[HIGH COURT OF AUSTRALIA.]

PERCIVAL JOHNSTON . . . . . APPELLANT;
PLAINTIFF,

AND

FRIENDS MOTOR CO. LTD. . . . RESPONDENTS;
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 5, 6, 7.

Griffith C.J., O'Connor and Isaacs JJ.

Company—Rescission of contract to take shares—Misrepresentation in inducing the contract—Non-disclosure of material agreement—Representation made by company.

A company was formed for the purpose of dealing with certain patents, and to carry out a provisional agreement dated 9th October 1906, between F., the owner of the patents, and G., as trustee for the intended company. The company was registered on 7th December. On 26th December the agreement of 9th October was adopted by the company. In February and May 1907 the plaintiff applied for contributing shares in the company, which were allotted to him. The plaintiff, who was one of the first directors of the company, and was a director during all material times, brought a suit against the company for rescission of his contracts to take shares upon the ground that these contracts were induced by a representation that the agreement of 9th October was the only material agreement, and that this representation had since been ascertained by him to be untrue. It appeared that on 11th September F. agreed to sell to G. one-fourth of his interest in the patents upon certain terms. On the same day by another agreement, which was not disclosed, F. agreed to give G. another one-fourth share of the profits he might receive from the patents if sold to the then projected company. After the offer by F. to G. in September, a syndicate, which included the plaintiff, F. and G., was formed to acquire the one-fourth share offered to G., and to endeavour to float a company. At a meeting of the syndicate held before the company was formed, and at which the plaintiff was present, a draft prospectus was drawn up, containing the statement, which all the parties

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except F. and G. believed to be true, that the agreement of 9th October was the only material agreement. This prospectus was not in fact issued before the formation of the company, but the plaintiff had seen a copy of it between the date of his application for shares in February, and the acceptance of this application by the company.

Held, that the alleged secret agreement of 11th September between F. and G. was admissible in evidence to show that the representation relied upon as to the agreement of 9th October was untrue, and also for the purpose of inquiring whether it was a material representation.

But, *held*, that, assuming that the representation that the agreement of 9th October was the only agreement necessary to be disclosed was material, and induced the plaintiff to apply for shares in the company, the plaintiff was not entitled to relief against the company, because the representation was not one made by the company, or for which in the circumstances the company was responsible.

Held, further, upon the evidence, that the plaintiff's contract to take shares was not induced by the alleged representation.

Decision of *A. H. Simpson* C.J. in Equity, affirmed.

APPEAL from the decision of *A. H. Simpson* C.J. in Equity, dismissing a suit by the plaintiff for the rescission of two contracts made by the plaintiff to take shares in the defendant company. The facts are sufficiently stated in the judgment of *Griffith* C.J.

Wise K.C., *Gordon* K.C. and *Nicholas*, for the appellant. The plaintiff is entitled to rescission upon the ground that the representation by the company, that the engine invented by Friend had generated twenty horse power by brake test with a consumption of 18 lbs. of steam per horse power per hour, was untrue. The principle is that a company will not be allowed to retain the benefit of a contract obtained by misrepresentation. If a director is knowingly a party to a false statement contained in a prospectus, he cannot ask to have his contract to take shares set aside. But if the director is in fact an innocent party to making the statement he is in no worse position than any member of the public who applies for shares in the company. The appellant in this case was the innocent dupe of Friend and Gregory. It was held in *Western Bank of Scotland* v. *Addie* (1), that the fact that the complainant was himself a member of

(1) L.R. 1 H.L. Sc., 145.

the company whose agents had committed a fraud, was not an objection to his suit for redress. There is no presumption of law by which the appellant can be held to have had constructive knowledge of facts contrary to the real truth: *In re Wincham Shipbuilding Boiler and Salt Co., Hallmark's Case* (1). The evidence of the secret agreement between Friend and Gregory of 11th September 1906 was wrongly rejected. The appellant was informed by the company that the only material contract was the agreement of 9th October 1906, between Friend and Gregory. The appellant was entitled to rely on the truth of that statement: *Rawlins* v. *Wickham* (2). It is immaterial whether or not the company knew of the existence of the agreement of 11th September. The omission to inform the appellant of the existence of this agreement entitles the plaintiff to rescind his contract to take shares: *Sullivan* v. *Mitcalfe* (3); *Bagnall* v. *Carlton* (4); *Components Tube Co. Ltd.* v. *Naylor* (5); *Capel & Co.* v. *Sim's Ships Composition Co.* (6).

[ISAACS J. referred to *In re Leeds and Hanley Theatre of Varieties Ltd.* (7).

GRIFFITH C.J. referred to *Lydney and Wigpool Iron Ore Co.* v. *Bird* (8).]

The company is entitled to get back 2,500 shares from Gregory: *In re Hereford and South Wales Waggon and Engineering Co.* (9).

[ISAACS J. referred to *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (10); *In re Metropolitan Coal Consumers Association*; *Karberg's Case* (11); *Cackett* v. *Keswick* (12)].

The appellant must be taken to have entered into the contract upon the faith of the representation made to him unless it is shown that he knew it to be untrue or did not rely upon it: *Redgrave* v. *Hurd* (13); *Aaron's Reefs Ltd.* v. *Twiss* (14).

The company by accepting Friend's statements made themselves responsible for them: *In re Reese River Silver Mining Co.*; *Smith's Case* (15).

(1) 9 Ch. D., 329.
(2) 3 DeG. & J., 304.
(3) 5 C.P.D., 455.
(4) 6 Ch. D., 371.
(5) (1900) 2 I.R., 1.
(6) 58 L.T., 807.
(7) (1902) 2 Ch., 809, at p. 824.
(8) 31 Ch. D., 328.
(9) 2 Ch. D., 621.
(10) (1896) 1 Ch., 178.
(11) (1892) 3 Ch., 1.
(12) (1902) 2 Ch., 456.
(13) 20 Ch. D., 1, at p. 12.
(14) (1896) A.C., 273.
(15) L.R. 2 Ch., 604.

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[They also referred to *In re Coal Economising Gas Co.*; *Gover's Case* (1); *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (2); *Colonial Land Co.* v. *Bohan* (3); *Macleay* v. *Tait* (4); *Arnison* v. *Smith* (6); *New Sombrero Phosphate Co.* v. *Erlanger* (5): *Palmer on Companies*, 10th ed., pp. 118, 165.]

Knox K.C. and *Leverrier*, for the respondents, were not called upon.

GRIFFITH C.J. This is a suit brought in the Supreme Court of New South Wales in Equity by the plaintiff against the defendant company, claiming rescission of two contracts made by the plaintiff to take shares in the company, and for relief by rectification of the register of the shareholders of the company by striking out the plaintiff's name as the holder of 4,950 shares. The company was formed for the purpose of taking over and dealing with certain patents for inventions in relation to rotary gas and steam engines, and for that purpose to carry out a provisional agreement between the owner of the patents, one Friend, and one Gregory, as trustee for the intended company. The agreement was dated 9th October 1906, and the company was registered on 7th December following. The plaintiff was one of the first directors, and was a director during all material times. On 26th December the agreement of 9th October was "adopted" by the company, and declared to be binding upon them. The expression, perhaps, is not quite correct; but there is no doubt of the meaning. In February 1907 and again in May 1907 plaintiff applied for contributing shares in the company, which were allotted to him; and this suit is to be relieved from his liability in respect of the shares so allotted. The case made by the statement of claim was that the plaintiff was induced to take the shares by material representations made by the company, and since ascertained to be untrue. These representations may be divided into two classes. The first class, which is stated rather elaborately in the 5th paragraph of the statement of claim, is summed up in a few words by the learned Chief Judge as a repre-

(1) 1 Ch. D., 182.
(2) 9 H.L.C., 711.
(3) 3 N.Z. L.R., 98.
(4) (1906) A.C., 24.
(5) 41 Ch. D., 348, at p. 368.
(6) 5 Ch. D., 73, at p. 118.

sentation that an engine for which Friend had taken out a patent had on test produced 20 h.p. on a consumption of 18 lbs. of steam per horse power per hour. For reasons which I will state directly that was the only misrepresentation dealt with by the learned Judge. Having heard the witnesses *vivâ voce*, he came to the conclusion that no such representation had been made in fact. I for my part desire to say that, upon the evidence to which he referred, I should have come to the same conclusion. But even if this were not so it would be manifestly wrong for this Court to come to a different conclusion from that of the learned Chief Judge on a matter depending entirely upon credibility of witnesses. So far the case failed.

Before this Court another aspect of the case was put forward which was not considered by the learned Judge, and which is based upon another representation alleged in the statement of claim, to the effect that the only contract material to be known by persons intending to take shares in the company was the agreement of 9th October between Friend and Gregory. The case now set up is that there was another agreement which was material and ought to have been disclosed. In a case in which relief from a contract to take shares is asked on the ground of misrepresentation three things must be proved: (1) that the representation was made to the plaintiff by the company, or some person for whose actions they are responsible in the eye of the Court; (2) that the untrue representation was material as an inducement to enter into the contract, (which is a question of fact and not of law); and (3) that the plaintiff was induced by that representation to apply for the shares, (which also is a question of fact). The relevant facts upon this branch of the case are as follows:—On 11th September Friend agreed to sell to Gregory one-fourth of his interest in the inventions for £1,200 on certain terms. This agreement was disclosed to the plaintiff. On the same day another agreement was made between the same parties —which was not disclosed—by which Friend agreed to give Gregory another fourth share of what he might receive upon a sale of the patents, if sold to the projected company, for his services in getting up the company. The alleged misrepresentation is that in a document spoken of as a prospectus—though it is doubtful

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if it deserved that name—it was alleged that the only material contract was the agreement of 9th October between Friend and Gregory. At the trial a document, spoken of as the secret agreement of 11th September, was tendered in evidence. The learned Judge rejected it, apparently on the ground that even if it was fraudulent as between Gregory and the company, that fact would not afford the plaintiff any ground for relief against the company. But it is now suggested that the document was admissible on another ground, for which the case of *Capel & Co.* v. *Sim's Ships Composition Co.* (1) (which was not cited to the learned Judge) is relied upon, namely, that it was a document which should have been disclosed in the prospectus, and that the plaintiff is entitled to be relieved on the ground that the company told him that the agreement of 9th October was the only agreement. I think that the document was admissible to show that the representation relied upon was untrue, and also for the purpose of the inquiry whether it was material, both of which matters were in issue. I propose, therefore, to deal with the case upon the assumption that this document had been admitted. I will also assume that the representation that the agreement of 9th October was the only contract was material as an inducement to the plaintiff to apply for shares. I express no opinion as to whether it was or not. That, as I have already said, is a question of fact and not of law. Assuming that it was material, the question remains, was it made to the plaintiff, and if so by whom? The material facts appearing upon this branch of the case are these: After the offer by Friend to Gregory in September, a syndicate was formed to acquire the quarter share offered to Gregory and endeavour to float a company. This syndicate, which included the plaintiff as well as Friend, the vendor, and Gregory, became the promoters of the proposed company. At a meeting of the syndicate held before the company was formed, and at which the plaintiff was present, a draft prospectus was drawn up, which contained the allegation in question as to the agreement of 9th October, but it was determined not to issue that prospectus, and it does not appear to have been issued, at any rate before the formation of the company. But between the

(1) 58 L.T., 807.

date of the plaintiff's application for the first lot of shares and the acceptance of his application by the directors (of whom he himself was one), he had seen a copy of it. This document contained the allegation in question, which all the parties except Friend and Gregory probably believed to be true. Under these circumstances it appears to me that the misrepresentation really relied upon by the plaintiff is that which was made by Friend or Gregory to the other members of the syndicate at that meeting. Is the company which was not then in existence responsible for it? A company may, no doubt, be responsible, under some circumstances, for representations made by its promoters: *Karberg's Case* (1). The principle is that where persons assuming to act, as it were, *de bene esse* for the benefit of a projected company make a representation to a stranger and the company when formed adopts and takes advantage of it, it is bound by it. But in a case of that sort there must be two parties, the party who makes the representation and the party to whom it is made—the promoters who make the representation and the outsider to whom it is made. The promoter cannot make representations to himself. How then can the company be held to be responsible for representations made under the circumstances of this case? The only representation which the company made to the plaintiff, if they made any, was one which had been already made by the plaintiff himself as a promoter to them, and which they merely repeated to him on his own authority. The case is as if A advises B to purchase for himself a piece of land on certain representations as to its value, and after the purchase by B buys a share in it from him, both parties believing the representations previously made to be true. In these circumstances A could not ask to be relieved from his sub-purchase. If A is a promoter and B a company the case is exactly the same.

There is a further ground why a representation made under such circumstances cannot be relied on. It is, as already said, a question of fact whether the contract was induced by the misrepresentation. It appears clearly in this case that the purchase by the plaintiff was induced by his belief in the existence of a fact supposed to have been ascertained *aliunde* before

(1) (1892) 3 Ch., 1.

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the formation of the company, and as to which all the information that the company had was that given to them by the plaintiff himself and his associates in the syndicate. In other words it was not induced by the company's statement, but by Gregory's. Unless, therefore, the company is responsible for the false statement made by Gregory to his associates in the syndicate (which is quite distinct from the formation of the company), the case must fail. In may opinion it is impossible to impute to the company Gregory's representations made under such circumstances. The only conceivable ground on which the plaintiff might be entitled to relief is that there was a mistake as to the subject matter of the contract. If the plaintiff had not been a promoter, and himself made the representations to the company as such, but had merely been a director coming in after the company was formed, possibly other considerations might arise; but I must not be supposed to suggest that in such case he would have been entitled to any relief. In my opinion the appeal must be dismissed.

O'CONNOR J. In this case the appellant is seeking to rescind a contract with the respondent company for the purchase of certain contributing shares on the ground of a material misrepresentation by the company inducing the contract. In his statement of claim the appellant relied upon a number of misrepresentations. With most of them the learned Judge has expressly dealt in the Court below, and with his conclusions as to those misrepresentations I see no reason to differ. But the representation which has been the subject of argument on this appeal the learned Judge did not deal with, namely, that the only material contract was the agreement of 9th October 1906 from Friend to Gregory. That was not dealt with by the learned Judge because it was not in evidence, he having refused to admit the secret agreement by which it is claimed that the representation is proved to be false. It seems to me that the question of the admissibility of that evidence, and the question whether the appellant is entitled to have the contract rescinded on the ground of that misrepresentation are substantially the same, I shall therefore deal with the broad question whether, on the ground of that misrepresentation, the appellant has shown he is entitled to

rescind the contract. Before a person who has made a contract for the purchase of shares in a company is entitled to escape from his obligation on the ground of misrepresentation, he must show that the misrepresentation was material as inducing the contract, and that it was made either by the company or by some one authorized on behalf of the company, or that it was a misrepresentation inducing the contract from which the company had obtained an advantage, which under the circumstances in which the contract was made it would be inequitable for the company to retain after the real facts had been brought to their knowledge and they had become aware that the contract was induced by the misrepresentation. That no doubt is the broad principle of law governing such cases, but the application of it to the facts of this case requires some consideration. It is clear that the misrepresentation complained of was material. There was a contract made between the vendor of the property, Friend, and Gregory for the sale of one-fourth share in the invention. Friend's idea was to sell one-fourth share to the syndicate for £1,200 cash, to get money in that way for the registration of the invention, the construction of steam engines and the carrying on of experiments. Having got the money in that way, he proposed to float the whole of the property into a limited liability company. In order to induce Gregory, whom he appointed as his agent for the getting up of the syndicate and the obtaining of the sum of £1,200, to put forth his best efforts, he made an agreement with him, which is substantially as follows—Gregory was to have a quarter of Friend's interest in the inventions. In other words, he made Gregory a present of a similar interest to that which he was selling to the syndicate. The company was afterwards promoted by Gregory, and his name appears in the agreement between the company and the owner of the property as trustee. He was not only a nominal trustee, but an active promoter. Under these circumstances it is clear that as promoter and as trustee he stood in a fiduciary position to the company and to every shareholder of the company, and that he had no more right to conceal from the company or from the syndicate promoting the company that he was getting this advantage from the vendor of the property than an ordinary agent would have had who was making the pur-

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chase on behalf of the company. If the question had therefore been simply one between a shareholder and the company there could not be any question that the contract in question was material to be disclosed, and ought fairly to have been disclosed to any person buying shares in the company. But we have not to do here with so simple a case as that. The appellant is bound to make out not only that it was material that the contract should be disclosed, but that the company were responsible for the concealment, or perhaps I should say the failure to disclose. As I have pointed out the appellant was bound to establish either a misrepresentation by the company or by some agent of the company, or a misrepresentation from which the company had received advantage and which they could not equitably hold under the circumstances that have arisen. It is plain that the misrepresentation was not made by the company. It was contended at first that it was made by the promoters in a prospectus which in fact was never issued. It was also contended that it was made by the company, by the same prospectus, after the company was formed. Both these grounds fail completely. There is no evidence to show that the company were in any way bound by any statement appearing in the prospectus. Mr. *Wise* and Mr. *Gordon* no doubt felt the weakness of that position, and placed their principal reliance upon the other ground—namely, that under the circumstances in which the statements inducing the contract were made equity would not allow the company to take advantage of the contract induced by the misrepresentation. The circumstances on which that contention is based were these:— Certain misrepresentations were made by Friend and Gregory to the appellant in the course of business of the syndicate. It was claimed that the misrepresentation bound the company afterwards formed by the syndicate. That is certainly a rather startling contention. A company may be bound in a great variety of ways, but it is the first time I have heard it argued that mere conversations between persons forming a syndicate and about to float a company can be held to bind the company afterwards formed. The legal foundation put forward for the contention is a statement by *Romer* J. in *Lynde* v. *Anglo-Italian Hemp Spinning*

Co. (1). After setting out the different circumstances in which a company may be held liable for misrepresentations, he says:—"It appears to me that, speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it the shareholder must bring his case within one or the other of the following heads:—(1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf—as, for example, by a prospectus issued by the authority or sanction of the directors of the company inviting subscriptions for shares; (2) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority—as, for example, by an agent specially authorized to obtain, on behalf of the company, subscriptions for shares. This head of course includes the case of a person constituted agent by subsequent adoption of his acts; (3) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentations—as, for example, when the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentations, even though made without any authority; (4) Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue—as, for example, if the directors of the company know when allotting that an application for shares is based on the statement contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, or even if its contents are not known to the directors." That was the position, said his Lordship, in *Karberg's Case* (2).

Although the proposition, which he numbers 4, was stated in very broad language, it is clear that the learned Judge does not intend to carry it beyond a state of circumstances such as is described in the illustration which he gives. It has always been held that the promotion of a company being one of the usual antecedents of its formation, and being that stage of formation during which, generally speaking, a very large number of

(1) (1896) 1 Ch., 178, at p. 182. (2) (1892) 3 Ch., 1.

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shares subsequently allotted are applied for, the company will generally be held to have adopted and taken over responsibility for what has been done by the promoters. Taking advantage of what the promoters have done they will be held to be liable for the representations made by the promoters by which the advantage has been obtained. Mr. Justice *Romer's* observations do not go beyond that. There is certainly no authority for holding that a representation made by one individual promoter to another before a company is formed binds the company when it is formed. There is no difference between the purchase of shares and the purchase of any other subject matter. Before a person can escape from a contract, deliberately entered into, on the ground of misrepresentation, he must show that the other party was to blame for the misrepresentation under circumstances of such a nature that he cannot equitably be allowed to hold the advantage gained by the misrepresentation. The evidence relied on by the appellant entirely fails in my opinion to establish any such ground of escape from the liability with which he is charged. It follows that in my view the judgment of the learned Judge ought not to be disturbed, and the appeal must be dismissed.

ISAACS J. The appellant relies upon misrepresentation by the company. There are three classes alleged of misrepresentation. The first is a general species which I may designate as laudatory statements respecting the engines.

Another is a substantial one and definite—namely, that Friend had invented an engine that had generated 20 h.p. by brake test, with a consumption of 18 lbs. of steam per h.p. per hour. And the third is that the only contract material to the purchase of shares was an agreement of 9th October 1906 from Friend to Gregory. As to the first two the learned primary Judge has found against the appellant, and for reasons already given by my learned brothers, it is impossible to disturb that finding having any regard whatever to established principles. If I were called upon to decide the matter for myself I have no hesitation in saying I would thoroughly agree. I do not see how any other conclusion could possibly be arrived at. It was suggested that

the learned Judge had overlooked the evidence of one witness who contradicted Friend, but reference to his evidence will, I think, give ample reason for disregarding it. His cross-examination and re-examination disclosed evidence that would in my estimation deprive his testimony of any weight. Even, however, should his evidence be accepted, it would not help the appellant in the slightest, because he would still have to prove Friend's authority, which he has failed to do. It was also suggested that the prospectus (exhibit H) contains substantial misrepresentation. If it did, one step and only one step would be gained. But there are many answers to that. It does not contain misrepresentation or anything like it. It was never seen before the first application for shares; appellant admits that. Between the application and the allotment it was known to him that it was incorrect and that it was withdrawn, and notwithstanding this he still allowed his application to stand and accepted the shares. Of course in face of these facts the second application cannot be disturbed by reference to that document. The laudatory class of representations relied also upon the same exhibit (H) and failed with it. The only matter that had any semblance of substance is the alleged misrepresentation with regard to the only material contract, that of 9th October. A great many legal principles were invoked by counsel for the appellant. With some of them I thoroughly agree, but they have no reference whatever to this case, and when the facts are looked at it shows a considerable amount of hardihood on the part of the appellant to advance any such claim in this case. I propose to examine the facts, because the position the appellant takes up is one in which he asserts he has been hardly dealt with and on proper principles of equity ought to be relieved. He says in effect to the company—"You accepted my application for shares knowing that, on the strength of a statement in the prospectus on the basis of which your company was formed, I applied, and that prospectus contained a material untruth. You ought not to keep my money or hold me liable for calls; you should return my money with 5 per cent. interest." Now, on 11th Sept. 1906 Friend, who had patent rights in two engines, placed in the hands of Gregory one quarter of his interest for sale for £1,200. The material exhibit is "B," and it is material

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in more ways than one. It provides not only that the price shall be £1,200 for a quarter interest, leaving Friend three quarters, but refers incidentally to the flotation of the company and winds up in this way:—"Simultaneously with the syndicate . . . it is suggested that a company be formed and registered with a capital of £100,000, of which 90,000 are to be issued as fully paid up, and 10,000 to be contributing to provide funds" for various purposes. Thus the subscribers would receive 22,500 shares—that is to say on a syndicate being formed to take up one fourth share of Mr. Friend's interest. If the company of 100,000 shares were formed he would get 75,000 and they would get 25,000. But what was the scheme of the company? When the syndicate is formed, holding one-fourth share and Friend three-fourths, the public generally are to contribute 10,000 shares and 90,000 is to be divided between Friend and the syndicate, the syndicate to receive 22,500, making Friend and the syndicate the joint vendors to the company. Gregory appears to have seen Johnston, and on 23rd September Johnston writes a letter of some importance. He says he took no active part in forming the syndicate. He admits in general terms that he and some friends did form a syndicate but he took no active part. Here is the letter:—"My dear Gregory, I am writing these few lines to let you know that I have decided to take the 6 shares of 100 each in Mr. Friend's rotary oil and steam engine invention, which number as per previous arrangement between us you kindly agreed to keep for me. I shall be glad if you will kindly arrange to be at your office to-morrow so that I can pay you my cheque for half the liability, and at same time assist you to choose from the list of applicants those whom we think will be the best class of men to be associated with us, and the concern, and this matter of a careful selection, I regard as a very important one. If you remember Mr. Friend was especially emphatic upon this head, and he enjoined upon us to be sure and only select the best men, from the list of applicants, and in that contention he is perfectly right. I shall be glad therefore to assist you in any way I can to make the selections as desirable as possible. May I suggest that you defer making general application for payments from those you have spoken to until we have

finally determined who they shall be." So that he did take an active part in it. It shows that meetings of the syndicate were held, they determined to form a company, and the outcome was that on 9th October Gregory made an agreement with Friend as trustee for the company. It is a remarkable document when the whole of the preceding facts are looked at. The document represents Friend as the only vendor to the company. It represents the company as paying to Friend or his nominees, as if he were the sole owner, 90,000 paid up shares. That was not true. 22,500 shares, as Johnston then knew, belonged to his syndicate, and were not to go to Friend at all. It does seem a bold thing for him to come forward and say that the prospectus was the company's representation to him when there was a very material thing, namely, the syndicate contract, which considerably modified the apparent contract of 9th October. It shows very distinctly that the contract of 9th October was a contract which in substance was a sale by Friend and Johnston and the whole syndicate to the proposed company. When they sat in the syndicate and framed Exhibit F., which is the prospectus he complained of, they made that prospectus say that 90,000 shares were to be issued to the vendors by the company in full payment for all their right, title and interest in and to Mr. Friend's gas turbine engine. So that very prospectus really refers to them as the vendors to the company, and it is in that prospectus, as I say, the representation is contained that Mr. Johnston relies upon. The prospectus is put before the syndicate, is approved by them, and the company is formed and comes into existence. In the meantime Gregory has made a secret agreement, by which he is to get a fourth share from Friend, the condition being expressly limited by Friend to his getting up the syndicate and not the company. Was Mr. Johnston, who says he was deceived by the prospectus himself, a promoter or not? I cannot conceive any doubt whatever on the subject, and there are some words of Lord *Cairns* L.C., in *Erlanger* v. *New Sombrero Phosphate Co.* (1), which apply very strongly to the present case. The Lord Chancellor says:—"It is now necessary that I should state

(1) 3 App. Cas., 1218, at p. 1236.

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Isaacs J.

to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what stage, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." That applies very strongly in this case, because three-fourths of this property that has been sold to the company on the 9th October agreement was the property of the syndicate of which Johnston was a member. What do they do? They prepare a memorandum and articles of association, a solicitor is employed by Gregory, no doubt on behalf of the syndicate, and the members of the syndicate became the first board of directors. In the case of *Gluckstein* v. *Barnes* (1) Lord *Robertson* said:—" Where speculators have formed, exclusively of themselves, the directorate of a company, to be immediately floated for the purpose of buying the property which those same individuals are associated to acquire and resell, they have brought themselves directly within Lord *Cairns's* statement of the law in *Erlanger's Case* (2). They have taken a decisive

(1) (1900) A.C., 240, at p. 256. (2) 3 App. Cas., 1218.

step in shaping and limiting the company. It may well be asked, if this be not an act of promotion, what is ?" Mr. Johnston therefore was a promoter of a very decided type, and this prospectus he put forward was for the purpose of getting 90,000 paid up shares for himself and his co-syndicators and friends, and getting from the general public £10,000 worth of contributing shares to pay for carrying on the business of the company and making it a success. It is quite true he, afterwards thinking it was a very good thing, applied for some contributing shares himself, but that does not alter the initial facts. Now he says :— " When I applied for these shares I relied upon that prospectus." How can he be heard to represent the company as making a statement, whereas he was one of the persons who were instrumental in putting that prospectus forth. It was he who had the making of representations. He was probably the dupe to some extent of Gregory and Friend, but he was the instrument of inducing members of the public to come in and join the company. I say he cannot be heard to allege his own misstatement as a ground for abandoning innocent members of the public whom he, amongst others, induced to come in and join the company, or be allowed to steal away from them on the ground that he can in law impute to the company a statement for which he himself is responsible. I never heard of such a case before. I doubt if we will ever hear of one again. The company in my opinion is justified in holding Johnston to the bargain he made, and whatever remedy he may have against those by whom he was misled regarding the secret agreement, he has not the shadow of a case, morally or legally, against this company. I agree with the order proposed by the Chief Justice.

Appeal dismissed.

Solicitors, for appellant, *Lawrence & Lawrence.*
Solicitor, for respondents, *P. C. Law.*

C. E. W.