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*June 12, 13.
*June 26.

CHARLES HOOD AND ANDREW J. SNOW..... } APPELLANTS;

AND

JOHN R. EDEN, LIQUIDATOR..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Winding-up Act—Joint stock company—Contributories—Consideration for shares.

H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase said assets, which was done, payment being made by the discount of a note for $2,000 made by H. and indorsed by another of the parties. The company having been formed the said assets were transferred and the said note was retired by a note of the company for $4,000 indorsed by H., which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company which eventually went into liquidation. After the company was formed, in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of the local master in this respect was affirmed by a judge of the High Court and by the Court of Appeal.

Held, reversing the judgment of the Court of Appeal, Davies and Nesbitt JJ. dissenting, that as all the proceedings were in good faith and there was no misrepresentation of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid up was valid and the order making them contributories should be rescinded.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

Held, per Davies and Nesbitt JJ. that as they did not pay cash or its equivalent for any portion of the shares as such the order should stand.

Held, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three, or any number of, successive courts before which the case has been heard.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Mr. Justice Ferguson, who upheld the ruling of the local master placing the appellants on the list of contributories of the Baden Manufacturing Co., in process of being wound up under R.S.C. ch. 129.

The material facts are stated in the above headnote and in the judgments given on this appeal.

Aylesworth K.C. and *Robertson* (*Segsworth* with them) for the appellants referred to *Kelner* v. *Baxter* (1); *Natal Land & Colonization Co.* v. *Pauline Colliery Syndicate* (2).

Haight for the respondent cited *North-West Electric Co.* v. *Walsh* (3); *In re Hess Mfg. Co.* (4).

THE CHIEF JUSTICE.—The appellants were each subscribers for twenty-five shares of the stock of the Baden Machinery Manufacturing Company, Limited, a company incorporated under The Ontario Companies Act by letters patent, dated August 27th, 1902. The stock is of the par value of $100 per share, and the appellants claim that their stock is paid up, as their stock certificates state. In winding up proceedings before the local master at Berlin under the Winding Up Act, R.S.C. ch. 129, an order was made placing the appellants on the list of contributories for the sum of $2,500 each, being the full par value of

(1) L.R. 2 C.P. 174.
(2) [1904] A.C. 120.
(3) 29 Can. S.C.R. 33.
(4) 23 Can. S.C.R. 644.

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their stock. That order was confirmed by Mr. Justice Ferguson, and the Court of Appeal for Ontario have dismissed an appeal taken by the appellants from his order. The present appeal is from the judgment of the Court of Appeal.

The facts of the case are rather complicated. They are substantially as follows:

For some time prior to the formation of the Baden Machinery Manufacturing Company a firm of Oelschlager Brothers had carried on business as manufacturers of wood-working machinery at Baden, where they had a large plant and a factory, subject to encumbrances. Their interest in the property, valued as a going concern, was worth from $17,000 to $25,000. The firm had, however, heavy debts to banks and others. They had no cash capital, one of the brothers was intemperate, and both were poor business men. They had, in consequence, lost their credit and were on the eve of failure.

The appellants were officers of the Buffalo Tool and Machine Company, doing business at Buffalo, N. Y., and having a branch place of business at Toronto. Their company had given orders for machines to Oelschlager Brothers, and had trouble in getting their orders filled. Inquiry by Hood as to the cause led to his discovery of the financial difficulties of Oelschlager Bros. On his suggesting assistance he was visited in Buffalo by Oelschlager Brothers and by one Oliver Master, a broker from Berlin, who was then liable to the banks for about $2,600 upon paper he had indorsed for the accommodation of Oelschlager Brothers, and which he would have to pay unless he could get some one else to come to the rescue. Master called over to Buffalo one W. M. Cram, a solicitor practising at

Berlin, who was in the same position as Master with respect to Oelschlager Brothers.

Master and Cram having suggested to Hood, as a solution of all their difficulties, the formation of a joint stock company, it was agreed among them that Cram should acquire the property of Oelschlager Brothers on the best terms he could as trustee for Hood, Snow and Master, and undertake on their behalf to pay the debts of Oelschlager Brothers, and that thereupon a company should be formed, to which the property with its encumbrances might be transferred, Hood undertaking for himself and Snow to give such financial assistance from time to time as might be required to carry on the undertaking, and that in consideration Hood, Snow and Master should receive paid-up stock in the company to the amount of $10,000, that being the value placed by them on their interest in the property (valued as a going concern) after it had the financial assistance promised by Hood and Snow. Hood represented Snow as well as himself in these transactions.

To carry out their plan, on the 29th July, 1902, Hood, Snow and Master signed a document appointing Cram their attorney and trustee to acquire and hold for their use and benefit the property of Oelschlager Brothers. Cram, in exercise of that authority, acquired the property, consisting of the plant and factory before mentioned, in consideration of the payment of $1,155 and the assumption of the encumbrances upon the property and of certain debts of Oelschlager Brothers to banks and others.

The transfer from Oelschlager Brothers was not completed until the 9th August, 1902, as appears by the affidavit of execution of the bill of sale. In the meantime, Hood, in pursuance of the agreement to aid

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financially, had given his promissory note for $2,000 to Master on the 6th August, 1902. The proceeds of this note were to be used to pay off certain encumbrances and to carry on the concern, but $1,155 of the proceeds was actually used by Cram to pay to Oelschlager Brothers the cash consideration on the purchase of their property.

Pending the completion of arrangements, Cram continued the factory as a going concern, and for that purpose requiring the sum of $700, applied to Hood, and he procured the acceptance by the Buffalo Tool and Machine Company of a draft, dated 8th August, 1902, for $700, in Cram's favour, and the proceeds were used in the Baden business. Again, on the 13th September, 1902, Cram required $1,200 to pay off the lien and mortgage of one Petrie, covering portions of the plant, and again Hood procured the acceptance by the Buffalo Tool and Machine Company of a draft for that amount in Cram's favour, and the Petrie claims were paid out of the proceeds.

On the 27th of August, 1902, letters patent were issued incorporating the Baden Machinery Manufacturing Company, Limited, the objects of the corporation being "to manufacture and dispose of engines and boilers and wood-working and other machinery, and to repair machinery." Hood, Snow and Master were the provisional directors, and they called the first general meeting of shareholders for the 17th day of October, 1902.

At the shareholders' meeting on October 17th, 1902, the agreement or arrangement proposed to be made by Hood, Snow and Master with the company as before set forth was put before the meeting.

There were present at this meeting all the shareholders except Snow and Carter. Snow was repre-

sented by his proxy, Hood. Carter, who was an employee of the Buffalo Tool and Machine Company, and whose $1,000 of stock was to form part of the $10,000 paid-up stock, had had the proposed arrangement submitted to him when he was asked to subscribe, and had assented to it, and in fact it was a proposal entirely for his benefit, and it was only upon that understanding he had subscribed. All the shareholders present assented to the arrangement, and in pursuance thereof certificates were, on the same day, issued to Hood, Snow and Master for the stock they had subscribed for, as fully paid-up stock.

The company forthwith took over the plant and factory and continued the business theretofore carried on. On the 1st November, 1902, the company took up Hood's $2,000 note by giving the company's own note for $4,000, dated November 1st, 1902, which, however, it was necessary to have indorsed by both Hood and Snow before discounting it. This $4,000 note was eventually paid up by Hood out of moneys obtained by him for the purpose from the Buffalo Tool and Machine Company. The company also, from time to time, made provision for the debts of Oelschlager Brothers at the banks as well as for some of their own debts.

For these and other purposes of the company, such as payment of wages, frequent application was made to Hood for financial assistance, which Hood obtained for the company from his own company, the Buffalo Tool and Machine Company. These applications were in pursuance of the agreement, before stated, which provided, among its other terms, that the stock of Hood and Snow should be paid-up stock, and no other agreement was ever made in reference thereto. The

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total amount obtained by the Baden Company from Hood for the enterprise from the time of taking over the Oelschlager property exceeded $13,000, not one dollar of which was ever returned. Certain machinery, amounting in value, at the outside price, to $2,675, was delivered to the Buffalo Tool and Machine Company, by the Baden Company, but it had no connection with the advances made, and, in fact, none of the machinery was shipped until after advances aggregating between $5,000 and $6,000 had been made.

The net result, as appears by the liquidator's report, so far as creditors are concerned, has been that the $6,000 indebtedness of Oelschlager Brothers has been reduced to an indebtedness of less than $2,000, leaving aside the claim of Hood and Snow and the Buffalo Tool and Machine Company, in respect of advances made.

On the 18th day of May, 1903, an order was made to wind up the company, and the respondent was appointed liquidator. The plant at Baden had prior thereto been seized under execution and sold by the sheriff. The liquidator obtained an order for payment over to him of the proceeds of the sale of the plant, and still claims to hold such proceeds as the property of the company, and has not in any manner offered to hand over such proceeds to those from whom the company obtained such property, nor has he in any way applied to set aside, or to have the company relieved from, the agreement under which the property was obtained.

Under these circumstances the appellants claim that they are entitled to hold their stock as fully paid under the terms of the agreement made on the 17th October, 1902, as if paid in cash; that the company has, by receiving all the benefits provided for it by

such agreement in taking over the property purchased from Oelschlager Brothers and in receiving to a much larger amount than the value of the stock the financial assistance promised by Hood on behalf of himself and Snow, and by issuing certificates for paid-up stock, and by assuming as between the company and Hood, Snow and Master, the debts of Oelschlager Brothers and Hood's note for $2,000, affirmed that agreement; that the liquidator has re-affirmed it by claiming from the sheriff the proceeds of the sale of the plant; and that he cannot in this proceeding repudiate that part of the agreement which is for the appellants' benefit.

The appellants further say that even if what took place on the 17th October, 1902, did not amount to a formal agreement binding upon the company as such, an implied agreement to the same effect arose by reason of what was done on the faith of the understanding between the parties.

The case as I view it is entirely one of inferences of fact from the facts proved and the application to it of incontrovertible law. It seems to me clear upon the evidence that the appellants have given real and valid consideration for their stock.

Mr. Justice Sedgewick has put in writing the reasons upon which the majority of the court have come to the conclusion that the appeal should be allowed. I have only a few words to add. The respondent has not failed to resort to the stock argument on appeals of this class of cases, that upon a question of fact he has the concurrent finding of three courts below in his favour. Now, in the first place, there are no controverted facts of any importance here. The case rests principally upon inferences of law and facts from admitted or uncontradicted facts. And, sec-

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ondly, it must not be forgotten that, when the statute allows of an appeal on facts, even if concurred in by three courts, as here, it is on the assumption, as in all cases, that there may be error in all these judgments, and the respondent is not entitled to invoke as an argument in his favour the very judgment that the appellant complains of.

It is our duty, in every case, to give the judgment that the Court of Appeal should, in our opinion, have given. The fact that two or three courts have passed upon a question of fact does not relieve us from the responsibility of judging of the evidence as we view it. If, in this case, we think that the local master came to a wrong conclusion, it is not simply because two successive appeals from his findings have failed that the appeal to us must also fail. When the statute gives an appeal to any court it never imposes the condition that the judgment must not be reversed. We have repeatedly had to reverse on questions of fact; *Russell* v. *Lefrançois*(1); *The North British & Mercantile Ins. Co.* v. *Tourville*(2); *Dempster* v. *Lewis*(3); and, as long as the right to appeal as to findings of fact exists, we have to continue to do so every time that we are convinced that there is error in the judgment complained of, whatever may be the number of courts or of judges that the respondent has previously succeeded in leading into error.

SEDGEWICK J.—There is nothing at common law to prevent two mercantile establishments carrying on two separate businesses uniting for the purpose of forming a new partnership, each association contributing as its share of the capital of the new partnership

(1) 8 Can. S.C.R. 335, at p. 366. (2) 25 Can. S.C.R. 177.
(3) 33 Can. S.C.R. 292 and the cases there cited.

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whatever property it may possess. And in the absence of bad faith or fraud there is nothing to prevent the members of the new partnership from allotting as among themselves the share of the capital with which each member of the partnership may afterwards be credited, even although the amount so allotted to him may be from a purely monetary point of view largely in excess of its market value. In other words, members of a partnership for mutual convenience may agree among themselves that the nominal capital may exceed, without reference whatever to amount, what from one point of view may be deemed to be the real capital. And if afterwards the original members, or other members coming in after the original members choose to form themselves and do form themselves into a joint stock company under the Ontario Companies Act, it being agreed that the whole assets of the partnership shall become the capital and the only capital of the company, the same results follow. The members of the new company in such a case would have just as much right as the former partnership to agree among themselves as to the figure at which the capital stock of the company shall be put down, whether that figure is actually in accordance with the fact, or is more or less fictitious. Admitting that in such proceeding there was no fraud, accident or mistake, no failure on the part of any one to disclose material facts, the complete and adequate knowledge on the part of every member as to the exact condition of affairs, all parties being *sui juris* and of disposing mind and understanding, no court of justice would or could entertain an action to set aside such an agreement, whether such action is brought by a shareholder or by any subsequent member of the company. It would be otherwise were it necessary in

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order to the raising of additional capital that the prospectus should be issued, and after the formation and complete organization of the company there had been left in the treasury or unallotted stock for the purpose of inducing the public to purchase these shares so undisposed of. In that case the original members of the company or its executive would be under certain legal and equitable obligations to the owners of the new stock company in regard to the actual accuracy and the utmost fidelity to proof as between them and the new members.

The company now being wound up was not a company of the latter, but of the former kind. Upon its organization a meeting was held at which every shareholder or the representative of every shareholder was present. Whatever negotiations may have taken place prior to the 17th October, 1902, to my mind it is clearly established by evidence, the evidence, too, of the respondent's witnesses (see the evidence of Oliver Master) that on that day, before the stock had been divided, there was a meeting of all of the shareholders of the company, every one of whom was either present or his representatives were present, and it was unanimously agreed that the stock in the company, as mentioned in the charter of incorporation, should be wholly divided up amongst the then existing shareholders in certain proportions, and that this verbal understanding was on the same day carried out by the secretary and president of the company issuing under the seal of the company certificates for fully paid-up shares to the amount just agreed upon, and the two appellants now hold these certificates as evidence of their immunity from further liability in respect to the shares so transferred to them. The evidence shews that the whole transaction was one of the most perfect

good faith; that the property brought into the business by the corporators was in the view of every one approximate, at least, to the stated amount of the company's capital. There was no suggestion of any fraud, imposition, mistake, failure to disclose material facts or anything to suggest any desire on the part of the company or any officer or member of it to defraud anybody, whether as between themselves or any future creditors.

Some time afterwards, the company having become financially embarrassed, a winding-up order was made and the two appellants were placed upon the list of contributories in order to pay the full amount of the capital stock held by them, as if nothing had been paid at all. I am of opinion that this transaction cannot now be impeached by the company's liquidator.

Some point was made in the court below that the agreement come to at the meeting of the 17th September not having been made a matter of record in the minutes of the company, no evidence could be given by oral testimony shewing that the agreement was. I have never found, apart from statutory enactment, where evidence of that kind was held properly rejected. The company may bind itself in many cases by simple silence; it may as effectively bind itself by verbal communication made by its responsible executive officers. *A fortiori,* when not only its executive, but every possible shareholder comes to an agreement as to a certain proceeding, and that agreement is followed up by a legal transfer under sale of the property, the subject matter of the discussion, the agreement in question, in absence of evidence to the contrary, must be held to be valid and binding, not only as between the shareholders but as between themselves and the whole world.

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I am of opinion the appeal should be allowed and the appellants' names struck off the list of contributories. The appellants will have their costs in all the courts below.

GIROUARD J.—I concur in the judgment allowing the appeal with costs and striking the appellants' names off the list of contributories, for the reasons stated by my brother Sedgewick.

DAVIES J. (dissenting).—I am of opinion that this appeal should be dismissed, and will add very few words to the reasons given for the judgment of the Court of Appeal by the Chief Justice of that court.

The appeal turns largely, if not entirely, upon questions of fact. The three courts below have found these facts against the appellant and the question for us to determine is whether they have properly appreciated the evidence.

The main question is whether the appellants as promoters of the company being wound up occupied such a fiduciary position towards the company at the time of its formation as prevented them from making any secret profit out of the sale to the company of the Oelschlager business and property which they had previously acquired.

I am clearly of the opinion that they, together with Master, did occupy such fiduciary position and that on the formation of the company which they had promoted, and of which they and Master became the directors, it was not legal for them to issue to themselves as paid-up shares of the company shares which as a fact were unpaid, and the alleged payment for which alone consisted in the profit which they charged the company in the sale to it of the Oelschlager business.

The facts in the case are as conclusive as the law. On the 26th July the appellants Hood and Snow, together with Master, Cram and Oelschlager, signed a memo. of agreement to become incorporated as a company under the provisions of the Ontario Companies Act under the name of the Baden Machinery Manufacturing Company, Limited, with a capital of $40,000, divided into 400 shares of $100 each, and severally agreeing to

take the respective amount of the capital stock of the company set opposite their respective names as hereunder and hereafter written and to become shareholders in such company to the said amounts.

This was signed on the 26th July by Hood for $2,500, by Master for $2,500, by Cram for $100, and Oelschlager for $1,000. On the 29th July Snow signed for $2,500, and in August two other shareholders signed.

The three promoters of the company about to be formed, namely, Hood, Master and Snow, on the latter date of 29th July—and after the execution of the above memorandum—executed a power of attorney to one of the other promoters, Cram, in the following words:

We and each of us hereby nominate and appoint William Moffatt Cram our attorney and trustee, to acquire and hold for our and each of our use and benefit, the property owned by William Oelschlager, and the property owned by Henry Oelschlager, of Baden, and any other property owned by Oelschlager Brothers, of Baden, the said property to be acquired and held as aforesaid, for the purpose of a joint stock company, proposed to be formed with us as provisional directors, and this is the said Cram's authority for so doing, and we hereby authorize him to do whatsoever may be necessary in the premises.

The Oelschlager property was then almost immediately purchased by Cram under this power of attorney, namely, on the 4th August following, who, after letters incorporating the company had been issued, assigned and handed over the property to it.

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Letters patent constituting Hood, Snow, Master and Cram a body incorporate under the name of the Baden Machinery Manufacturing Company were issued 27th August, 1902, and Hood, Snow and Master were named provisional directors of the company.

The first meeting of these provisional directors was held 4th October, when it was decided to call a general meeting of the company on the 17th day of October for "the purpose of organization," and to demand a transfer to the company of the property from Cram.

This transfer was promptly executed by Cram and at the organization meeting held 17th October, Hood was elected President, Snow one of the directors and Master Secretary-Treasurer and director.

On the same day twenty-five shares of stock each were issued to Hood and Snow, but the local judge held as the evidence shewed that although the stock was issued as fully paid-up stock, nothing, in fact, had been paid by either of these parties. They were consequently held liable on the subsequent winding up of the company to pay the amount of this stock so issued to them, and from this decision successive appeals up to this present one have been taken.

The facts are complicated by a $2,000 note which at the time of the purchase of the Oelschlager property Hood signed in favour of Master, which was discounted and the proceeds applied, $1,155 in paying Oelschlager and the balance in carrying on the business after the purchase. It was, however, stipulated by Hood from the first that this $2,000 should be assumed with other liabilities by the new company, and this was afterwards done by the company issuing its note for $4,000, and Hood got back his $2,000 note.

This $2,000 note may therefore be eliminated from the transaction, and when that is done there would not be a dollar paid by Hood either actually or ostensibly towards the purchase of the property.

It was properly admitted by Mr. Aylesworth that this $2,000 did not in any way constitute a payment for the shares issued to Hood, or have anything to do as consideration for these shares.

What was contended was that the purchase of the Oelschlager property by their attorney, Cram, was entirely a personal one by Hood, Snow and Master for themselves, and not for the company, and that they were under no personal fiduciary relationships with regard to the sale of that property to the company, but could do with it as they liked after its purchase, and, having sold it to the company they were justified in taking as and for their own profit the paid-up shares for which they had subscribed, and that the absence of any record in the minutes of the company authorizing the issue of such shares as paid-up shares made no difference if the fact was as they alleged that it was understood and agreed that they should be so issued.

I am quite unable to put this construction upon the Cram power of attorney, or to accept the reasoning of Mr. Aylesworth upon this point.

At the time this power of attorney was given these parties, Hood and Master, had, together with Cram, executed the agreement subscribing for their stock in the proposed company. They were promoters of that company in every sense of the word within the definition of that term as given by Lord Cairns L.C., in *Erlanger* v. *New Sombrero Phosphate Company*(1), at p. 1236. They authorize Cram to purchase the pro-

(1) 3 App. Cas. 1218.

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perty "for the purpose of a joint stock company proposed to be formed by us as provisional directors." They afterwards complete the formation of the company and as provisional directors call upon Cram to assign the property to the company, which he at once does, and which assignment they as provisional directors of the company accept.

I am of opinion that on these facts the appellants under the authorities clearly occupied as promoters a fiduciary position towards the company, and as such could not be permitted to issue to themselves as secret profit paid-up shares of the company, and where they have done so the shares can, in a winding-up proceeding such as this, be treated as unpaid shares. See Chief Justice Strong's judgment *In re Hess Manufacturing Company*(1). See also *In re Olympia Limited*(2), and on appeal to the House of Lords under the title of *Gluckstein* v. *Barnes*(3), especially the observations of Lord Robertson at p. 256.

The law is clear that the consideration which must be paid or given for shares in order that they may be considered paid up and that the holders may not be held liable as contributories in a winding up must be a real, valid and *bonâ fide* consideration in cash or its equivalent actually paid or transferred and that nothing less will suffice. *North-West Electric Co* v. *Walsh*(4); *Ooregum Gold Mining Co.* v. *Roper*(5).

This is sufficient to dispose of the appeal, and if it were not, I desire to say that I fully share the opinion expressed by the Court of Appeal that the oral evidence given to establish an agreement for these shares as paid-up shares in the face of the record of the min-

(1) 23 Can. S.C.R. at p. 659
(2) (1898) 2 Ch. 153.
(3) [1900] A.C. 240.
(4) 29 Can. S.C.R. 33.
(5) (1892) A.C. 125.

utes of the company, which is absolutely silent on the subject, is altogether too vague and unsatisfactory to justify any affirmative holding, even if admissible at all to supplement such minutes.

NESBITT J. (dissenting).—I confess I have been greatly troubled in this case. The question is one solely of fact, and were it not that three courts have found the facts against the appellants, I should have thought the view so ably argued for by Mr. Aylesworth entitled to prevail. At one time I thought the Chief Justice in the court below had taken a wrong view of the effect of the statement that the goods were purchased for the company to be formed, and so gone wrong in the result, but I am satisfied he only viewed it as a circumstance shewing there was no intention to have the stock issued for the consideration of the transfer of the goods, and that the company, as it was originally intended, paid for the goods by note (which subsequently was left unpaid) and assumed the liabilities of Oelschlager Brothers, and that the stock was issued as paid up when in fact no legal consideration was given to the company. Had the company paid the $4,000 note it would have paid for the goods, etc., for which it is now claimed the stock was issued. I concur in the judgment of the Chief Justice of the court below.

Appeal allowed with costs.

Solicitor for the appellants: *R. F. Segsworth.*
Solicitor for the respondent: *James C. Haight.*