[HIGH COURT OF AUSTRALIA.]

GOULD . . . . . APPELLANT;
DEFENDANT,

AND

THE MOUNT OXIDE MINES LIMITED (IN LIQUIDATION) AND OTHERS . . } RESPONDENTS.
PLAINTIFFS,

BIRKBECK . . . . . APPELLANT;
DEFENDANT,

AND

THE MOUNT OXIDE MINES LIMITED (IN LIQUIDATION) AND OTHERS . . } RESPONDENTS.
PLAINTIFFS,

BACON AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

THE MOUNT OXIDE MINES LIMITED (IN LIQUIDATION) AND OTHERS . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 16, 17, 20-24, 27; *Dec.* 22.

Griffith C.J., Isaacs and Rich JJ.

Company—Directors—Liability—Wilful default—Sale of company's undertaking—Consideration—Charging property of company with debt of another—Authorizing person to operate on company's banking account—Over-issue of scrip—Certificate by directors of new scrip—Measure of damages.

By the articles of association of a company it was provided that none of the directors should be answerable for the acts or defaults of the other or others of them, or for any other loss, misfortune or damage which might happen in the

execution of their respective offices or trusts, or in relation thereto, except the same should happen "by or through their own wilful default respectively."

Held, by *Isaacs* and *Rich* JJ., that "wilful default" meant a course of conduct consciously pursued in circumstances which would indicate to a reasonable man who considered the matter that he was not performing with due care for the company's interests the duty which he had undertaken towards the company.

By *Griffith* C.J.—To entitle a director to the protection afforded by the provision above referred to, he is not required to use in conducting the affairs of the company any greater care than a business man of ordinary intelligence and capacity may reasonably be expected to use in the conduct of a similar transaction in his own affairs.

The directors of the plaintiff company entered into an agreement with A for the sale of the company's undertaking for £170,000, which might be satisfied by 170,000 shares of £1 each in a new company to be formed by A. One of the provisions of the agreement, which A insisted upon, was (in effect) that the new company should out of its contributed capital discharge a debt of £20,000 owing by one B to A, as security for which debt A held 40,000 shares in the plaintiff company belonging to B. The agreement was carried out, the new company was formed, the plaintiff company received the 170,000 shares in the new company, the new company paid the debt of £20,000, and A purchased from B the 40,000 shares.

Held, by *Isaacs* and *Rich* JJ. (*Griffith* C.J. dissenting), that under the circumstances it was a wilful default on the part of the directors of the plaintiff company to make the agreement without providing that either the plaintiff company or the new company should have the benefit of the 40,000 shares.

Held, also, by *Isaacs* and *Rich* JJ., that the measure of damages was the lessened value of the interest of the plaintiff company in the new company by reason of the new company having to pay the £20,000.

Held, further, by *Isaacs* and *Rich* JJ. (*Griffith* C.J. dissenting), that the directors of the plaintiff company, having empowered B, who was neither a director nor an officer of the company, to draw cheques on the company's banking account, and having directed the bank to honour cheques drawn by him, were liable as for wilful default for any loss arising to the company through B drawing a cheque for an unauthorized purpose.

Held, further, by *Isaacs* and *Rich* JJ. (*Griffith* C.J. dissenting), that a director of the plaintiff company who had certified under the company's seal to new share certificates without requiring production of the old certificates for which the new certificates were to be substituted, or looking at the Register or doing more than inquire of the secretary as to a matter not within his personal knowledge, whereby there was an over-issue of shares, was in the circumstances liable as for wilful default for loss to the company thereby arising.

Decision of the Supreme Court of New South Wales (*Harvey* J.) varied.

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APPEALS from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court by the Mount Oxide Mines Ltd. (in Liquidation) and Harry Brisbane Jamieson and William Harrington Palmer, the liquidators of that Company, against Sir Albert John Gould, Francis William Bacon, Gerald Francis Allen and Thomas Brougham Birbeck, directors of the Company and Joseph Earle Hermann and J. Earle Hermann Ltd. (in Liquidation), by which the plaintiffs claimed (*inter alia*) that the four directors should be ordered to pay to the plaintiff Company a sum of £25,000 or other the amount of the loss sustained by the plaintiff Company by reason of their negligence or misconduct as such directors; an inquiry as to the loss and damage sustained by the plaintiff Company by reason of such negligence or misconduct; and all necessary accounts, inquiries and directions.

The suit was heard by *Harvey* J. who made a decree which, so far as is material, ordered the four defendant directors to pay to the plaintiffs the sum of £20,000 and interest thereon amounting to £557 and the sums of £650 and £101 10s., and ordered the defendant Bacon to pay to the plaintiffs the amount of loss sustained by the plaintiff Company by reason of the over-issue of 5,650 shares in the plaintiff Company and an inquiry as to the amount of the loss so sustained.

Appeals to the High Court against that decision were instituted by Gould, by Birkbeck, and by Bacon and Allen, respectively, and were now heard together.

The material facts and the nature of the arguments sufficiently appear from the judgments hereunder.

Leverrier K.C. and *Maughan*, for the appellants.

Knox K.C. and *Innes* K.C. (with them *Harper*), for the respondents.

During argument reference was made to *Dovey* v. *Cory* (1); *Prefontaine* v. *Grenier* (2); *In re Bahia and San Francisco Railway Co.* (3); *Dixon* v. *Kennaway & Co.* (4); *George Whitechurch Ltd.*

(1) (1901) A.C., 477, at p. 485.
(2) (1907) A.C., 101.
(3) L.R. 3 Q.B., 584.
(4) (1900) 1 Ch., 833, at p. 837.

v. *Cavanagh* (1); *Sheffield Corporation* v. *Barclay* (2); *Joint Stock Discount Co.* v. *Brown* (3); *Holmes* v. *Jones* (4); *Merchants' Fire Office Ltd.* v. *Armstrong* (5); *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (6); *Balkis Consolidated Co. Ltd.* v. *Tomkinson* (7); *Rainford* v. *James Keith & Blackman Co. Ltd.* (8); *In re Brazilian Rubber Plantations and Estates* [*No.* 1] (9); *Hickson* v. *Lombard* (10); *Nocton* v. *Lord Ashburton* (11); *Nevill* v. *Fine Art and General Insurance Co.* (12); *W. Scott Fell & Co. Ltd.* v. *Lloyd* (13); *Fenwick* v. *Greenwell* (14); *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (15); *Mosely* v. *Koffyfontein Mines Ltd.* (16); *Trevor* v. *Whitworth* (17); *In re Young and Harston's Contract* (18); *In re Hetling and Merton's Contract* (19); *Palmer's Company Precedents*, 11th ed., vol. I., pp. 653, 713, 788, 1140; *Buckley on Companies*, 9th ed., p. 629; *Pingrey on Suretyship*, 2nd ed.; *Companies Act* 1899 (N.S.W.) (No. 40 of 1899), secs. 25-32, 108, 109, 238.

Cur. adv. vult.

Dec. 22.

The following judgments were read:—

GRIFFITH C.J. These are appeals from a decision of the Supreme Court of New South Wales (*Harvey* J.) in a suit brought by the respondent Company, which is in liquidation, against the appellants to recover damages for misfeasance and breaches of trust alleged to have been committed by them as directors of the Company. The liquidators were afterwards added as co-plaintiffs.

One J. Earle Hermann and a company called J. Earle Hermann Ltd., of which he was the managing director, and which I will call the Hermann Company, were joined as defendants, but the suit was dismissed as against them. Before referring in detail to the case made against the appellants by the statement of claim and the evidence

(1) (1902) A.C., 117.
(2) (1905) A.C., 392.
(3) L.R. 8 Eq., 381, at p. 402.
(4) 4 C.L.R., 1692.
(5) 17 T.L.R., 709.
(6) (1899) 2 Ch., 392.
(7) (1893) A.C., 396.
(8) (1905) 1 Ch., 296.
(9) (1911) 1 Ch., 425.
(10) L.R. 1 H.L., 324, at p. 336.
(11) (1914) A.C., 932.
(12) (1897) A.C., 68, at p. 76.
(13) 4 C.L.R., 572.
(14) 10 Beav., 412.
(15) (1895) 2 Q.B., 604.
(16) (1904) 2 Ch., 108.
(17) 12 App. Cas., 409.
(18) 31 Ch. D., 168, at p. 174.
(19) (1893) 3 Ch., 269.

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by which it was sought to support that case, it will be convenient to state briefly the circumstances under which the claim arises.

The respondent Company was incorporated in New South Wales on 22nd June 1912. Its principal objects, as defined by the Memorandum of Association, were to acquire, explore, develop and work mines, and in particular (and this is the only object material to the case) to acquire a copper mine known as "Mount Oxide" situate in Queensland, and with a view to its acquisition to enter into and carry into effect with or without modification a draft agreement that had been prepared, and was expressed to be made between a joint stock company called Mount Oxide Options Ltd. of the one part and the respondent Company of the other part. I shall have occasion to refer to other subsidiary objects when I come to the details of the evidence. But at this stage I should point out that by art. 140 of the Company's Articles, which deals with the liabilities of directors and officers, it is provided that "none of them shall be answerable for the acts or defaults of the other or others of them or for joining in receipts for the sake of conformity . . . or for any bankers . . . or for the insufficiency or deficiency of any security . . . or for any other loss misfortune or damage which may happen in the execution of their respective offices or trusts or in relation thereto except the same shall happen by or through their own wilful default respectively."

The mine is situated in a remote part of Queensland, distant nearly 200 miles from the nearest railway. I should premise that J. Earle Hermann seems to have been one of those meteoric adventurers who occasionally appear in the financial world from nowhere in particular, and obtain for a time the command of large sums of money or extensive credit, and finally vanish into the obscurity from which they had emerged.

By an agreement dated 22nd January 1912 (elsewhere described as of the 19th) made between one Ernest Henry (who was lessor of the Mount Oxide mine from the Crown), who is called the "vendor," and the Hermann Company, called the "purchaser," the vendor placed the mine under offer to the purchaser for six months for the sum of £60,000, plus the value of unused tools and stores. The option was afterwards exercised. In the meantime, by an agreement dated

7th February 1912 made between the Hermann Company, called the "vendor," of the one part, and Mr. C. A. Jaques, solicitor, on behalf of a company, of the other part, reciting that the vendor had agreed with Jaques that the latter should proceed with the formation of a company to be known as "Mount Oxide Options Ltd." having for its object, *inter alia*, the acquisition of the vendor's option, the nominal capital of which company was to be £10,000, divided into 1,000 shares of £10 each, and that the Memorandum and Articles of the proposed company had been prepared, by which it was provided that the proposed company should on incorporation adopt the option agreement of 19th (or 22nd) January, the vendor agreed to assign to the company when incorporated all its rights under that agreement in consideration of a payment of £6,000, of which £2,000 was to be paid in cash, and represented cash payments made by the Hermann Company, and the balance of £4,000 by the allotment to the vendor or his nominees of 400 fully paid shares. Four hundred shares were to be offered to the public, and the remaining 200 shares were to be held in reserve. If the company should be satisfied with the results of its investigation of the mine it was to be at liberty to promote the formation of a larger company to take over the property, but the promotion was to be placed in the hands of the Hermann Company, which was to receive a commission of 2½ per cent. on shares subscribed by the public on such flotation, and was also to receive a further sum of £40,000 in cash. The proposed new company was, in addition, to pay the balance of the purchase money due to the original vendor, Henry, and take over all the obligations of the Options Company, which included the payment of £40,000 to the Hermann Company in cash. At this time, as already stated, the Hermann Company had an actual or controlling interest in the Options Company to the extent of one-half the issued shares.

Hermann then proceeded with the promotion of the "larger" company, which is the plaintiff Company.

By another agreement, dated 10th June 1912, made between the Hermann Company of the one part and the Mount Oxide Options Ltd. of the other part, by which, after reciting that a company to be called the Mount Oxide Mines Ltd. (the plaintiff Company) was then in

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course of formation by the Options Company, which proposed company was to have a capital of £200,000 divided into 200,000 shares of £1 each, and that the proposed company proposed to offer 120,000 (or 90,000 if Henry would—as he did—accept debentures in payment of £30,000 the balance of the purchase money due to him) for public subscription, it was agreed that the Hermann Company should underwrite, that is, guarantee the subscription by the public of, the 120,000 or 90,000 shares, for which and other services it was to receive £20,000, payable in fully paid up shares of the proposed company.

The plaintiff Company was then incorporated, as already stated, with a nominal capital of £200,000 as agreed, and 170,000 shares were afterwards issued.

By an agreement dated 17th January 1912, made between Mount Oxide Options Ltd. of the one part and the plaintiff Company of the other part, reciting previous agreements, it was agreed that the plaintiff Company should buy the Mount Oxide property for a consideration of £180,000 to be satisfied as follows: as to £100,000 by payment of £70,000 in cash and £30,000 by debentures, and as to £80,000 by allotment to the vendor company or its nominees of 80,000 shares, to be numbered 1 to 60,000 inclusive, and 60,001 to 80,000 inclusive, the latter lot being allotted to the Hermann Company as a commission for their underwriting bargain. The plaintiff Company were also to pay to the Hermann Company the consideration payable to it by virtue of the agreement of 7th February (including the sum of £40,000 in cash) and generally to satisfy all claims under the recited agreements. The result was that the Hermann Company was entitled to get from the plaintiff Company £40,000 in cash and 50,000 fully paid up shares, namely, 30,000 (being half of the 60,000 to be allotted to the Options Company in which it held a half interest) and 20,000 as indemnity commission.

After incorporation the directors issued a prospectus, which stated that 50,000 shares were reserved for subscription in London which had been "taken firm" (which means, I suppose, actually allotted to underwriters or their nominees) in London and Antwerp, and that the whole of the issue had been underwritten in London,

Antwerp and Australia. The agreement of 10th June was mentioned in the prospectus.

By an agreement dated 31st July 1912, made between Henry of the first part, the Hermann Company of the second part, and the plaintiff Company of the third part, the plaintiff Company agreed to purchase the property for the price mentioned in Henry's agreement with the Hermann Company, but instead of paying it £60,000 in cash, to pay £5,000 on signing the agreement, a further sum of £5,000 on 22nd August, a further sum of £10,000 on 22nd September, and a further sum of £8,000 on 22nd October. The sum of £2,000, which had already been paid by the Hermann Company as a consideration for the option, was credited as part payment. For the balance of £30,000 Henry agreed to accept three sets of debentures for £10,000 each, payable on 30th July 1913, 1914 and 1915. In the event of any default in payment the whole balance was to become immediately payable.

Of the 40,000 shares offered in Australia, 20,000 appear to have been subscribed for by the public, but the Hermann Company appear to have been compelled to assume the liability in respect of some of them. The other 20,000 were, some months afterwards, allotted to the Hermann Company. When, therefore, the Company began operations their total working capital in hand seems to have been very small, and there is nothing to suggest that any of their ore was sold or saleable. The working capital might, no doubt, have been supplemented by calls paid upon the 50,000 shares allotted in London, but, as will directly appear, 40,000 of these shares were allotted to the Hermann Company, apparently in satisfaction of the £40,000 cash due to it under that company's agreement with the Options Company. No money could be looked for from this source. The sum of £10,000 was, however, due from London shareholders, and the directors hoped to receive it soon. They were not able to meet the payments due to Henry, on 22nd September and 22nd October, and had been obliged to obtain on onerous terms an extension of time for payment. In October 1912 the directors authorized an expenditure of £15,000 upon the mine within the following six months. They seemed to have been still very hopeful, but it is plain that the Company was then in serious,

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if not hopeless, difficulties. It was indeed recognized that their only hope was in a sale of the undertaking. At this time the Hermann Company was the owner of more than half the issued shares in the Company, namely, 40,000 of the London shares underwritten by it, and accepted in discharge of the £40,000 payable in cash by the Options Company, 30,000, being half of the 60,000 allotted to the Options Company, and 20,000 issued to it for its underwriting commission, in all 90,000 shares. It had also apparently been obliged to assume the liability upon some other shares, which the allottees in Sydney had refused to take up. This number may have been reduced to some extent by sales to other persons. Its interest in preserving the life of the Company and in financing its affairs was, therefore, very large, and, indeed, preponderating. The Company was believed to have at grass on the mine about 3,000 tons of copper ore of a grade which would make its nominal value about £38,000, but with the existing means of transport it had no present convertible value. Its prospective value, however, in the hands of a Company strong enough to make provision for smelting the ore on the mine, although altogether conjectural, might well be taken into consideration as an asset.

I now come to the transactions upon which the charges of misfeasance and breach of trust are founded, remarking that the Company had at this time practically only two alternatives before it, sale of its undertaking or winding up.

In the latter end of the year 1912 a Mr. Mercer was in Australia for the purpose of inspecting mining properties in the interest of a group of London speculators or investors called the Properties Selection and Trust Ltd. Amongst other properties he inspected the Mount Oxide mine. The result of his inspection and of other negotiations between Mercer, Hermann, and one or more of the appellants, was that an agreement, dated 23rd December 1912, was entered into between the plaintiff Company (called "the vendor company") of the first part, the Hermann Company of the second part, and the Properties Selection and Trust Ltd. and one Edmund Davis of the third part, which may be briefly described as an option agreement by which the plaintiff Company offered their undertaking to the parties of the third part on certain terms specified.

As the plaintiff Company's case, as now sought to be made, is based almost wholly upon this agreement, it is necessary to consider it in some detail. It provided as follows: the parties of the third part agreed to despatch an engineer to the mine to inspect it, and if his report should be satisfactory to advance to the Hermann Company, with the vendor company's consent, by way of loan the sum of £20,000. The Hermann Company was, before the advance was made, to give as security a blank transfer of 40,000 shares on the London Register (to which I have just now referred as taken by them in satisfaction of £40,000 in cash due to them) to be held by the parties of the third part until repayment of the advance with interest. As further security for the advance it was stipulated that not less than 3,000 tons of copper ore assaying not less than 17 per cent. of metallic copper to the ton of ore should remain on the mine. Immediately on the making of the advance the parties of the third part were to have the right to proceed with the flotation of a new company with a capital of £475,000 to take over the vendor company's undertaking. The purchase money was to be £200,000, to be satisfied in whole or part by the allotment of fully paid shares. The proposed new company, which was to have a cash working capital of £150,000, was to be formed, and have the stipulated capital placed to its credit within six months, and in default the vendor company might terminate the agreement by notice in writing, but such determination was not to prejudice or affect the rights of the parties of the third part to repayment of the £20,000 to be advanced to the Hermann Company or their rights to "the securities for its repayment," that is, the transfer in blank by the Hermann Company of 40,000 fully paid shares and the promise of the plaintiff Company to retain 3,000 tons of ore on the mine.

Clause 12 of the agreement was as follows: "The sum of £20,000 if so advanced as aforesaid shall be applied for the benefit of the said vendor company and at least half shall be expended for the company's benefit in such manner that with it and the moneys now in hand belonging to the said vendor company work at the mine of the said vendor company shall continue without interruption with the object of developing the property and increasing the amount of available ore as much as possible."

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In the meantime the monthly expenditure of the vendor company on the mine was to be maintained, and, if possible, increased, and the parties of the third part were to have the right to make suggestions as to the manner of expenditure. The agreement did not contain any express stipulation as to what was to happen with respect to the £20,000 if the proposed flotation was carried out.

In pursuance of this agreement the parties of the third part sent an engineer to inspect the mine, and, his report being favourable, they made the agreed advance to the Hermann Company, which reached Sydney about 31st July 1913. A question was raised as to the exact meaning of the words "expended for the company's benefit" in clause 12 of the agreement. It was, in fact, acted upon as authorizing the Hermann Company to apply it in payment for 20,000 contributing shares, by which the Company obtained the advantage of the use of that sum of money, and I do not think that the Court can differ from *Harvey* J. in holding that this is the true construction. But I do not think the point is material, nor can I concur in the opinion of the learned Judge that the agreement was designedly drawn to obscure its meaning. The agreement is tripartite, and its general effect was a bargain between three parties, all largely interested in the subject matter, by which a valuable consideration moved from each of the parties to each of the other two. The plaintiff Company were in desperate straits. They obtained the advantage of keeping their undertaking going until the £20,000 had been expended, in consideration for which they gave the option of purchase and a guarantee that if the bargain came off the purchaser should find 3,000 tons of ore of the prescribed quality available for smelting or other disposition. The Hermann Company, which was practically owner of more than half the undertaking, obtained corresponding advantages. If the advance had been made direct to the vendor company it is unquestionable that the promise not to remove the ore would have been unobjectionable, and the object of the agreement being to keep the Company's operations going and dispose of its undertaking as a going concern, was, I think, unobjectionable from any point of view.

I pass now to the case made by the pleadings. The general

effect of them is that the appellants allowed themselves to be wholly guided by Hermann, and did not exercise any independent control of the Company's affairs, and the statement of claim mainly consists of long categories of instances in which they failed in their duty in this respect. On that part of the case I desire to remark at the outset that, although such a dereliction of duty may be very regrettable and reprehensible, yet it does not of itself amount to actionable misfeasance or breach of trust, and cannot be made the subject of a complaint under sec. 162 of the *Companies Act* or otherwise, unless the Company sustained some loss or damage in consequence of it. If, for instance, the advice which Hermann gave, and which the appellants are said to have followed blindly, was good advice, there is no cause of complaint cognizable by the Court.

With respect to the agreement of 23rd December, which is set out at length, it is alleged that there were some irregularities in its execution, and that it was not confirmed (as it should have been according to its terms) by a general meeting of the Company. But as it was acted upon, and in effect ratified, by another agreement, to which I shall have occasion to refer later, these matters are immaterial. It is not alleged that the agreement was *ultra vires* the Company, or beyond the powers of the directors, or was improvident, or that the proposed sale was not justified by the then present facts, or that any better thing could have been done in the interests of the Company.

The benefit of the agreement of 23rd December was afterwards assigned by the parties of the third part to a company called Fanti Consolidated Mines Ltd., a joint stock company registered in the United Kingdom. The option conferred by it was afterwards extended, but was not exercised, and in July the Fanti Company informed the plaintiff Company that it would not be exercised.

After setting out the agreement of 23rd December in the manner I have stated, the statement of claim proceeded to allege more acts of omission on the part of the appellants in the same bald manner as before. It also alleged (par. 43) that the £20,000 advanced to the Hermann Company was not applied wholly or in part for the plaintiff Company's benefit, nor was half of it expended for the

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Company's benefit in such a manner that with it and the money already in the Company's hands work at the mine continued without intermission with the object of developing the property and increasing the available ore. Par. 44 alleged that £10,000 of the £20,000 was applied by the Hermann Company in payment of calls upon shares which that Company had underwritten. After other similar allegations of inaction on the part of the directors, without any allegation of consequent damage, the statement of claim set out an agreement dated 21st August 1913, by which the plaintiff Company agreed to sell to the Fanti Company the plaintiff Company's undertaking on terms to which I will afterwards refer in detail, and which was in fact carried out, although, strangely enough, that fact is only mentioned incidentally in par. 57 of the statement of claim, which sets out resolutions for winding up the plaintiff Company. It did not contain any allegations suggesting the invalidity or impropriety of the agreement, but merely alleged it as a fact. Mr. *Knox* had to admit that any complaint founded upon the making of that agreement could only be supported on the doctrine of *res ipsa loquitur*. After alleging the proceeding for winding up the plaintiff Company, the statement of claim in par. 62 charged that the appellants were guilty of breaches of duty as directors of the Company and grossly negligent in relation to the Company's affairs "in the following amongst other respects." It then enumerated 25 separate instances of acts of omission on the part of the appellants. One of them (*r*) was that they consented to the insertion in the agreement of 23rd December of the provision for payment of the £20,000 to the Hermann Company and neglected to see to its application. Another (*v*), with which I will deal separately, was that they improperly issued certificates for shares. It wound up by an allegation (the futility of which I have already pointed out) that the appellants were puppets of Hermann and the Hermann Company, and acted under their direction, without exercising any independent judgment or discretion, and delegated to them the exercise of their powers and duties as directors. After an allegation against the appellant Allen separately, which they failed to establish, they finally alleged that the plaintiff Company had lost at

least £25,000 by reason of the appellants' breaches of duty and gross negligence.

With respect to the whole of these charges, except the last, the learned Judge found that the evidence failed to establish that any damage had been sustained by the Company in respect of them if otherwise proved.

Here one would suppose that the case ended. But not so. At an early stage in the trial the plaintiffs had added to the particulars of the acts of the appellants of which they complained an allegation that they intended to rely upon the making of the agreement of 21st August 1913, that is to say, upon the making of the agreement, not upon any point of its invalidity, as being *ultra vires* of the Company, or as being beyond their powers as directors, or on the ground that it was an improvident agreement, or made for insufficient consideration, or that a sale of the Company's undertaking was not under the circumstances justified. The learned Judge allowed this to be treated as a separate and distinct cause of suit, on which he found against the appellants, and assessed the plaintiff Company's damages at £20,000.

Before examining the nature of the case which he allowed to be spelt out of the evidence, I desire to express my strong opinion that it is unjust and improper, when a plaintiff has made definite charges against a defendant in which he fails, to allow a different case to be spelt out of evidence adduced *alio intuitu*. In the case of *Hickson* v. *Lombard* (1) Lord *Cranworth* said :—" This being the conclusion at which I have arrived, it is unnecessary to consider whether the pleadings do, or do not, properly raise the question on which the Court below proceeded. It was argued that no such case is made by the bill, and that the relief there asked is grounded solely on certain frauds on the part of Norris, alleged but not proved. Though the question does not in this case call for any decision, I yet feel bound to say that I subscribe most readily to the doctrine that, where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet

(1) L.R. 1 H.L., 324, at p. 336.

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warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives. There is nothing of this sort in the pleading of this case; and whether the facts alleged are so alleged as to preclude the petitioner from insisting on any ground for relief except fraud, is a point on which, for the reasons I have stated, I do not feel called on to give any opinion."

That was a case of fraud, but in my opinion the doctrine is equally applicable to a case of a charge of breach of trust against directors. It seems to me to be merely a statement of an elementary rule of justice and fair play.

The observations of the learned Lords who decided the case of *Wilde* v. *Gibson* (1) are to the same effect. In *Archbold* v. *Commissioners of Charitable Bequests for Ireland* (2), which was a bill against a trustee for alleged breaches of trust, the Lord Chancellor (Lord *Cottenham*) said:—"Now two points arose, which it was necessary we should consider before we came to the last point, which we have heard argued by Mr. *Bethell* in reply. The first question was with regard to the personal charges against the appellant. Having very minutely examined each of the charges during the time that the respondents' counsel were heard; and calling upon them with respect to one charge after another, to show how each was proved, and by what evidence it was established, every one of them in succession appeared to be totally unfounded. There did not appear to be anything in the evidence to support the charges made in the bill. Attempts were made, by matters said to be in evidence, but not upon the record, which, if properly stated and properly proved, might have been grounds of objection to the conduct of the trustee; but the House are of opinion that they cannot

(1) 1 H.L.C., 605.

(2) 2 H.L.C., 440, at p. 455.

enter into the consideration of any matter not charged; and consequently that part of the case we have rejected from our consideration. I only mention it now for the purpose of removing any impression which may have been made by the arguments at the bar, that, because this is a charity case, it is competent for the plaintiffs to introduce unfounded charges against an individual connected with the charity, and yet to sustain the bill, although those improper charges appear to be necessarily thrown out of consideration. There is no such rule; it would be very unjust if there were. The relaxation of strictness, allowed in cases of charities, has no reference to the state of the pleadings as affecting the conduct of individuals. We therefore confined the plaintiffs to what was alleged, looking to the evidence we had in support of those allegations; and that part of the case, in the opinion of the House, entirely fails."

In the present case the learned Judge appears to have applied as against the defendants the principle applied as against the plaintiffs in the well known case of *Clough* v. *London and North-Western Railway Co.* (1), in which it was held that if upon the proved and admitted facts a plea could be framed which would clearly establish that the defendants had a good defence to the action a plaintiff who had not raised any point which might have afforded a possible answer to such a plea was not entitled to a new trial. The rule has now been applied as against a defendant.

I will, however, proceed to examine the case which is now founded on the making of this agreement, premising that, in the absence of any allegations of any extraneous facts, it can only be supported on the ground that (1) it is on the face of it a breach of trust, and that (2) loss to the Company must necessarily have followed from it, both of which inferences rest on the position that *res ipsa loquitur*. It is necessary, therefore, to examine the agreement in detail. I have already said that the Fanti Company had refused to go on with the option granted by the agreement of 23rd December. By the agreement now in statement, which was made by the plaintiff Company (called "the vendor company") of the one part and Fanti Consolidated Mines Ltd. (called "the purchaser company") of the

(1) L.R. 7 Ex., 26.

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other part, and contained no recitals, it was agreed that the vendor company should sell and the purchaser company should purchase the vendor company's undertaking subject to (*a*) the sum of £30,000 due by the vendor company and owing in respect of debentures issued by them (to Henry), (*b*) a sum of £1,700 due by the vendor company to Henry in respect of a lien for unpaid purchase money, and (*c*) a sum of £20,000 described as "due from the vendor company to the purchaser company in respect of an advance made by the purchaser company" with interest, and (*d*) a sum of £650 due by the vendor company to Mercer for commission for procuring the advance of £20,000 but otherwise free from incumbrances. I pointed out in the course of the argument that the description of the £20,000 as "a debt due from the vendor company to the purchaser company" may have been *falsa demonstratio*, but that there is no doubt that what was meant was the £20,000 advanced to the Hermann Company under the agreement of 23rd December. The consideration for the sale was to be (*a*) £170,000, which should be satisfied by the allotment to the vendor company or its nominees of 170,000 shares in a company proposed to be formed (called "the proposed company"), (*b*) "the payment and discharge" of all principal and interest payable in respect of the said debentures and in respect of the said lien (to Henry) and the advances made by the purchaser company (this also was not quite accurate as the advance was made by their assignors), and the sum of £650. Within 14 days the purchaser company was to form and register the proposed company, which was to have a nominal capital of £500,000, divided into 500,000 shares of £1 each, of which 80,000 were to be reserved for working capital but with liberty to apply so much as might be necessary to satisfy the debenture debt, the lien debt, the £20,000 advanced, and the £650. When the proposed company was formed the purchaser company was to enter into an agreement for sale of the property for £420,000, to be satisfied by the allotment to the purchaser company or its nominees of 420,000 fully paid shares of the proposed company, of which the purchaser company should be entitled to retain 250,000 for its own use. Clause 5 provided that the purchaser company should procure the proposed company to agree to discharge the debenture debt, the lien debt, and Mercer's

debt on specified days, and also on or before the completion of the purchase to pay the £20,000 to the purchaser company, the purchaser company agreeing—*i.e.* with the vendor company, the plaintiffs—that "in consideration of this agreement all interest in the £20,000 is to cease on its date and" the purchaser company "shall keep the vendor company indemnified in respect of all moneys claims and interest in the claims mentioned." In the event of the proposed company not being incorporated or, if incorporated, not paying two specific sums of £10,000 and £1,750 to Henry within 21 days from 21st August, the purchaser company was itself to pay and indemnify the vendor company against them. Until the completion of the purchase (*i.e.*, by transfer of leases, &c.) the vendor company was, under the direction of the purchaser company and at its expense, to carry on work upon the mine. In the event of the proposed company not being incorporated or 80,000 shares not being subscribed by responsible persons and not obtaining its certificate enabling it to commence business on or before 31st October 1913, the vendor company might rescind the agreement, in which case the purchaser company should have no claim in respect of any moneys paid by them under it (that is, in payment of the £10,000 and the £1,750 to Henry and the cost of working the mine). Before completion of the purchase the purchaser company undertook to procure the proposed company to deliver to the vendor company an undertaking under its common seal to allot to the vendor company or its nominees the 170,000 fully paid up shares and to indemnify the vendor company against the debenture debt, the lien debt, the advance of £20,000 and Mercer's £650.

Whether this was a provident agreement or not I do not know, and the evidence is silent upon the point. But one thing at least is certain, that it embodied the best terms the respondent Company could get. This fact was established by the evidence of Mr. Arthur Robinson, who negotiated it on behalf of the Fanti Company, and by the correspondence which passed between him and the directors, who, after protracted negotiations, agreed to the terms offered by his principals, who absolutely refused to negotiate except upon the terms that the proposed company should be at liberty to apply

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£20,000 of their working capital to the discharge of the debt due to them by the Hermann Company. As the money was to be paid by the proposed new company, the only interest that the vendor company had in that particular matter was that the working capital of the new company, in which it was to hold approximately a one-third interest, would be proportionately diminished, and to that extent the value of the 170,000 shares in the new company which they were to receive as payment might be reduced. If the directors could by insistence have obtained better terms, or if the sale was at an undervalue, the matter might have some importance. But it is abundantly clear that the Fanti Company were the only possible purchasers, and that the plaintiff Company had the choice between sale to them on their terms and collapse. This agreement was carried into effect, although, as already stated, that fact is not mentioned in the statement of claim, and the plaintiff Company's mine and other assets were duly transferred to the proposed company.

The contention that this agreement was a misfeasance or a breach of trust, is, as I have said, based upon the proposition *res ipsa loquitur*. The argument is put in various ways, the inference in each case being said to be self-evident :—

First: It is said that the provision contained in the agreement of 23rd December not to reduce the ore at grass below 3,000 tons constituted in effect an incumbrance upon the Company's property to secure the advance of £20,000 made to the Hermann Company, which incumbrance was (1) *ultra vires* of the plaintiff Company, and (2) unlawful on other grounds, and that this defect followed and attached to the agreement of 21st August which gave practical effect to the agreement of December. It was assumed through a great part of the argument that this provision in effect created an incumbrance by reason of which the plaintiff Company became sureties to the Hermann Company to the extent of the value of the ore. If this is the true view, they would or might in some events have been entitled to have recourse as sureties to the 40,000 shares pledged by the Hermann Company as security for the advance. But was that its true effect? The operative words, which, of course, express a promise of the plaintiff Company to the parties of the third part,

are : " As further security for the said advance there shall remain on the mine . . . so long as the said advance and interest are unpaid not less than 3,000 tons of ore." These words do not purport to transfer the title to any specific ore, and, indeed, could not under the law of Queensland have that effect. In my opinion, they only operated as what in the case of a contract between natural persons is called a personal covenant, for breach of which the remedy is in damages and possibly by injunction. The object of the promise is manifest from the nature of the transaction, namely, to secure that the company which it was proposed to form to take over the plaintiff Company's undertaking should have a large body of ore to go on with. It was, therefore, in substance, a promise by intending vendors not to diminish during the negotiations for purchase the value of the property proposed to be sold. This point will be seen to be very material when I come to consider the objection made to its validity. If the negotiations for the formation of a new company had fallen through, I think that the promise would have come to an end. It would at any rate have become inoperative, since the parties of the third part, and the Fanti Company as their assignees, could not have sustained any loss from a subsequent breach of it.

As to the objection of *ultra vires* I need only refer to clause (*j*) of the Memorandum of Association, which states as an object of the Company " To enter into . . . any arrangement for . . . co-operation, joint adventure, or otherwise with any person or company . . . engaged in or about to engage in any transaction which the Company is authorized to . . . engage in or any . . . transaction capable of being conducted so as directly or indirectly to benefit the Company : and to . . . guarantee the contracts of or otherwise assist any such person or company."

It is manifest that the agreement of 23rd December was an arrangement for a co-operative joint adventure with two companies about to engage in a transaction which the plaintiff Company was authorized to engage in and which was also capable of being so conducted as directly or indirectly to benefit the plaintiff Company. If the provision not to remove the ore operated as a guarantee or an assistance of the Hermann Company, it fell also within that

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clause. If it operated as creating a charge it fell also within clause (*r*) of the Memorandum of Association, which states as an object of the Company "to sell . . . mortgage . . . turn to account or otherwise deal with any part of the property of the Company." This point, therefore, fails.

Even if the promise created a charge of the £20,000 upon the Company's ore, and was invalid, I do not think that it would make any difference in the result. The Fanti Company were, in my opinion, entitled to regard the advance of the £20,000 made by their assignors as being (as it was in fact) part of the expenditure incurred by them for the purpose of keeping the undertaking alive, and therefore fairly claimable as part of the expenses incurred in promoting the new company. The question whether the directors were wise or not in selling the Company's undertaking on the terms which they accepted, that is, for 170,000 shares in a company which intended to treat that advance as promotion money, is quite irrelevant to the question of the legal effect of the promise. If it was a valid incumbrance, it was manifestly immaterial whether the money required to discharge it was paid by the purchasers to the incumbrancers and by them applied in discharge of the incumbrance, or whether the purchasers discharged it themselves. The vendors could not make a good title to the property they sold without discharging the incumbrance. But it abundantly appears that, to whatever extent the assets of the proposed company would be depleted by the payment of the £20,000, they would also be supplemented by the value of the Hermann Company's 40,000 shares in the new company, to which they would be entitled in respect to 40,000 shares in the plaintiff Company pledged to them.

Second: On the assumption that the promise not to remove the 3,000 tons of ore operated in law as a charge upon property of the plaintiff Company, it was contended that the creation of the charge to secure a loan the proceeds of which were to be applied to taking up shares in the plaintiff Company was a mere contrivance to allow the Hermann Company to take up shares at a discount. This contention seems to me to be based upon an entire misconception both of the agreement of December and of the doctrine which forbids the allotment of shares at a discount. The stipulation in question

was, as I have already pointed out, directed to the preservation of the Company's property during contemplated negotiations. The fact that it might indirectly confer other advantages does not convert it into a guarantee, even if a guarantee by a company of a debt incurred to enable the debtor to take up shares in the company would be otherwise obnoxious to the rule. It is obvious that this must depend upon circumstances. If, for instance, a customer and shareholder in a banking company were allowed to increase his overdraft for the purpose of taking up part of a new issue of shares the transaction would not necessarily be unlawful.

Third: Another attempt to attack the agreement of August was made by the contention that the directors ought to have stipulated for the insertion in it of some provision by which the plaintiff Company would have obtained the advantage of the 40,000 shares in that company pledged by the Hermann Company with the Fanti Company's assignors. It did in fact contain a stipulation (clause 7) that the proposed company should, besides allotting to the plaintiff Company 170,000 fully paid shares, indemnify the plaintiff Company against, amongst other things, the £20,000 advance. Now, that advance was directly secured by a pledge of 40,000 shares in the vendor company to the Fanti Company's assignors. When, therefore, the proposed company paid this debt, which was to be done at the Fanti Company's request, it is obvious that they would be entitled to the benefit of that security. The result was that besides the undertaking of the plaintiff Company the proposed company would become the owners or pledgees of 40,000 shares in the plaintiff Company which would be represented by a corresponding number of shares in the proposed company. This asset might or might not have been equivalent in value to the £20,000 which they were to pay to the Fanti company. The suggestion of loss is therefore a mere suggestion unsupported by evidence and resting upon the conjecture that the shares in the proposed company would be worth less than 10s. each.

This new charge of breach of trust has taken many Protean forms, each more elusive than the other. The running-water phase of the metamorphosis may be said to have been reached in another suggestion (made at a late stage of the argument in this Court)—

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it is only fair to Mr. *Knox* to say that he did not make it—that the erroneous description of the advance of £20,000 contained in the agreement of August (which was prepared by solicitors in London on telegraphic instructions) was conclusive evidence of wilful default on the part of the directors in Australia. All the variations of the charge resolve themselves into this, that the directors ought to have made a better bargain, which is only another way of saying that they sold the plaintiff Company's property at an undervalue. In the absence of a scintilla of evidence that they could have sold on better terms, and in the face of the positive evidence that they could not, it seems to me a mere misuse of language to describe the making of this agreement as conclusive, or indeed as any, evidence of wilful default.

The net result of the transaction was that, while before the agreement of August the plaintiff Company were owners of a mine which was heavily incumbered and had no working capital, after the agreement had been carried out they were the owners of rather more than one-third of the stock in a joint stock company which owned the mine free from incumbrance and had a working capital of about £25,000. Who can say that this change of position was necessarily detrimental to the Company?

I listened in vain during the long argument for some indication of the causal relation suggested between the Fanti Company's insistence upon payment by the projected company of the Hermann debt due to their assignors and the loss caused by the alleged wilful default of the appellants. The suggestion must be, although no one ventured to formulate it, that the appellants are responsible for that insistence, and that that responsibility establishes wilful default. Even so, the relation of cause and effect between the wilful default and the loss would still be wanting in the absence of the further link that but for this wilful default the projected company would have given a higher price for the plaintiff Company's property. There is no suggestion of non-disclosure of any fact. On the contrary, it is abundantly clear that all parties, including the projected company, were fully aware of all the facts and of all their rights. How it can be suggested that under such circumstances

agents for vendors are responsible for the unwillingness of the purchasers to give a higher price passes my comprehension.

In my judgment the charge of breach of duty with regard to the sale of the plaintiff Company's undertaking entirely fails.

The plaintiff Company were also allowed to spell out from the evidence a further charge with respect to a sum of £101 10s., representing a fee of £100, with bank exchange, paid to a Mr. Davis, who had acted as local director of the Company in London. The evidence used in support of this charge was elicited in the course of an attempt to prove that the Hermann Company had expended the sum of £20,000 otherwise than for the benefit of the Company. It was proved incidentally that the plaintiff Company had authorized their bank at Cloncurry to honour cheques drawn by Hermann upon their account, and that amongst other payments he had made this payment of £100 to Davis. The directors had power under art. 109 (*h*) to establish local boards, and to appoint any persons to be members of such a board and to fix their remuneration. They had in fact appointed Davis to be a local director in London but had not fixed his remuneration. The payment made to him by Hermann's cheque was, therefore, formally unauthorized, but it clearly might have been, and probably would have been, ratified by the directors when brought to their knowledge. The amount was paid in May 1913, but does not appear to have been brought to the notice of the directors until August 1914. The only default that can be charged against them in respect of it is that they did not thereupon exercise their discretion either to ratify the payment (which they probably would and, in my opinion, should have done) or to require repayment of it from Davis. In my opinion it is a misuse of terms to call this omission a wilful default resulting in loss to the Company. I do not repeat what I have already said as to the injustice of allowing the plaintiff Company to make such a point for the first time after the close of the evidence.

The only matter remaining to be considered is a charge, originally made in par. 54 of the statement of claim against the appellants Gould and Bacon (and repeated in par. 62 (*v*) against all the defendants) but now confined to Bacon, that they, relying upon a fraudulent representation made to them by Hermann that 5,650 shares

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of the plaintiff Company held on their London Register had been transferred to the Sydney Register, and without taking steps to verify such representation or requiring production of the certificates for the shares, issued to Hermann certificates under the seal of the plaintiff Company for 5,760 shares, whereby certificates for that number of shares in addition to the authorized and issued capital of the Company had been placed in circulation, with the result that claims were made against the Company.

Bacon is, I think, entitled to rely upon the plaintiff Company's statement in their pleadings that he was induced to make the mistake which he actually made by the fraud of Hermann. There was, indeed, abundant extrinsic evidence of that fact. The charge, although originally applying to 5,760 shares, is now only relevant to a much smaller number, since Hermann on the discovery of the fraud made reparation by substituting genuine share certificates in the place of many of those wrongly issued. The shares which were not so provided for were 663 shares, part of a larger lot of 3,300 for which a certificate was issued to a Mr. George Crowley, and 900 shares for which certificates were issued to one E. J. Frame, who afterwards transferred them to innocent purchasers. So far as regards Crowley's shares, it appears that the certificates were issued on the faith of a transfer, dated 12th December 1913, from one Alexander Spence to him, which was attested by Hermann, and which had on its face a note signed by the secretary of the plaintiff Company, against whose honesty and competence no suggestion is made, to the following effect: "Scrip lodged in London office against this transfer. Fresh scrip to be issued on arrival of scrip in Sydney for" the plaintiff Company.

Crowley presented the transfer with a note affixed, "Please issue scrip in name of George Crowley, Managing Director of City Mutual Assurance Society Limited or its nominee." In my opinion, Crowley, by presenting the transfer for registration, warranted to the Company that Spence, his vendor, was the owner of the shares, and is therefore liable for any loss occasioned to the Company by their acting on the faith of his warranty. See *Sheffield Corporation* v. *Barclay* (1). The argument that they might by care have found out

(1) (1905) A.C., 392.

that the fact warranted did not exist was fully dealt with in that case. But, however this may be, it is plain that Crowley was not induced to pay whatever he paid for the shares (not stated in the transfer) by the certificate issued upon the faith of it. There is, therefore, no estoppel against the Company within the case of *Balkis Consolidated Co.* v. *Tomkinson* (1). It appears that the liquidators of the plaintiff Company have allowed a claim by a Mr. Booker in respect of this transaction. But, as it also appears from the only evidence on the point, namely, a letter of 27th May 1913, part of Exhibit A26, that Crowley was a trustee for Booker, it follows that Booker's claim, although the liquidators may have been justified in allowing it, by way of compromise, could not have been pressed against the Company, and that Bacon cannot be charged with wilful default in respect of it.

With regard to the 900 shares for which certificates were issued to Frame the evidence is very meagre. A transfer dated 19th November 1913 from the same Alexander Spence to him came into existence, and was presumably presented to Bacon. It described the shares transferred as "Rights attaching to Mount Oxide Options shares numbered 1,189 to 1,203," and the numbers "82,001 to 82,900" are written in the margin. The transfer was apparently presented to Bacon by Hermann, for he joined in signing the certificates (fifteen in number) which were given in pursuance of it. Spence was a clerk in Hermann's office. It is suggested, but not proved, that Frame was also a clerk in his office. No consideration is stated in the transfer. A careful investigation would have shown that, although Hermann had or had had the control of 30,000 of the 60,000 shares in the plaintiff Company issued to the Mount Oxide Options Co., the consecutive numbers of those shares were 1 to 60,000, so that the shares bearing the numbers mentioned in the margin of the transfer could not have been amongst them. An examination of the Share Register would have disclosed the same fact. The true facts, therefore, appear to be that Bacon was induced by Hermann's fraudulent representation to believe that Spence (who, being his clerk, might well be his nominee) was the owner of the shares dealt with, and that he failed to examine the

(1) (1893) A.C., 396.

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Share Register or to require the production of the relevant share certificates. If that failure establishes wilful default it is sufficiently established against him. But does it?

Shares represented by fourteen of the fifteen certificates issued to Frame were afterwards disposed of by him, apparently to persons who dealt with him in good faith in reliance on the certificates. Those represented by the remaining certificate do not appear to have been dealt with by Frame.

Without attempting to define the precise extent of the protection afforded by the provision that a director shall not be liable except for loss occasioned by his wilful default, I think that it extends at least as far as this—that a director is not required to use in conducting the affairs of the company any greater care than a business man of ordinary intelligence and capacity may reasonably be expected to use in the conduct of a similar transaction in his own affairs.

I should be reluctant to lay down as a proposition of law that a director who is asked by a person himself largely interested in the company, whom he knows to be fully aware of the facts, and whose honesty he has no reason to doubt, to sign a certificate upon a transfer of shares is guilty of wilful default by reason merely of omitting before signing the certificate to require the production of the existing certificate and on its non-production to examine the Share Register, and I am not prepared to do so. Applying the working rule I have just endeavoured to formulate, I ask myself whether a partner in a firm who is asked by another partner to join him in signing a document which will bind the firm to acknowledge an obligation in respect of a transaction which is peculiarly within the knowledge of the partner who makes the request can be said to have shown want of reasonable care merely because before complying with the request he failed to examine the books and records of the firm in order to ascertain whether the obligation so sought to be acknowledged really existed. I cannot see my way to answer the question in the affirmative. And I am unable to distinguish such a case from the present. I think, therefore, that this charge also fails.

In my opinion the appeal should be allowed and the suit dismissed with costs as against all the defendants.

ISAACS and RICH JJ. These are three appeals from the decree of *Harvey* J. in one equity suit wherein, as it stands after amendment, the Mount Oxide Mines Ltd. and its liquidators sued four directors, namely, Sir Albert Gould and Messrs. Bacon, Allen and Birkbeck, and also sued one Joseph Earle Hermann, and a company called J. Earle Hermann Ltd. The liability was rested on what in the statement of claim is variously called "negligence" and "gross negligence," "breach of duty" and "misconduct." The statement of claim, besides averring negligence in a general form, charged a great many specific instances for which liability was alleged. Nevertheless, one of the three matters which are the subject of these appeals is not to be found specifically alleged either in the pleadings themselves or in the particulars under them. Another, the main item, though it is literally within the pleadings and particulars, might well, as a matter of pleading, have been more clearly indicated and the precise point of complaint specifically stated. The third is expressly charged.

Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest. There is abundant authority for this, even if the matter were required to rest on authority only. See, for instance, *Nevill* v. *Fine Art and General Insurance Co.* (1); *Browne* v. *Dunn* (2), the relevant passage being quoted fully in *Rowe* v. *Australian United Steam Navigation Co.* (3). There are qualifications, no doubt, and each case must depend for the proper application of the principle upon its own

(1) (1897) A.C., 68, at p. 76. (2) 6 R. 67, at p. 75.
(3) 9 C.L.R., 1, at p. 24.

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facts. It has been laid down by the Privy Council that "As a rule relief not founded on the pleadings should not be granted." "But in this case" (said their Lordships) "the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule": *Sri Mahant Govind Rao* v. *Sita Ram Kesho* (1). *Nocton* v. *Lord Ashburton* (2) is a decisive authority that even where fraud is charged and the charge fails, the plaintiff does not necessarily fail. He may still have a sufficient cause of action left. But in the present instance the defendants, whatever course might have been open to them at the hearing, unquestionably adopted that of fighting the claims as presented in argument upon the evidence as if the particular claims made had been specifically alleged, and as if there were no other evidence upon those claims which the defendants desired to adduce. There is no suggestion even now that other evidence would have been available; and it is perfectly obvious that any objection raised could have been instantly met by a formal amendment, and that no further evidence would have been offered. The case has been fully tried out, as far as the parties desired, on the three matters before us, and the only question is whether the judgment appealed from as to the challenged items should be affirmed, modified or reversed on the merits.

The decree declares: (1) that all the directors pay to the plaintiffs certain specified sums of money, namely, a sum of £20,000 with £557 interest thereon and a sum of £650; (2) that all the directors pay to the plaintiffs a sum of £101 10s.; and (3) that Bacon pay the amount of loss occasioned by over-issue of 5,650 shares in the plaintiff Company. These are the net outcome of the charges in the statement of claim, which, however variously the objections to the directors' conduct were phrased, claimed only a maximum of £25,000 from them. Something further as to the multiplicity of issues will be said later on.

(1) *Hermann's Debt.*—The material facts down to a certain point cannot be better or more accurately stated than by adopting the

(1) 25 Ind. App., 195, at p. 207. (2) (1914) A.C., 932.

following passage from the judgment of *Harvey* J. :—" In the month of January 1912 one Ernest Henry was the lessee from the Crown of a mining property in Queensland known as the Mount Oxide mine. By an agreement dated 22nd January 1912 Ernest Henry in consideration of £1,500 paid to him by J. Earle Hermann Ltd. placed the property under offer to that company for six months for the sum of £60,000 cash plus the value of certain stores and plant. The company had the right on payment of a further sum of £500 to a further three months' option. In the event of the option being exercised the sums paid for the option and extension were to be taken as part of the purchase money.

" On 7th February 1912 Hermann Ltd. entered into an agreement with a trustee for a company then in course of promotion, to be known as the Mount Oxide Options Ltd. The agreement was subsequently adopted by this company on its incorporation. By this agreement Hermann Ltd., in consideration of 400 fully paid shares of £10 each and £2,000 in cash, was to transfer and assign to the Mount Oxide Options Company the benefit of the option agreement with Henry. Should the Mount Oxide Options Company decide to exercise the option it was to be at liberty to form a larger company to acquire the property subject to two conditions : (1) that Hermann Ltd. was to have the promotion of the flotation of the larger company in consideration of a sum equal to $2\frac{1}{2}$ per cent. on the amount subscribed by the public for shares in the larger company ; (2) that on the formation of the larger company Hermann Ltd. was to receive £40,000 in cash and the larger company was to pay Ernest Henry the balance of the money due under the original option agreement.

" The Mount Oxide Options Ltd. having been incorporated and having adopted the agreement made with Hermann Ltd., steps were taken by Hermann Ltd. to promote the larger company, which was ultimately formed under the name of the Mount Oxide Mines Ltd., and is the plaintiff in this suit.

" Shortly before its incorporation an agreement was entered into between Hermann Ltd. and the Mount Oxide Options Ltd. for the underwriting of the shares in the plaintiff Company. By this agreement, in the events that happened, Hermann Ltd. agreed to

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underwrite the whole of the 90,000 shares in the plaintiff Company which were to be offered to the public and as a consideration for so doing was to receive 20,000 fully paid up £1 shares in the plaintiff Company.

"The plaintiff Company was incorporated with a nominal capital of £200,000 in 200,000 shares of £1 each, of which 40,000 shares were to be offered for public subscription in Australia and 50,000 shares in London; the whole issue was described in the prospectus as having been underwritten in London, Antwerp and Australia. Eighty thousand fully paid up shares were to be allotted to the Mount Oxide Options Ltd. as the vendors, and the remaining 30,000 shares were to be held in reserve.

"The agreement between the Mount Oxide Options Ltd. and the plaintiff Company for the purchase of its rights provided that the plaintiff Company should pay to the vendor company £70,000 cash and £30,000 in cash or debentures, out of which Henry was to be paid, and allot the vendor company 80,000 fully paid up shares. The plaintiff Company was also to pay to Hermann Ltd. the 2½ per cent. brokerage payable by the Options Company under the agreement of 7th February.

"On 31st July 1912, about a month after the incorporation of the plaintiff Company, an agreement was signed between Ernest Henry, Hermann Ltd. and the plaintiff Company for the purchase of the property. It recited the original option to Hermann Ltd. and that the plaintiff Company had acquired the rights of Hermann Ltd. and had paid £500 for the extension of the option. The plaintiff Company agreed to purchase the property from Henry for the price provided in the option. The terms of payment, however, were varied. Instead of paying the balance of the purchase money, viz., £58,000 in cash, the Company agreed to pay £5,000 down, £5,000 on 22nd August, £10,000 on 22nd September and £8,000 on 22nd October; the balance, viz., £30,000, was secured by three sets of debentures of £10,000 each payable on 30th July 1913, 1914 and 1915. In the event of any default the whole of the purchase money became immediately payable. The stores which were to be taken at a valuation under the original option were to be paid for by fully paid up shares at their full value.

"The result of these transactions so far as Hermann Ltd. was concerned was that it was entitled to £40,000 cash from the Options Company, which sum the Options Company was entitled to receive from the plaintiff Company. Hermann Ltd. was also entitled to £20,000 fully paid up shares in the plaintiff Company out of the 80,000 to be allotted to the Options Company. Hermann Ltd. had agreed with the Options Company to underwrite the 90,000 shares in the plaintiff Company which were to be subscribed for in cash.

"The defendants, Sir Albert Gould, F. W. Bacon, G. F. Allen and T. B. Birkbeck, were the first directors of the Company, and at a board meeting held on 17th July 1912 the whole of the issued capital of the Company was allotted, viz., 60,000 fully paid up shares were allotted to the Mount Oxide Options Ltd., 20,000 fully paid up shares to Hermann Ltd., 50,000 contributing shares for the London Register allotted to the Broad Street Trust and Investment Co. Ltd., and the remaining 40,000 were allotted to various contributors in the local Register, inclusive of 1,500 which were allotted to Ernest Henry as payment for stores on the mine. The contributing shares were to be paid for, 5s. on application, 5s. on allotment and the balance of 10s. per share on or before 7th September 1912. On 22nd September a payment of £10,000 became due to Henry. The minutes show that the application, allotment and call money was not coming in very satisfactorily, and in fact on 24th September 1912 there was then due £6,786 17s. 8d. of application and allotment money for which they held postdated cheques amounting to £1,964, and £10,873 of call money due for which they held a postdated cheque for £250. The Company had a bank balance of £4,169, but the instalment of £10,000 due to Henry on 22nd September had not been paid. The above figures are without taking into account the amount due on the London shares.

"Some time before 22nd September 1912 the defendant Hermann had arranged with Henry that in consideration of the sum of £500 he should extend the time for payment of the £10,000 due to him on 22nd September and the £8,000 due to him on 22nd October for a period of 16 days each, and a letter of advice to this effect from Hermann to the directors was read at the directors' meeting of 24th September. A further modification was afterwards obtained

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from Henry in consideration of a payment of £1,000, as appears from the minutes of the 4th October 1912. As a result of these modifications an instalment of £3,000 was paid to Henry on 5th October.

"In the meantime the matter of 50,000 contributing shares on the London Register had apparently been engaging the attention of Mr. Hermann's London agent. These shares had originally been allotted to the Broad Street Trust and Investment Co., but at some period apparently prior to 4th October Hermann Ltd. had taken up 40,000 of these shares in satisfaction of the £40,000 due to it under the flotation agreements."

On 23rd December 1912 an agreement in writing was entered into in Sydney between three parties, the plaintiff Company as one party, J. Earle Hermann Ltd. as another party, the third party, represented by one Mercer, being described as "Properties Selection and Trust Limited and Edmund Davis of London." This agreement is very material to the appeal, and, indeed, is relied on by both sides.

It is important, before considering its terms, to collect the relations of the first two parties. Hermann Ltd. was in substance, so far as the evidence leads, what is called "a one-man company." It was Hermann incorporated. Hermann in its name had, by project number one, secured the original £60,000 option from Henry, who was still unpaid to the extent of over £30,000. Hermann had, as project number two, created the Oxide Options Company; and, although we have not the Memorandum or Articles of that company before us, it is manifest Hermann was the controlling mind of that legal entity. He also was the real promoter of the plaintiff Company as project number three. His influence respecting that Company will be presently referred to, but, in the meantime, his legal relations towards it, so far as now material, should be first mentioned. His underwriting contract had not been performed. There were 20,000 shares which were in effect not taken up by the public, and Hermann as Hermann Ltd. was responsible for these—a liability which represented £20,000, though not necessarily constituting a debt payable immediately.

A new project, number four, was set on foot, which eventuated

in the agreement of 23rd December 1912. There is in the plaintiff Company's minute book a record of a special meeting of directors. A good deal of argument took place with reference to this entry, and the meeting it purports to record. Its manner of coming into existence and its subsequent experiences before reaching its present condition are doubtful, but not now material. It is sufficient to say the making of the agreement was authorized by all the defendants and it was actually signed by some of them. The agreement recited that Hermann Ltd. " are largely interested in the vendor " (plaintiff) " company, and, *inter alia*, are registered holders or have the control of 40,000 fully paid up shares of £1 each in the said vendor company." These were the shares which Hermann Ltd. had taken from the plaintiff Company in satisfaction of the £40,000 he was to receive under his agreement with the Options Company.

Now, the agreement of 23rd December 1912 was mainly an option to Mercer's principals to purchase the mine on certain terms which need not be enumerated except that the 170,000 shares of the Oxide Company were to be paid for on the basis of being fully paid up. This necessitated Hermann Ltd. completely fulfilling at once their underwriting agreement with the plaintiff Company with respect to the 20,000 shares above mentioned, by paying them up to £1. They were apparently unable to do it without borrowing. The way in which that was managed was by providing in the December agreement that Mercer's principals should, with the plaintiff Company's consent, advance Hermann Ltd. £20,000 on security of their recited 40,000 shares already paid up. As " further security " the plaintiff Company agreed to leave on their mine dump not less than 3,000 tons of copper ore assaying not less than 17 per cent. metallic copper to the ton. Except for leaving that quantity of ore as " security," and therefore subject to whatever power of sale or otherwise the law would confer on the lenders in case of default in repayment, the plaintiff Company entered into no obligation whatever respecting the loan of £20,000 to Hermann Ltd. It remained Hermann Ltd.'s own debt incurred towards Mercer's principals for the purpose of discharging an existing liability by Hermann Ltd. to the Oxide Company, and necessary for the purposes of all three contracting parties to be paid at once as a present debt. One of the defendants,

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Bacon, swears "the proposal was to lend Hermann the sum of £20,000 on his 40,000 shares, and with that money he was to take up the defaulting underwriting and the 10,000 shares in London which would create means to pay the debts and carry the thing on." Birkbeck, another defendant, swears that as far as he knew there was no necessity for a loan from the optioners to develop the mine so far as the Company was concerned.

At the trial the defendants, apparently under the apprehension that they might be rendered liable for pledging their company's property for Hermann's debt, adduced evidence to show the commercial worthlessness of the ore under existing conditions. That evidence demonstrated that, having regard to those 3,000 tons of ore, it was worthless practically as it stood, and to ship it would cost £10,000 more than it would produce at the then price of copper. Asked why it was allowed to remain in the agreement, Birkbeck said Mercer told him: "I am only using this as padding for the benefit of London, and in a few months' time the whole thing will be floated." The only materiality now of the exact situation of the parties in respect of the ore is in view of the suggestion that the Oxide Company was justified by it in assuming responsibility for the entire loan in the following August.

The December agreement provided, by clause 12, that the £20,000 if advanced should be applied for the benefit of the Oxide Company, and at least half expended in developmental work. That clearly means that the Company receiving the money from Hermann for the shares should apply at least half of it in development for the benefit of the optioners and possible purchasers. Hermann got the money some time before 31st January 1913, and, though the records are not distinct, it appears, and is not disputed, that he accounted for it, *inter alia*, by paying up the 20,000 shares. That left him clear of his underwriting agreement, but debtor to the Mercer group for £20,000 and interest, the group holding his 40,000 shares as security and a charge over the 3,000 tons of ore of the Oxide Company.

The agreement of 23rd December 1912 did not mature. The option was not exercised; all that was left was the debt and securities mentioned. But a fifth project was started, which eventuated

in an actual sale by the plaintiff Company of its mine. An English company called Fanti Consolidated Mines Ltd. was in reality the principal with respect to the Mercer group, and was therefore the creditor in respect of the £20,000 loan and the holder of the securities. Negotiations took place for the sale of the Oxide property to the Fanti Company, and one condition upon which the latter would purchase at all was that the loan should be repaid. There was no stipulation or demand that it should be paid by the Oxide Company instead of Hermann, but simply that the Fanti Company should get its debt repaid. And there was no stipulation that Mercer's £650 should be paid by the Oxide Company.

The negotiations ended in an agreement. The special meeting of the Oxide Company's directors at which this took place was held on 12th August 1913. The minutes say:—"Present—Sir Albert Gould (Chairman), Messrs. Thomas B. Birkbeck, Gerald F. Allen, J. Earle Hermann. There were also in attendance Messrs. Williams and Fawcett." Hermann, though not a director officially, was, as the evidence discloses, the dominant mind of the concern. He acted as director, sometimes as attorney for Allen, sometimes as attorney for Birkbeck, sometimes apparently without troubling about such formalities. But, without multiplying details, he undoubtedly was the real "director" of the Company's affairs, the official directors giving but a very superficial supervision, and apparently trusting to Hermann's ability and business acuteness to bring things out on the right side. The explanation given by the defendant Allen for permitting Hermann to occupy that position is in these words: "He was close to the Company in this way, that he was the man who had sold the options and had underwritten the shares of the Company and was closely allied to it, but I don't know what his position was"; and again the same defendant, after stating that Hermann was "the general military adviser to the Company," said that Hermann "put himself in that position as far as I know." It seems to have been overlooked entirely that in some respects Hermann's interests were opposed to those of the Company. Nothing illustrates the attitude of the directors towards Hermann better than the proceedings at the meeting of 12th August 1913. It was agreed to accept the Fanti Company's offer. The

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terms included the formation of a new company, and that Henry's debentures should be paid out of its subscribed capital, and that the £20,000 owing by Hermann Ltd. should also be paid out of the subscribed capital, treating that loan as a debt of the Oxide Company itself and not as any liability of Hermann. The terms did not include the assumption by the Oxide Company of liability to pay the balance of Mercer's commission. But it may be noticed that, as appears in a letter of 31st July 1913 from Mr. Robinson, solicitor for the Fanti Company, to the Oxide Company, it was agreed by Mr. Hermann's London attorney that the Oxide Company should pay that sum of £650. That letter demanded repayment of the £20,000 and interest, payment of the £650, and also retention of the ore security on the mine.

Hermann's London attorney was Mr. John Goodwyn. It was resolved at the meeting to give "a full amended power of attorney to Mr. John Goodwyn as attorney for the Company in London, and that he be instructed to see that the provisions of the agreement of the 23rd December relating to the ore at grass, local Sydney Board and other matters be embodied in the new contract for the protection of the Australian shareholders in the Company generally." A full power of attorney dated 13th August 1913 was sent to Goodwyn, and the usual clause as to ratification was included. No evidence appears as to what the instructions to Goodwyn were, or who sent them. If they were sent from the Company's office, one would have expected some record to appear. If the matter were left to Hermann, it would be quite reasonable to expect no record in the Company's office.

The result was the agreement bearing date 21st August 1913—eight days after the date of the power of attorney—but signed in London. It provided for a sale of the Oxide Company's property (with certain exceptions not material) but "subject to" certain liabilities including, as stated, "a sum of £20,000 due from the vendor company to the purchaser company in respect of an advance made by the purchaser company with interest thereon from the date of such advance," and also "the sum of £650 due from the vendor company to William Alexander Mercer in respect of a balance of commission" for procuring the said advance. By clause

2 the consideration from the Fanti Company to the Oxide Company was stated to be (*a*) £170,000, which "shall be satisfied" by the allotment of 170,000 fully paid up shares of £1 each in a company to be formed and called "the proposed company," and (*b*) the payment and discharge of Henry's debentures, a further sum of £1,750 owing to Henry, and the two sums of £20,000 and £650.

If clause 2 were read alone, it might be construed as meaning the Fanti Company released the claim of £20,000 and would pay Mercer the £650. But, read as a whole, the proper construction of the consideration is that the Fanti Company were bound to pay £170,000 by seeing that 170,000 shares in the proposed company were allotted, and were bound to see that the proposed company, if formed, would pay Henry and Mercer, and as for the £20,000 the Fanti Company accepted the chance of getting payment from the proposed company, and at once and finally gave up their alleged claim against the Oxide Company in respect of the £20,000.

There can be no doubt that the Fanti Company insisted on getting paid in some way the £20,000 or making provision for it by means of the proposed company, and the view may be accepted that without acceding to that term the agreement could not have been made. But it was immaterial to the Fanti Company who paid so long as they were paid, and possibly so long as Mercer was paid by some one else the £650. But still the question remains as between the Oxide Company and Hermann, why did the Company assume a debt that was his solely without providing in some way for such indemnity or security as was possible? In the known circumstances it would not be just to assume Hermann's solvency or his ability to raise the means of repaying the £20,000 personally; but it is clear that he had 40,000 shares in the Oxide Company, that these shares were lodged as security, and practically as the sole available security for the £20,000 with the Fanti Company. It seems only a reasonable and just and business-like stipulation to be inserted in the agreement, that these 40,000 shares on payment by the proposed company should be handed over either to the plaintiff Company or to the proposed company by the Fanti Company—which, on payment, had no right to retain them and in ordinary course would return them to Hermann. The proposed company

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when paying would pay because so provided in the agreement to be made between that company and the Fanti Company, and by virtue of that agreement would pay what was assumed to be a debt not of Hermann, but of the Oxide Company. No case could be made by the proposed company to get possession of shares belonging to Hermann, and indeed the proposed company would, so far as appears, have no knowledge of their existence. That this was so, is shown by the fact that subsequently the shares were bought at 4s. a share by the Fanti Company from Hermann.

Or the agreement might have provided that the shares should be handed over to the plaintiff Company as security for Hermann's liability to recoup it for its loss in taking shares in the proposed company with depleted assets. But notwithstanding the obvious practicability of either of the provisions referred to, Goodwyn, that is, Hermann's London agent, acting in this case as the Company's attorney, made the agreement on the basis that the debt was the Company's, and that the Company not only owed the debt, but also owed Mercer £650 commission for getting it. That, of course, would be inconsistent with making any provision whatever as to Hermann's shares, it was in fact a freeing of Hermann from all responsibility or accountability, and such an agreement to pay the £20,000 and £650—*simpliciter*—was unjustifiable as between the plaintiff Company and Hermann, and upon the evidence was not necessary as between the Fanti Company and the plaintiff Company. Had some person been appointed attorney other than Hermann's agent, or had the power been properly defined, or perhaps had instructions been given which would have strictly limited the attorney's action, this result would in all probability have been avoided. The initial fault was in allowing Hermann to dominate the affairs of the Company, and in permitting him to carry out the transaction without proper care and supervision. Subsequently, when the actual agreement came to hand, it was carried out by the directors unquestioned, and was never referred to the shareholders. No attempt was ever made to remedy the fault in the agreement of 21st August 1913, and the Company has undoubtedly sustained loss.

Are the defendants liable; and, if so, for what amount? Art. 140 provides that they shall be liable only for "wilful default." "Wilful

default " is a term which, like most other terms, must depend for its precise connotation on the subject matter and the context. It does not connote dishonesty. Here it means—a course of conduct consciously pursued in circumstances which would indicate to a reasonable man who considered the matter that the duty he has undertaken to the Company is not being performed with due care for its interests.

The conclusion is not to be escaped, that in this transaction there was " wilful default " within the meaning of the clause, and the defendants are liable to make good the loss.

The next question is as to amount. Is it £20,000 and interest and £650, or a less sum ? Once accept the position that the plaintiff Company was compelled to accept the 170,000 shares, and that payment of the £20,000 out of the subscribed capital of the proposed company was a fixed condition, because Hermann could not pay, and someone must, then it seems to follow that the loss actually sustained by the plaintiff Company was the lessened value of the interest the plaintiff Company had in the new company, by reason of the new company paying the £20,000 and the £650. It is not just to assume that but for the agreement to pay the Fanti Company out of the funds of the new company, the plaintiff Company would have had £20,000 more for its mine. How and from whom could it have obtained that sum, if Hermann were insolvent, the shares insufficient, and the Fanti Company insisting on payment ? Now, the lessened value of the interest of the plaintiff Company in the new company is in the proportion of the number of shares it obtained, and the total number issued—not merely created (see *Koffyfontein Mines Ltd.* v. *Mosely* (1)). If the £20,000 had been treated in the agreement as Hermann's debt which the Oxide Company had, practically at his request, to agree to the new company paying, and taking the security, the new company would have been in fact paying not a higher price but a lower price, that is, a price which so far as it relates to the debt was less than £20,000 by the value of the shares. Thus, the Fanti Company would have been equally well off, the new company would have been better off, so would the Oxide Company, and Hermann would have met *pro tanto* a just liability.

(1) (1911) A.C., 409.

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The total shares issued at a given moment represent the totality of interests existing in the assets of the Company, and the inherent value of each share is as 1 to the total number contemplated to be issued. Unless the parties can agree as to the total number contemplated to be issued at the time the plaintiffs' shares were to be issued, the matter must go for inquiry.

As to the £650 it must be added to the £20,000 and interest for the purpose of ascertaining the loss, and the amount recoverable will be the proportion of the total sum ascertained in the way mentioned.

(2) *Davis's Fees.*—With respect to the £101 10s. the facts are few and simple. The Company had funds in a banking account at Cloncurry; the directors expressly empowered Hermann to sign cheques on the account, and directed the bank to honour those cheques. He drew a cheque for the sum of £101 10s. in favour of Davis, and this was paid to Davis as director's fees. Davis was not a director within the meaning of the Articles, and the only justification set up at the trial for the payment was a certain resolution of the directors. The resolution relied on at the trial was not relied on before us, and the transaction was not really defended. There was negligence, and it was "wilful" in the sense already stated. Indeed, to entrust a person who is not a director, or an officer or even in his individual character a shareholder, with an uncontrolled power of drawing cheques on the Company's banking account, is a clear case of wilful default, and for any loss arising from it, directors are justly liable. Of course it is only one illustration of the unbounded reliance placed on Hermann. The directors are liable for this sum.

(3) *Share Certificates.*—The third head of liability is the responsibility of Bacon for certifying to 5,650 share certificates. They were not signed at a board meeting, nor did anyone else sign them as director except Hermann as attorney for Birkbeck. The numbers of the shares certified to indicated they were on the London Register of the Company, which had been duly authorized and created (see secs. 25 to 32 of the *Companies Act* 1899, No. 40), and a copy of that register was in the Company's office, available for Bacon to look at, at a moment's notice, if the business of certifying were done at

that office. As to 3,300 of the shares the secretary Cocker, who was also secretary of the Options Company, and who was not called, stated in writing on the transfer, "Scrip lodged in London office against this transfer. Fresh scrip to be issued on arrival of scrip in Sydney for the Mount Oxide Mines Ltd." This was signed "J. E. Cocker, Secretary." The transferor was Spence, a clerk in Hermann's office, as Bacon knew. Hermann was the witness to his signature. The regulations provided that on transfer the old certificate should be lodged. The transaction was a fraud on Hermann's part, and Cocker gives no explanation of the way he came to give the false certificate of lodgment of scrip in the London office. It is contended that Bacon was not guilty of negligence, and certainly not of wilful default, in certifying as he did.

No rule of universal application can be formulated as to a director's obligation in all circumstances. The extent of his duty must depend on the particular function he is performing, the circumstances of the specific case, and the terms on which he has undertaken to act as director. Here the directors stipulate for no responsibility beyond "wilful default." The nature of that has been already stated. What is "default" in relation to one transaction may not be default in relation to another. Lord *Halsbury* has said in *Dovey* v. *Cory* (1) that directors may "trust those who are put into a position of trust for the express purpose of attending to details of management." If this were a case of a director being assured by the secretary as to a detail of management, or as to anything which it was the duty of the secretary to certify, it might well be that there would be no responsibility. But that is not so. The Act of Parliament (sec. 238) makes such a certificate under the common seal of the company *primâ facie* evidence of title. It is trite law that such a certificate issued by a person authorized to issue such a document imposes a liability on the company for loss sustained in reliance upon it.

To "certify" means primarily to "assure" (see *per* Lord *Kenyon* in *Farmer* v. *Legg* (2)), and neither the Act nor the Articles entrust to the secretary so formal and important a function as certifying to proprietorship, which confers not merely rights of property but

(1) (1901) A.C., 477, at p. 486.

(2) 7 T.R., 186, at p. 191.

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power of control. The Articles do not weaken, but rather emphasize, the principle that a certificate under the Company's seal must be authorized by the Company, and it is the directors who under the Articles may act for the Company. It is a most reasonable and obvious precaution that a director when asked to certify by authorizing the Company's seal should look to the Register before issuing a document affecting not merely the Company itself, but outsiders, who may be led to deal on the faith of it. Besides, Cocker could not personally know what had taken place in London. This instance and the others, which were if anything weaker so far as excuse goes, are cases of "wilful default," and Bacon is responsible.

The defendants' argument in effect is that, as the owner of a business acts in a business way in trusting to a manager personally as to certain matters, the manager may, as to those very matters, that is, as to his own duties, trust to a subordinate in turn. But Bacon is responsible only for what he has certified, or, rather, permitted the Company to certify. His certificate in all cases was for shares paid up to 10s. As to the 3,300 shares no greater sum appears on the face of the certificate to have been paid up. On the 1,450 share certificate there is a note in the corner by rubber stamp: "Fully paid up to £1 per share, J. E. Cocker, secretary, per"—followed by a word apparently "Bloom." The word "Bloom," or whatever it may really be, is in writing. On the remaining certificates, representing in all 900 shares, there was a note in the corner, made with a rubber stamp, as follows: "Fully paid up to £1 per share, J. E. Cocker, secretary, per"—and then followed a signature, "Oscar J. Hagen." Hermann replaced genuine certificates for a large number of these shares, and so reduced the Company's loss. The liquidators have received claims and dealt with them. But the whole facts are not before the Court, and the amount of Bacon's liability must be a matter of inquiry and report. He is liable on the basis of certifying up to 10s. a share for all loss which the Company is compellable to make good by reason of that statement.

The question of costs is a very material one. Without dealing in detail with the arguments on this point, it is obvious that in a case like the present, the plaintiffs' difficulties in ascertaining the facts, and formulating exact charges, arise largely from the want

of attention on the defendants' part. This should be borne in mind in connection with the fact that, out of the numerous charges made, there emerge in plaintiffs' favour only the three dealt with. As to the chief one of those, the defendants achieve on the appeal a considerable success, though they fail in their contention to be completely absolved. Following the principle indicated by the Court of Appeal in *Willmott* v. *Barber* (1), it seems a proper thing, having regard to the substantial alteration now made, that, in order to stop at the earliest moment the further waste of assets and outlay generally, the order as to costs should be varied by directing that the plaintiffs' costs in all Courts be taxed and that the defendants be ordered to pay one-half.

Appeal dismissed except that decree of Harvey J. varied: (1) *by omitting the order as to the payment of the sums of* £20,000 *and* £650, *and by substituting a reference to the Master to ascertain the proportion of the said sums of* £20,000 *and* £650 *to be paid by the defendants on the footing of this judgment*; (2) *by substituting a reference to the Master to ascertain the amount payable by the defendant Bacon on the footing of this judgment*; (3) *by omitting the order as to costs and by substituting an order for taxation and payment by the defendants of half the plaintiffs' costs in all Courts.*

Solicitors for the appellants, *Gould & Shaw*; *Asher, Old & Jones*; *Pigott & Stinson.*

Solicitors for the respondents, *Minter, Simpson & Co.*

B. L.

(1) 17 Ch. D., 772.