim was not made * * * before Greene went to South Africa.

This seems to be irreconcilable with the evidence of Mr. Hart Green.

We have said sufficient to show that the findings of the learned trial judge were not necessarily binding on the

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Court of Appeal. With respect, in our opinion, his reasons afford solid grounds for thinking that he has failed, in respect of the cardinal issues of the case, to give sufficient weight to the documents, the course of dealing, and the broad features of the situation as disclosed by the evidence.

There is a matter of some importance which, probably, to some extent, affected the view of the learned trial judge in respect of the relative weight of Mr. Anderson and the respondent as witnesses. As we have pointed out, the appellants have failed to account to the Mining Company. The learned trial judge says that if the Mining Company "are the proper plaintiffs, the defendants would have a counterclaim."

Now, as regards the so-called counterclaim, it appears to be set up first in a letter of the 10th of July, 1930, addressed to "Mr. W. S. Kickley, Gem Lake Mines Ltd." by "Anderson, Greene & Co. Ltd." It is a letter in respect of expenses incurred by Lott in connection with a certain transaction described as the "Minneapolis Deal," which had nothing to do with the 75,000 shares we have been discussing. That letter was answered, the respondent says, by the Company, on the 15th of July, in which letter the appellants are told that no authority was ever given for charging these expenses to the Company. The letter proceeds,

> The Minutes of the Gem Lake Mines Limited Directors' Meeting provide for the payment of 10% on the Minneapolis deal provided it goes through, to be divided equally between Mayor Webb and Lloyd Lott and the assumption was that they would stand their own expenses. That, I think, would be the usual practice.

Anderson denies that this letter was ever received by his Company. The denial is not very convincing; but, however that may be, there was a further letter of the 17th of November, already quoted, the receipt of which is not disputed, that negatives the claim made in the appellants' letter of the 10th of July. Moreover, there is no suggestion that the respondent had any authority to vary the arrangement authorized by the directors, which admittedly was that Lott was to receive 10 per cent. of the proceeds of "the deal" if it was effectuated; under such an arrangement no valid claim for expenses could arise.

Some attempt was made on the argument to cast doubt on the evidence of the respondent that the cheque of $10,000, paid into the Mining Company's account on the

29th of March, was in payment of shares acquired for the purpose of effectuating the arrangement between the respondent and the appellants. These suggestions were not put to the respondent in cross-examination. They are based on inferences drawn by a witness from the examination of the books, and there appears to be exceedingly little, if any, admissible evidence in support of them. We accept the view of the Court of Appeal with regard to this cheque as well as the cheque for $5,000.

There is another point of view from which this appeal should be considered.

The respondent in his statement of claim stated the basis of his claim thus:

> 3. Between the said months of February and December, 1930, the Defendants were selling to the public shares of the capital stock of said Mining Company at a price in excess of 15 cents per share, and not having a sufficient number of shares for delivery, requested the Plaintiff to deliver to them 75,000 shares of the Plaintiff's holdings in said Mining Company in blocks as required from time to time, to enable them to make delivery of shares which they had contracted, or would contract to sell, upon the terms that the proceeds of said shares up to the extent of 15 cents per share would be held by the Defendants in trust for the Plaintiff and paid over to him.

Counsel for the appellants admitted he could not dispute the contention advanced by the respondent that the shares represented by the share certificates delivered by the respondent to the appellants were the private property of the respondent. The substance of his argument was that they were treated as shares belonging to the Company, made available to the Company by loan from the respondent for the purpose of enabling Anderson to carry out sales made under Lott's option; and that, consequently, any moneys for which the appellants were accountable were to go to the Company, in payment of shares, to be allotted and delivered to the respondent, to replace the shares lent by him.

It is quite obvious that rational people, entering into such an arrangement, would have regarded it as essential that the respondent should be protected, and that delivery to him of shares, in return for shares advanced by him, would be secured. In the view advanced by the appellant, one form of security would be to have the appellants account to him, as president of the Company, on the understanding that the moneys received were to be applied in payment for shares to be allotted and delivered to him; and this is what

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the appellants contend was contemplated. In view of the facts, that seems to be the only intelligible and plausible form in which the appellants' case could be put.

Let us assume, then, that the moneys owing by the appellants were, as the appellants contend, to be paid to the respondent as president of the Company; in other words, to the Company; to be applied in payment of shares to be issued to him.

Such an arrangement might not unnaturally be referred to by laymen as a loan of shares from the respondent to the Company; and it would follow, as a consequence, as the appellants' counsel put it in his reply, that these shares were to be returned to the respondent. If this was the arrangement, then there is no substantial inconsistency with the facts in the respondent's pleading, because the moneys for which the appellants were accountable were moneys to be devoted to the payment of the purchase price of shares to be issued to the respondent. In other words, they were moneys impressed with a trust, which, in that sense, was a trust in favour of the respondent.

It is perfectly obvious, looking at the matter from this point of view, that the parties could never have contemplated that the moneys received by Anderson in respect of these shares were to be paid to the Mining Company to be used as it might see fit,—to pay its creditors, for example. It is equally implied that it would be a violation of the rights of the respondent, a breach of the trust under which the moneys were held, to apply these moneys in payment of any claim by the appellants against the Company, arising, at all events, out of matters not connected with these 75,000 shares. This follows from an application of the principles enunciated by Bowen, L.J., in *The Moorcock* (1), and by Lord Esher in *Hamlyn* v. *Wood* (2). And yet, ever since July, 1930, these appellants have kept these moneys under a pretense that they were entitled to apply them in satisfaction of the claim for expenses already mentioned.

The action was tried in September, 1932. For three and one-half years they have held these moneys without any right to them which can be even plausibly stated. What, then, is the legal result?

(1) (1889) 14 P.D. 64, at 68. (2) [1891] 2 Q.B. 488, at 491.

In the first place, the appellants repudiated the trust when they retained these moneys under a claim of right to apply them in the liquidation of their so-called counter-claim. In the second place, and this is the critical point, by reason of their wrongful detention of the moneys, the trust has become impossible of fulfilment, because of the fact that, before the trial, the Company went into liquidation. The moneys which, under the terms of the arrangement, were to be paid to the respondent, whether as president of the Company or not, can no longer be applied in execution of the trust. The legal result is beyond controversy. The object of the original trust has failed in consequence of repudiation by the trustee and present impossibility of performance; a resulting trust, therefore, attaches to these proceeds of the sale of the respondent's property, in favour of the respondent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. M. S. Ross.*

Solicitor for the respondent: *J. F. McCallum.*