THE INTERNATIONAL CASUALTY COMPANY AND HENRY VANHUMMELL (DEFENDANTS).. } APPELLANTS;

AND

J. W. THOMSON (PLAINTIFF) ..... RESPONDENT.

1912
*Nov. 18.
1913
*Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Company—Subscription for treasury stock—Contract—Principal and agent—Misrepresentation—Fraud—Transfer of shares—Rescission—Return of payments—Want of consideration.

V. entered into an agreement to purchase for re-sale the unsold treasury stock of a foreign joint stock company "subscriptions to be made from time to time as sales were made;" it was therein provided that the company should fill all orders for stock received through V. at $15 for each share; that V. should sell the stock for $20 per share; that V. should "pay for the stock so ordered with the proceeds of sales made by him or through his agency," and that the contract should continue in force so long as the company had unsold treasury stock with which to fill such orders. The company also gave V. authority to establish agencies in Canada in connection with its casualty insurance business and to appoint medical examiners there. At the time the company had no licence to carry on the business of insurance in Canada, nor any immediate intention of making arrangements to do so, and V. was an official of the company and was aware of these facts. V. appointed T. the sole medical examiner of the company for Vancouver, B.C., assuring him that the company would commence to carry on its casualty insurance business there within a couple of months, and then obtained from him a subscription for a number of shares of the company's treasury stock which were paid for partly by T.'s cheques, payable to the company, and the balance by a series of promissory notes falling due from month to month following the date of

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

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the subscription and made payable to V. A number of shares equal to those so subscribed for by T. were then transferred to him by V. out of the allotment made to him by the above mentioned agreement, the certificates therefor being obtained by V. in the name of T. from the company, but the company did not formally accept T.'s subscription nor issue any treasury stock to him thereunder. The company did not commence business in Vancouver within the time specified by V. nor did it obtain a licence to carry on the business of insurance in Canada until many months later. In an action by T. against the company and V. to recover back the money he had paid and for the cancellation and return of the notes.

Held, affirming the judgment appealed from (7 D.L.R. 944; 2 West. W.R. 658), Davies and Anglin JJ. dissenting, that, in the transaction which took place, V. was the company's agent; that the company was, consequently, responsible for the deceit practised in procuring the subscription from T.; that there had been no contract for the purchase of treasury stock completed between the company and T.; that the object of T.'s subscription was not satisfied by the transfer of V.'s shares to him, and that he was entitled to recover back the money he had paid and to have the notes returned for cancellation as having been paid over and delivered without consideration and in consequence of the fraudulent representations made by V.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), setting aside the judgment of Murphy J. at the trial, and maintaining the plaintiff's action with costs.

By his action, the plaintiff asked rescission of a contract, made by him, for the purchase of 250 shares of the treasury stock of the company, on the ground of misrepresentations made by the defendant VanHummell, as agent of the company, for the return of moneys paid by him on account of the price of the shares so subscribed for and for the return of certain promissory notes made by him for the amount of the balance of the price of the shares, at $20 each, in order that the said notes might be cancelled as having

(1) 7 D.L.R. 944, 2 West. W.R. 658.

been fraudulently obtained from him and for want of consideration. The action was tried by Mr. Justice Murphy without a jury and, as against the company it was dismissed with costs, judgment was given in favour of the plaintiff as against VanHummell for the return of the moneys paid on account and for the return of the promissory notes and the plaintiff was given costs of his action against VanHummell. By the judgment appealed from, an appeal by VanHummell from the judgment of the trial judge was allowed, without costs, and a cross-appeal by the plaintiff was also allowed and judgment directed to be entered for rescission of the contract and for the return by the company of the moneys paid and for delivery up of the promissory notes with costs of the action and of the cross-appeal.

The circumstances of the case are stated in the head-note and the matters in issue of this appeal are discussed in the judgments now reported.

Anglin K.C. for the appellant company.
D. J. McDougal for the appellant, VanHummell.
Hellmuth K.C. for the respondent.

THE CHIEF JUSTICE.—In this case the plaintiff, now respondent, asks for the rescission of a contract to purchase shares of stock in the appellant company on the ground of misrepresentation.

It was argued that the contract between the respondent and the company was never executed inasmuch as his offer to subscribe for shares in the capital stock of the company was not acted upon. Undoubtedly, Thomson's application purports on its face to be for treasury stock, the property of the company,

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and not for shares which were already allocated to VanHummell. It is equally certain, if we believe the evidence of the president, Ritter, and of VanHummell, that the certificate issued to Thomson was for 250 shares of the stock previously purchased by VanHummell and held by the company subject to his order, and counsel, at the oral argument here, pressed upon us this consideration: that, not having got the shares he applied for, Thomson is now entitled to recover his money back. That, however, is not the case made upon the pleadings and, although there is some evidence to support it, the course of the trial was not directed towards that issue, nor is it discussed in the factum here. I also doubt very much whether Thomson would have refused to accept the shares if he had known of their previous allotment to VanHummell if all the other conditions of the transaction had been faithfully fulfilled.

Dealing with the issues presented to the courts below, I am satisfied that the plaintiff has made out a case which entitled him to succeed.

On the pleadings and evidence two questions fell to be considered and decided. First: Who were the parties to the contract? Secondly: The character of the representations made on behalf of the company and their effect upon the transaction.

Both courts found that VanHummell acted throughout merely as the agent of the company and that the contract respecting the purchase of the shares was made by him for the company and not for himself. This concurrent finding of the two lower courts is supported by the documentary evidence, and VanHummell, when examined as a witness on discovery, admits that the contract was between the company

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and Thomson and that he was merely the agent "in the sale of the shares." The application for the stock is addressed to the company and the two cheques given in part payment are made to its order. The notes for the balance of the purchase price are made payable to the order of VanHummell — why, I do not pause to inquire — they were, apparently, signed after the transaction had been submitted to the head-office. The receipt for the money and notes is also signed in the name of the company.

As to the second question, I have read the evidence over very carefully and, if we believe Thomson, as the trial judge evidently did, I fail to see how we can refuse to grant rescission. Entering into the contract for the purchase of the shares meant the assumption of an obligation to pay $4,250 in monthly instalments, and having, as the trial judge says, been relieved of all his ready cash nothing could be more natural than that Thomson should be concerned about the payment of his notes at maturity. Dependent, apparently, upon his professional income, he relied upon the increase resulting from the new business to meet these notes. In such circumstances he naturally made inquiries as to the probabilities and says that he received from the authorized agent of the company positive assurance that it would be in business by the 1st of November, and in this he is corroborated by Wilmot. On the faith of this assurance he signed the notes and parted with his money. Time and again he repeats that he relied upon the business of the company to increase his revenue so that he might be in a position to meet his notes and he most emphatically states that the agent affirmed the intention of the company to begin business on the first of November. The exist-

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ence or non-existence of that intention is a fact, and, if he signed the application and parted with his cheques and notes on the faith of the statements made with respect to it, his position is the same as if he acted on a representation of the existence of any other fact. See 20 Halsbury, Laws of England, No. 1617.

Both courts below are agreed that VanHummell, to induce the subscription for the stock, made certain statements with respect to the time at which the company would be prepared to start business in Vancouver. The point of difference between them is just this: the trial judge found that the words used amounted merely to a qualified promise, and no more, that the company would be so far organized by the time fixed as to be then in a position to start business, that with this assurance the respondent was content, and that he was not induced to enter into the contract on the faith of what was said about the business beginning in November. The Court of Appeal came to the conclusion that the words manifested and expressed and were intended to manifest and express a then "fixed intention, readiness or capacity on the part of the company" to commence operations on that date, and that the respondent was induced to apply for the shares on the faith of that representation. There is certainly room for much difference of opinion in the appreciation of the language used by the agent, but, on the whole, after giving the evidence the most careful consideration, I have come to the conclusion that VanHummell did not give the respondent a mere promise or undertaking which was not fulfilled, but, being in the position of one who had special knowledge, he deliberately used language calculated to convey the impression that, at the time, there was an

existing fixed intention on the part of the company to begin business on the first of November, and that the respondent was induced to subscribe for the shares on the faith of the representation made with respect to that intention. I am also satisfied on the evidence that such a representation made by one who had intimate knowledge of the then state of the company's affairs was false. The application for the Dominion licence, without which it was impossible to begin business, was not made for a month after the transaction was closed, and the licence did not in fact issue until this suit was brought and more than half the notes had matured. The strongest evidence in support of my conclusion I find in the terms of the bargain, as given by the trial judge, who says, page 120:—

> Evidence is before me, uncontradicted, and I think very probable —that the agent of those shares endeavoured to ascertain how much ready money the doctor had, and then gave him *such terms as would induce him to make* this purchase; that he pointed out to him that doctors in other places made $1,500 to $2,500 from their connection with this company, and *thereby led him to infer that he could expect something, at any rate, for acting in connection with this company enabling him in part at any rate, to meet those notes.*

All the probabilities support this view. As I have already said, the immediate benefit Thomson expected to derive from his connection with the company was to earn money with which to pay his notes as they matured and this he could not do if the company was not in business during their currency. Can it be said, therefore, that the date at which the company would be a source of revenue was not a determining factor or an inducing cause. The appointment as medical examiner was valuable only in so far as it placed him in funds to meet the liability he was induced to assume. Further, although it is exceedingly difficult to prove the presence or absence of an expressed intention, on

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all the facts it appears to me impossible that VanHummell could, in August, have been at all certain if he had taken reasonable care or made reasonable inquiries that the company would have been in possession of the necessary Dominion and provincial licenses to do business in November. If this is merely a case of error it is an error which should have been avoided. The company was then only in the preliminary stages of its organization in so far as the Canadian branch was concerned. The necessary deposit to satisfy the requirements of the "Insurance Act" had to be found out of the sales of stock in Canada and there remained the formalities with respect to the obtaining of the provincial license to be fulfilled. In fact, the licences did not issue until May of the next year. On the whole, I am of opinion that the consent of the respondent was given on the condition that the company would be in business on the first of November, 1910, and the appeal of the company should be dismissed with costs.

On the issue with VanHummell, I agree that this appeal also should be dismissed with costs.

DAVIES J. (dissenting).—I am to deliver the judgment of myself and Mr. Justice Anglin in this case.

In his pleading the plaintiff seeks rescission of a contract for the purchase of 250 shares of the capital stock of the defendant company, on the ground that two definite misrepresentations were made to him by the defendant VanHummell when selling these shares as agent of the company. No other cause of action against the company was disclosed in the pleadings, or suggested at the trial, or on appeal to the Court of Appeal for British Columbia, or in the appellant's factum on his appeal to this court.

The two misrepresentations relied upon were that the plaintiff would be appointed the company's sole resident physician for the City of Vancouver, and that the company would commence and actively carry on business in Vancouver on or before the first day of November, 1910.

As to the former it was established that the plaintiff was appointed the company's physician for Vancouver as had been undertaken; and the claim for rescission, so far as it was based upon that alleged misrepresentation, was abandoned.

The trial proceeded wholly upon the other ground of misrepresentation. The evidence in respect of it was somewhat conflicting. But at the close of the case the trial judge reached the conclusion that it had not been established that the alleged misrepresentation "was unqualifiedly made" and added that he could "not hold that it essentially entered into the inducement" or "was made so clear as to operate on the doctor's mind to induce him to purchase in the sense set out above."

The learned judge, therefore, dismissed the plaintiff's action as against the company.

On appeal the learned Chief Justice, delivering the judgment of the Court of Appeal, said that:—

> In obtaining subscription for stock from the plaintiff it was made part of the arrangement that the plaintiff should be physician of the company and it was represented that the company should commence business at a date set out as the first of November, which representation was not made good. Then we have the evidence of the plaintiff himself that that representation was material to him; that it was of the essence of the contract. The plaintiff is entitled to the rescission.

In both the trial court and the Court of Appeal it was held that, as put by the learned trial judge:—

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The relation that existed between the International Casualty Company and VanHummell was that of principal and agent for the sale of stock. I can put no other interpretation on the documents that were placed before me, and on the history of what happened between them. * * * VanHummell was the agent of the company and if there had been misrepresentation here which would entitle Dr. Thomson to rescission of this contract the company would be bound.

And, as put by the learned Chief Justice on appeal:—

I think it is manifest that the arrangement between the company and VanHummell was only a contrivance between themselves to constitute him agent of the company; and that as such agent any representations made by him were within the apparent scope of that arrangement. He had authority as agent to sell stock.

Neither in the trial court nor in the Court of Appeal was it found that the alleged representation as to the time when the company would commence business was fraudulently made.

On a careful perusal of the evidence the conclusion of the trial judge upon the question of fact as to the character of the statements made in this connection to the plaintiff appears to be correct. It is not possible, in our opinion, to contend successfully that it was made a term or condition of the plaintiff's contract that it should become void if the company did not commence business on or before the 1st of November, 1910. The application for stock is in writing. It contains no provision of this kind. At the time of his application the plaintiff stipulated for his appointment as physician and had this term of his bargain put in writing, with the following provision:—

This agreement to be ratified by the president of the company and if not so ratified, application for stock together with cheques and notes to be returned.

It would be contrary to the elementary rule of evidence which excludes parol testimony of a term varying or altering a written contract to permit the plain-

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tiff to prove that the commencement of business by the company on or before the 1st of November was also a condition subsequent, the non-performance of which would avoid his obligation, to take the stock for which he subscribed.

Regarded as a misrepresentation the alleged statements made by VanHummell as to the commencement of business by the company, in view of the fact that they relate to matters of mere intention, would require to be very clear and positive in order to support the claim for rescission. I agree with the learned trial judge that the onus upon the plaintiff in this connection was very heavy. The mere fact that the stipulation as to his appointment as resident physician and for the cancellation of his subscription, should that appointment not be made, was so carefully reduced to writing, gives rise to serious doubt as to whether there was any definite or unqualified representation as to the time when the company would begin business, and casts still greater doubt upon the position taken by the plaintiff that the representation, if made, was a material inducement for his subscription. The plaintiff admits that he was told the commencement of business would be contingent upon the company's obtaining necessary licences, and he must have known that the issue of these could not be absolutely controlled by it. Taking all the circumstances of the case into account and allowing for the advantage which the learned trial judge had in observing the plaintiff's demeanour when giving his evidence, my conclusion would be that his findings of fact that no unqualified misrepresentation was made and that whatever was said in this connection did not essen-

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tially enter into the inducement for the contract should not have been disturbed.

Assuming, however, for the moment that there was an unqualified misrepresentation by the company's agent and that it did materially induce the contract, inasmuch as it related to a matter of intention and expectation on the part of the company it would not afford a ground for relief by way of rescission, unless it had been clearly established that it was falsely and fraudulently made. *Clydesdale Bank* v. *Paton*(1); Kerr on Fraud (4 ed.), pp. 53-5. This has not been found either by the trial judge or by the Court of Appeal, and I have discovered nothing in the evidence which would justify such a finding, especially at this stage of the proceedings.

We are, therefore, of opinion that the judgment of the Court of Appeal reversing the trial judge on the question of fact and awarding judgment against the defendant company is not sustainable either in fact or in law.

In the course of his argument in this court, however, counsel for the respondent put forward an entirely new ground of claim not disclosed in the pleadings, not taken at the trial or in the Court of Appeal, and not mentioned in his factum on the appeal to this court. He claims judgment for return of the moneys paid by the plaintiff to the company on the ground that while his application was for unallotted treasury stock of the company he was given not such stock, but stock which had been already allotted to the defendant VanHummell and was transferred by him. In the first place, I do not think the plaintiff should be allowed now to set up this new ground of claim.

(1) [1896] A.C. 381, at p. 395.

Had it been raised in the pleadings or even at the trial there might have been more satisfactory evidence than is now before us as to the real nature of the arrangement between VanHummell and the company and as to the character in which he held the 30,000 shares of stock which stood in his name. Notwithstanding the evidence given by the company's president, Ritter, in support of its defence that the plaintiff's contract was with VanHummell and not with the company, to the effect that VanHummell was in fact as well as in name the holder of 30,000 shares, I am by no means satisfied that, had the issue now presented been before the court, other evidence might not have been forthcoming which would have made it clear why VanHummell became the nominal holder of all the company's treasury stock and what were precisely his rights and obligations under his arrangement with the company. The circumstances of this case and particularly the documentary evidence seem to indicate that all the facts are not before us. Moreover, from the examinations for discovery, of VanHummell and of Ritter, the plaintiff was made fully aware of all that he now knows concerning the alleged allotment of the 30,000 shares to VanHummell and of the means taken to satisfy his own application for stock. With that knowledge he deliberately elected to proceed with the branch of his action in which he sought to hold VanHummell liable to him on an alleged agreement to take the stock off his hands and dispose of it. He could only make and enforce such an agreement with VanHummell on the basis that the stock was his to dispose of. At the trial he succeeded in convincing the learned judge who presided that he had made such a bargain with VanHum-

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mell, and obtained a judgment against him for damages for breach of it. Having elected, with full knowledge of the circumstances upon which he now relies in order to recover back his moneys from the company, to proceed with a claim based upon his ownership of the shares which he obtained, he should not, in my opinion, be now allowed to take the stand that he never became owner of these shares and is entitled to a rescission of his contract because they were not what he had bargained for.

But if, notwithstanding these objections, the plaintiff should be allowed now to set up this new ground of claim, in my opinion he cannot succeed upon it. As pointed out by the learned trial judge, the documentary evidence makes it reasonably clear that VanHummell had no beneficial interest in or ownership of the 30,000 shares which stood in his name. He held them merely as agent of and trustee for the company. Concurrently with his subscription, an agreement was made between him and the company which recites that

> the said Casualty Company is desirous of disposing of its unsold treasury stock within the shortest possible time,

and that VanHummell had agreed to subscribe for and purchase the unsold stock of the company for the purpose of resale, said subscriptions to be made from time to time as sales are made. The agreement then provides:—

> (1) That the said Casualty Company so long as it has unsold treasury stock shall fill all orders for stock received by or through said VanHummell at the agreed price of $15 per share, said stock to be sold at $20 per share;
>
> (2) That the said VanHummell is to pay for the stock so ordered with the proceeds of sales made by him or by his agency * * *
>
> (3) That this contract is to continue in full force and effect so

long as the said company has unsold treasury stock with which to fill the orders presented by the said second party (VanHummell) or his agents.

The certificate issued to VanHummell was in a special form and certified him to be the owner of 30,000 shares "subject to payment in cash." As pointed out by the learned trial judge there is no covenant by VanHummell to pay for the shares. The agreement is made upon the basis that, although the 30,000 shares put in VanHummell's name constituted its entire unsold stock, the company would still have unsold stock. It provides that out of its unsold stock the company will fill orders for stock received by or through VanHummell and it is only for such stock as he sells for the company that he agrees to pay anything to it. The price at which he is to dispose of the stock is fixed. The certificate issued makes his ownership conditional on payment. The obvious purpose of the transaction was, for some undisclosed reason, to place the company's treasury stock in the name of VanHummell, and to have him dispose of so much of it as he could as the company's agent. The company undertook to honour his orders for shares out of those so held by him and it was understood that it would take off his hands whatever might not be sold, under the provision enabling it to forfeit for non-payment at the end of a year. This was in fact done. Upon the incomplete evidence before us it is sufficiently clear that this was the substance of the arrangement between the company and VanHummell. However irregular the transaction may have been, and although, as between himself and the company's creditors on liquidation, VanHummell might be held to be a contributory in respect of the entire 30,000 shares, as between him

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and the company, it seems impossible to escape the conclusion that he had no beneficial interest in the stock, that he could neither be compelled to pay for, nor could he insist on holding as his own, any of the shares which he had not sold. Under these circumstances, while the shares which the plaintiff received may have been nominally VanHummell's, they were in reality and in substance the company's treasury stock. If, therefore, the plaintiff should be allowed now to put forward the new ground of claim devised by the ingenuity of counsel representing him in this court, possibly because he regarded the grounds on which the action was launched as of very doubtful value, he should not, in my opinion, succeed upon it. He has got in substance that which he contracted for and he should not be allowed to recover back what he paid for it.

I would for these reasons allow this appeal with costs in this court and in the Court of Appeal and would restore the judgment of the learned trial judge in so far as it dismissed this action as against the defendant company with costs.

IDINGTON J.—Notwithstanding the many legal questions argued, I think if we can find, as the Court of Appeal did, that in fact there was a representation made to respondent at or before the time of his making the application for stock, to which I will presently refer at length, that the appellant company would by first of November following have begun business in Vancouver, the problems involved are not difficult of solution.

The company was incorporated in 1909 in the State of Washington for the purpose, as its name indi-

cates, of engaging in the business of casualty insurance.

On the solicitation of appellant, VanHummell, whose relations to the company will presently appear, the respondent made in writing on the 26th of August, 1910, an application to the company for two hundred and fifty shares of its capital stock.

The making of this application appears in said writing as follows:—

> Said stock being of the par value of ten dollars ($10.00) per share. I agree to pay the sum of twenty dollars ($20.00) per share for said stock, it being understood and agreed that the excess amount over and above the par value thereof is to be used for the purpose of securing subscriptions and perfecting the organization of said company, and for the creation of a surplus. Payable on demand.
>
> All amounts must be paid by check, draft or money order made payable to the company.

At the same time he got a letter addressed to him as follows:—

> Dear Sir,
>
> The International Casualty Company of Spokane, in consideration of your subscription for $5,000.00 of the Capital Stock of said Company, does hereby appoint you (said Dr. J. W. Thomson) the company's sole resident physician for the City of Vancouver.
>
> This agreement to be ratified by the President of the Company, and if not so ratified your application for stock, together with checks and notes to be returned to you.
>
> H. VANHUMMELL,
> For International Casualty Co.

He gave them, at same meeting as he thinks (but later according to VanHummell), two cheques together amounting to $750 payable to the company and twenty notes, each, except the last, for two hundred dollars, and the last for two hundred and fifty dollars, made payable in twenty successive monthly payments to VanHummell or order. He got therefor the following receipt:—

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INTERNATIONAL CASUALTY COMPANY,
Spokane, Washington.
Capital Stock, $1,000,000.00.

RECEIVED of J. W. Thomson Five thousand cash, and notes * * * Dollars in full payment for 250 shares of the Capital Stock of the International Casualty Company of Spokane, Washington.

INTERNATIONAL CASUALTY CO.,
Per H. VanHummell.

$5,000.00.

In evidence he speaks as follows:—

Mr. Deacon: Q. Whose shares were you buying?

A.—I understood it was treasury stock of the International Casualty Company, the receipt was signed——

Q.—On what ground did you understand that?

A.—I understood from VanHummell he was the agent selling stock for the company, and I asked him what authority he had to sell stock for the company, and he told me he was vice-president of the company, and, as near as I can remember, he shewed me a letter authorizing him to sell stock for the company.

Court: Did he tell you he was selling stock for the company?

A.—Yes, sir, and the receipt I received was a printed form, signed by the International Casualty Company, per VanHummell.

* * * * *

Mr. Deacon: Q.—You didn't know that they were VanHummell's shares?

A.—I heard nothing to that effect whatever.

The argument is put forward, notwithstanding said documents, that the transaction was one between VanHummell and the respondent in respect of shares which had been allotted by the company to VanHummell by what he calls an underwriting agreement.

He, however, with commendable frankness, in his examination for discovery, states the matter thus:—

Q.—Now you see this receipt is signed by the International Casualty Company. Did you tell Dr. Thomson that they were your own shares that you were selling him?

A.—No.

* * * * *

Q.—What did you tell him about the shares?

A.—Nothing at all, as to whose or what shares they were.

Q.—You gave him a receipt signed by the International Casualty Company per H. VanHummell?

A.—As agent.

Q.—There is no mention of agent on this receipt?

A.—That was what he understood and what I understood.

Q. That you were signing as agent for the company?

A.—Yes.

Q.—Was anything said in the course of the conversation which would lead him to believe that the shares which you were selling him were your own?

A.—No; nothing at all.

Q.—So he had no reason whatever to believe that the shares were not the treasury shares of the company?

A.—I cannot say what he thought or understood about the matter because there was no discussion regarding that point.

Q.—Had he any reason that you know of to suspect that these shares were not the treasury shares of the company?

A.—None that I know of.

He repeats this in substance in his examination taken under commission.

The above nomination of respondent by VanHummell was sent to the head-office of the company in Spokane and returned with the written approval of the president of the company signed by him at the foot thereof.

Curiously enough neither VanHummell nor respondent are very positive as to when or how it was returned. The former seems to think it came back to him before he got the cheques or notes above referred to. The latter thinks it came to him by mail.

If, as seems quite probable from the care respondent took to make sure of his appointment as the basis of his whole dealing, VanHummell is right, then the circumstance of the notes being made payable to him is easily explained, if, indeed, needing any explanation.

The company set up in its defence that it had, in short, nothing to do with the transactions beyond appointing respondent as its local physician; that the stock was VanHummell's and the transaction his own.

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This has been in fact its attitude throughout, though not distinctly pleaded affirmatively. Its denial of plaintiff's (now respondent's) statement of claim enabled it to make such contention. The effort to make the transaction wear that appearance and to carry it out in ways inconsistent with the documents, do not agree very well with what straightforward dealing required.

The truth seems accurately stated in the above evidence of both those who ought to know; the written parts of the agreement in question here bear that out; the cheques of respondent pursuant thereto were made payable to the company and received by it; and the agreement between the company and VanHummell, relied upon to displace all that, was hidden from the respondent and was nothing more or less than a round-about method of constituting him the agent of the company and giving him such terms of commission as it could not well do to a mere purchaser.

The power thus given was capable of great abuse and if the company adopted that method of creating agents so that it might be in a position to repudiate them and their acts, when leading to inconvenient results, it may as well understand such notions cannot avail anything herein.

The notes given in this case by respondent to VanHummell ought, in light of the foregoing, to have gone directly to the company as, no doubt, was intended by respondent, though a different purpose may have been in the minds of the company's officers.

VanHummell explains that in some other cases this was in truth what was done with such notes. I infer it was well understood between him and the

company that either of them might use them and discount them as occasion and opportunity might best promote the interests of the company, so long as it got three-fourths and VanHummell one-fourth of the proceeds.

I, however, suspect there was another purpose possibly arising from a necessity to shew cash subscriptions instead of notes as a payment for shares.

An improper use of the company's shares was thus possible and in this case was the direct result of the methods of doing business which the company thus adopted.

The respondent's notes were used by VanHummell at the bank to obtain the money wherewith to pay the company for its shares taken out of VanHummell's allotment instead of from the treasury and issued as if for the respondent and then put up as collateral security at the bank along with the same notes that represented their purchase from the company.

These were acts which the company could not, I imagine, do directly, and unless duly provided for by its charter powers, which is improbable, were improper methods.

All these contrivances for whatever purpose were, if not *ultra vires* the company, at least beyond the scope and purpose of the plain contract entered into between the company and respondent, which was clearly intended to have been the foundation for a purchase from it of its treasury stock and to have remained executory instead of being apparently executed in ignorance of respondent and to his detriment in the way it was.

The company must herein be treated as owner of these notes and in all else as if the agreement had

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proceeded in the regular way it manifestly was intended should have been done.

I have no difficulty, therefore, in holding, as did the Court of Appeal, that the transaction was between the company and respondent, and I have no further difficulty in holding that the company, under the circumstances, is bound by any material representations or misrepresentations made by VanHummell in the course of the negotiations inducing respondent to enter into the contract, and it must answer for the legal consequences thereof.

Any difficulty in the case seems to have arisen from the gravity in form of the charges of misrepresentation, so called, inducing the contract.

It seems to me as if the learned trial judge was so oppressed by the nature of the charges that he shrank from believing and finding as fact that the representations had been made as sworn to by the respondent and another witness, yet seems to have no hesitation in believing the same two witnesses as against VanHummell regarding the agreement for cancellation or the taking back by VanHummell of the shares.

In this latter instance he finds corroboration in the circumstances.

With great respect it seems to me that those same circumstances he relies upon reflect as strong light upon and give as much strength to the first contention set up by the respondent as to this found in his favour by the learned judge. And added thereto in support of said first contention, which is the real matter in dispute herein, are the peculiar circumstances I am about to advert to.

The respondent says, and is corroborated by Mr. Wilmot, his witness (and both are reported by the

learned trial judge as appearing credible) that, at the bargain which the above-mentioned documents set forth, it was distinctly stated that the company would likely be ready for business in Vancouver by the first of October, but absolutely sure to begin by the first of November, 1910.

I see nothing improbable in supposing such a statement might be made by VanHummell. And if made I see no reason why the company should not be bound by it when a determination has to be reached relative to the said contract and the inducements leading thereto and the bearing of statement thereon, either as representation or as misrepresentation, has to be considered.

On the contrary, it seems, from the nature of the business in hand, the terms made relative to the payments, and the facts (which all agree were mentioned), as to some doctors elsewhere earning $1,500 to $2,500 a year from such positions as the respondent was bargaining for, to be inherently a thing one should expect to be discussed, just as respondent and Wilmot say it was discussed.

I agree, therefore, with the Court of Appeal in accepting the version of the respondent, and any uncertainty I have is as to whether or not the representation I so find to have been made should be classed as a misrepresentation as the learned trial judge thought, if in fact made and found untrue, it should be held, or as a condition of the contract. It may well have been both. It clearly was a very material part of the consideration inducing respondent to act and being so I do not think we need go further.

I really cannot say that it makes much practical difference which view is taken. Neither the company

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nor VanHummell were as careful to shew respondent all they meant, or as artless as they might have been.

Yet a perusal of VanHummell's evidence does not impress me unfavourably as to his veracity, though I am holding he is in error in his recollection and the respondent right.

It is not, perhaps, a case of gross fraud or deceit. It is rather a case of undue want of care in making the statement.

No reasonable man could well suppose that negotiations for a license begun in July should not end successfully by the first of November, if properly pressed. The thing seemed so probable that VanHummell was likely to assert as certainty if asked. At the same time he should have been able to shew on what ground he founded his belief if he wanted to escape the suspicion of misrepresentation. His single answer is he never said so. I prefer to accept respondent's version corroborated as it is.

I think he and the company were called on by the *primâ facie* case made to shew they had, and how they had, been misled after taking due care to make such representations, or abide by the legal result flowing from a misrepresentation whether wilful or looked upon as recklessly made.

But passing that I think it must be taken, as between the parties now in issue in this appeal, as a condition of the contract, and clearly in any case a material part of the consideration inducing it, and entitling respondent to rescission of the contract in the executory condition it is found when stripped of the false appearances already shewn it is made to wear by means of improper contrivances.

One objection is that it is not in the written con-

tract, and, therefore, is not credible. I do not think this can avail the appellant under the circumstances.

The other is that it is a variation of the written contract. I do not think so. It varied nothing. The contract was not necessarily all in writing, nor did it pretend to be so. Under the circumstances an oral term or condition not contradictory or varying that written might be shewn to exist or to have been a material inducement as part of the consideration.

I, moreover, think there always was in this peculiar contract an implication that the business should be carried on within a reasonable time at least, and this verbal part of the contract may be well held good for fixing as between the parties what might be termed reasonable.

Suppose the company after assenting to this contract had decided never to enter the field of business contemplated, could it be said it might yet hold the respondent bound ?

I do not think so. It seems impossible to believe that such a defiance of the clear understanding in writing upon which the parties proceeded could be so tolerated in law.

It is clear to my mind that the respondent had a right when this suit was entered, in April, 1911, to have treated the reasonable time allowed even by implication as ended, unless some better reason shewn than the appellants have suggested.

And in proof there has been nothing offered to justify the delay. Glittering generalities can hardly be permitted to take the place of substantial details of fact to enable a court to judge for itself.

There is a curious piece of evidence not observed,

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or at all events remarked upon, at the argument. It is as follows:—

He then made the excuse that there was certain red tape, in regard to the State Insurance Commission that had to be gone through with, that he was not aware of when he promised the return of the cash and notes. He said that that sometimes took as long as 30 days and as soon as the red tape was gone through with, the money and notes would be returned to me.

The company's president offered no explanation of this in his evidence given later, yet it seems to me suggestive of a great many things that lay in the path of getting licenses issued. Did the very method I have adverted to find a rebuke and form a difficulty? He does in effect testify the company could not traffic in its own stock.

The time for earning money by virtue of the contract which the respondent had a right to expect had been so long passed as to render it inequitable to hold him longer in suspense, especially seeing the terms of payment on his part had been, in a measure, made to be met by part of such earnings.

I think the appeal of the company should be dismissed with costs.

The action was dismissed by the Court of Appeal as against VanHummell. Respondent has acquiesced in that judgment and thus there can be nothing involved in VanHummell's appeal but a question of costs.

This court has repeatedly refused to hear any appeal involving only a question of costs.

Schlomann v. *Dowker*(1) seems exactly in point, even if we have jurisdiction. *Moir* v. *Village of Huntingdon*(2) is likewise. There the court said:—

The court will not entertain an appeal from any judgment for the purpose of deciding a mere question of costs.

(1) 30 Can. S.C.R. 323. (2) 19 Can. S.C.R. 363.

No authority has been cited to the contrary. It is suggested that by reason of a recent statute requiring in the Court of Appeal that costs of appeal should, except in specified cases of which this is not one, follow the event, therefore, the appellant has been improperly deprived of a statutory right. That can create no new right of appeal here. Besides there is nothing to shew that the statute in question was brought to the notice of the Court of Appeal and that thus an exceptional case has arisen to which it might not be proper to apply the settled jurisprudence of the court even where an appeal might lie, but has by virtue of such jurisprudence been denied a hearing.

Then, if the appeal had to be considered on its merits and we had to determine what the proper judgment was in the court below as basis of an inference, I should say that the court below erred in dismissing the action as against VanHummell. The very cases cited in that regard here and below, if closely examined and applied to the peculiar facts herein, should lead to the conclusion that he was improvidently dismissed.

It was assumed below that, unless VanHummell was guilty of deliberate misrepresentation, he was not a necessary party and hence entitled to be dismissed. He was, unless previously instructed by the company to do so in such cases, guilty of most reprehensible conduct in suppressing the respondent's application instead of filing it with the company and thus inducing the company to act as if the application had never existed and to found its issue of shares to respondent on the hidden contract between him (VanHummell) and the company instead of on this respondent's said application. Even if this was done with the conniv-

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ance of the company it was as regards the respondent an improper thing for him to have done.

He took to himself notes which clearly ought to have been taken to the company, and concealed the true situation from respondent. He then used these notes as if his own property and has them yet or subject to his redemption of them from his hypothecation of them so far as unpaid and for that apparent reason if no other as well as foregoing reasons was a proper party and ought to have been held jointly answerable for the surrender of the respondent's notes or due cancellation of same and return of the moneys paid by him.

The inference is clear from full consideration of all the facts that the company and VanHummell jointly entered upon a course of dealing that should never have been used towards the respondent.

I have found his evidence so clearly fastening agency for all he did upon the company that I have had no difficulty in holding it liable, but that is no reason for excusing the appellant VanHummell, or holding he was entitled to be dismissed and hence entitled as of right to his costs either preceding the appeal to the Court of Appeal or costs of such appeal.

I think he was not entitled to either, and what I have said must answer as my reasons in case the appeal were founded independently of the statute on the rule as to just cause in respect of costs.

I may refer to section 53 of the "Supreme Court Act" as sufficient ground besides, or independently of all I have said, for dismissing this appeal and depriving appellant of his costs below and giving costs of his appeal here against him.

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DUFF J.—This is an appeal from the judgment of the Court of Appeal for British Columbia in an action brought by the respondent, Thomson, for the recovery back of certain sums of money and the cancellation of certain promissory notes paid and given by the respondent to the appellant, VanHummell, (as the proposed purchased price of certain shares in the capital stock of the appellant company upon an application by the respondent to the company for such shares) in which the Court of Appeal held that the respondent was entitled to succeed. I think the appeal ought to be dismissed; first, upon the short ground that the plaintiff's offer to purchase shares (which was an offer to the company and was intended by the plaintiff to form the basis of a contract between him and the company) was never accepted and that no such contractual relation as that contemplated was ever established. The moneys in question and the promissory notes having been received by the appellant, VanHummell, who was the company's agent to receive the same for a purpose which has entirely failed, the plaintiff is entitled to recover them back.

The first point is that no contract was ever concluded between the plaintiff and the company. That fact is undisputed. It was the ground upon which the company mainly based its defence at the trial. On that fact they relied in the Court of Appeal (as the judgment of the Chief Justice shews) and in this court Mr. Anglin, who appeared on behalf of the company, took the same position both orally and in his factum.

The contract was not a contract between the company and the plaintiff but between VanHummell and the plaintiff.

The contract was not between the plaintiff and the company but

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between the plaintiff and VanHummell personally. Whatever may have been the conception of the parties or any of them in this connection the facts appear to be that VanHummell sold for himself shares which he had bought or had a right to buy from the company.

I shall presently discuss the question whether the contention that the plaintiff entered into a contract with VanHummell can be sustained. In the meantime I am emphasizing the point that, at the trial and every subsequent stage of the litigation, the company has deliberately taken the position that it never entered into a contract with Thomson in respect of the sale or allotment of any of its shares and never gave VanHummell any authority to enter into any such contract on its behalf.

It was in May, 1911, that the company entered into its arrangement with VanHummell. The company desired to sell its unsold shares. An agreement was made with VanHummell in which it was recited that VanHummell had

> agreed to subscribe for and purchase the unsold stock of the company for the purpose of re-sale, said subscriptions to be made from time to time as sales are made.

The subscription price was fixed at $15 per share and it was provided that VanHummell should sell the shares at $20 per share. Pursuant to this agreement, on the same day, VanHummell applied to the company to have allotted to him 30,000 shares at the price of $15 per share. That application, as was stated by Ritter, the president of the company, in his evidence given on discovery, was accepted by the company and the shares applied for were allotted to VanHummell. They were allotted, however, subject to the condition expressed in a special share certificate which is in evidence, bearing the same date as the application, that

none of the shares comprised in the allotment should be transferable except on the payment of the subscription price of $15 per share. The plan of the company is plainly disclosed by these documents and the oral evidence. The intention was that the company should not enter into contractual relations with the ultimate purchasers of the shares. VanHummell was to sell shares allotted to him pursuant to his agreement with the company and he was to sell them at the price of $20 per share. This sum of $20 per share was not intended to pass through VanHummell's hands as agent of the company, but as the seller of shares which either belonged to him or which he was entitled to have allotted to him on his own account. From the point of view of the company VanHummell was to be the subscriber and the only subscriber. What the object of the company was in proceeding by this method is not expressly stated: but that this was the nature of the arrangement as the company intended it to go into effect is not open to dispute. As between the company and VanHummell this design was strictly carried out. It is stated both by Ritter and by VanHummell, whose evidence was put in by the company, that all shares sold by VanHummell were transferred at his request from shares which had already been allotted to him under the terms of this agreement with the company. It is stated by both of them that the practice was for VanHummell to pay the company for shares so transferred, but looking in turn for personal reimbursement to the persons to whom he had sold them. This course was observed in the transaction with the plaintiff. VanHummell applied to have the requisite number of shares transferred to Thomson from those standing in his name under the allotment

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already referred to, and he paid for them in full at the subscription price of $15 per share, and the shares were accordingly transferred. The company, according to Ritter's evidence, had no further concern in the matter. VanHummell's recourse was against Thomson and against him alone.

The understanding between the company and VanHummell then was perfectly clear and precise, that VanHummell, while representing himself as the company's agent to take subscriptions for shares, was to transfer to subscribers shares that had been already allotted to him under his own subscription contract. But the transaction, as it presented itself to the ultimate purchaser with whom VanHummell was dealing, wore a very different aspect. To him VanHummell represented himself as the agent of the company to receive subscriptions addressed to the company and to receive also on behalf of the company the subscription price of $20 a share. To the subscriber dealing with VanHummell the form of subscription placed before him was not merely an application to the company for shares, but an application setting forth the terms of what, if the proposal should be accepted by the company, would become a contract between him and the company in relation to the disposition by the company of the subscriber's contribution to the company's capital. One of the terms of the application is as follows:—

> I agree to pay the sum of $20 per share for the said stock, it being understood and agreed that the excess amount over and above the par value thereof is to be used for the purpose of securing subscriptions and perfecting the organization of the said company and for the creation of a surplus.

The contract proposed by the subscriber was, in a word, to involve the obligation on the part of the com-

pany to carry out this undertaking. The subscriber having placed this proposal in the hands of VanHummell, together with the amount he had agreed to pay, afterwards received a share certificate which he regarded as an acceptance of this proposal. The respondent's proposal was never presented to anybody who had authority in fact on behalf of the company to accept it. Nobody had authority in fact to enter into such a contract on behalf of the company with Thomson. The sum of $20 per share paid by Thomson according to his belief into the coffers of the company was never intended by the company to pass through the hands of anybody who should be accountable for it as an officer of the company; and it was of the essence of the company's plan that, while VanHummell represented himself as the company's agent to obtain subscriptions, the company itself should not enter into any agreement which would make it accountable for the disbursement of the subscription price to any purchaser of shares under a subscription contract.

In fact, then, there was no contract between the plaintiff and the company. It does not follow, of course, that the plaintiff might not have been in a position to shew that the company was estopped from denying the existence of such a contract. But that does not prevent the plaintiff himself from setting up the true facts if he chooses to rely upon the facts.

The respondent is entitled to say "you permitted VanHummell to represent himself as your agent to receive on your behalf proposals for contracts to be entered into with you together with moneys payable to you by the terms of those proposals. I acted on the belief that he was your agent in fact for those pur-

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poses. When I seek to hold you responsible for the representations upon the faith of which my subscription was given, you declare that my proposal was never in fact accepted by you, that you never had any intention of accepting it, and that you have no contract in fact with me." He is entitled to say that, and he is entitled on discovery of these facts to insist that the moneys and securities which were handed to VanHummell for a particular purpose, and which pursuant to the arrangement between VanHummell and the company had been applied to another purpose should be restored to him. There are two points which perhaps call for some observation. The first point is this: It may be suggested that in substance the plaintiff has got what he expected to get. That, in a word, it was immaterial to him whether a contract was or was not in fact formed between him and the company, so long as he got shares in the International Casualty Company, and, as might perhaps be added, so long as the company by its conduct was estopped from denying that it had entered into such a contract. I do not think there is any substance in this. The evidence demonstrates and the company by its officials and its counsel in effect avow, that the persons having the charge of the company's affairs concocted this scheme with VanHummell which I have described, one object of which certainly was to conceal from persons applying for shares the fact that out of the sum of $20 per share which they believed themselves to be paying into the coffers of the company and for the application of which the company was directly contracting with them, 25% was to be intercepted before any part of it reached the hands of the company; and that this part of the subscription price was not to

pass into the hands of any officer of the company who should be accountable for it as such. It was, I say, obviously, in part at all events, to conceal this state of facts from the subscribers that this scheme was designed. It involved, of course, deception. It was, in plain words, a fraud upon the subscribers. And it will not do for those who conceived and carried out that fraud to escape the consequences of it by saying "now you have found us out, the law will compel us to give effect to the transaction according to your conception of it." Or, in other words, "we elect to be bound by the transaction as you conceived it." The authors of such a fraud are not entitled to any such privilege.

The other point is this:—It is now suggested that this ground upon which I think the plaintiff was entitled to proceed was not put forward at the trial, and the plaintiff ought not to be permitted now to rely upon it. This also appears to be without substance. The plaintiff has a judgment in his favour and if the record discloses grounds upon which that judgment can justly be supported it is our duty to give effect to them even although those grounds were not relied upon at any stage of the proceedings in the courts below. The judgment, of course, could not be justly supported upon grounds relied on for the first time in this court if there were any danger of this court being led into a mistaken conclusion by reason of not being informed of all the relevant facts, but in the absence of any such danger it would be the merest pedantry to reverse a judgment, which according to the record is the judgment that ought to have been pronounced by the court below, merely because counsel for the party who has succeeded did not in the court

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below put his case in the strongest way. I have already pointed out that all the facts necessary to form a complete foundation for the plaintiff's title to relief upon the ground I have stated have either been deliberately put forward by the company as a part of its case or are proved irresistibly. It is a mistake, however, to suppose that this point was not taken in the court below. The plaintiff made it a part of his case both in the cross-examination of VanHummell and in the examination of Thomson to shew that VanHummell represented to Thomson that the shares with which VanHummell was dealing were "treasury" shares. The observations of the learned trial judge indicated that the bearing of this evidence was present to his mind and I see no reason to believe that the effect of it was not dwelt on both at the trial and in the Court of Appeal.

This would be a sufficient ground for dismissing the appeal. There is, however, another ground on which the respondent based his claim to relief and upon which I think he is entitled to succeed. The respondent alleges that for the purpose of procuring his subscription VanHummell, on the day on which the subscription was given as well as before that, told him in answer to his inquiry that the appellant company would probably commence business before the 1st of October, and that it would certainly commence business before the 1st of November. The company did not in point of fact commence business until the 1st of June in the following year; and if this statement of VanHummell's was made with the object of inducing the respondent to subscribe for shares by creating in Thomson's mind a belief that such was VanHummell's real opinion based upon his know-

ledge as an officer of the company, and if such a belief was thereby created and operated as a material inducement in bringing about Thomson's decision to subscribe, and if in fact VanHummell did not believe that the company would commence business as early as the 1st of November, or if he had no opinion or belief on the subject, that is to say, no real belief, then there can be no doubt the respondent is entitled to recover back the notes and money delivered and paid to VanHummell. The first question is: Did VanHummell tell the respondent that the company would certainly commence business not later than the 1st of November in Vancouver? On this point the evidence of the respondent and one Wilmot is explicit. That evidence was accepted by the Court of Appeal. I do not understand the learned trial judge to have any doubt upon the point that the statement was made as reported by the respondent; but he thinks the effect of the statement was qualified by the further statement that it would be necessary to obtain a licence from the Insurance Department in Ottawa and that the statement was subject to the condition that such licence should be obtained before the date mentioned. It is quite true, of course, that this statement of VanHummell's was a statement as to something which was to happen in the future, and that being so, the respondent must have understood VanHummell to be only giving an opinion which might be falsified in the event. But I see no reason to doubt that the respondent was entitled to regard it, and did regard it, as a positive assurance by VanHummell, who represented himself to be the vice-president of the company, that the necessary licence would be procured and the company established in Vancouver and in

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operation before the 1st of November. Then: Was the assurance given with the object of inducing the respondent to subscribe for shares? About that there is little room for doubt. As the learned trial judge mentions, there is uncontradicted evidence and there seems no reason for disbelieving it, shewing that VanHummell proceeded first to ascertain how much ready money the respondent had and then proceeded to arrange the transaction upon terms likely to induce the respondent to subscribe. But the main inducement was that the respondent, who had been for a comparatively short time practising his profession in Vancouver, was to be appointed the resident physician of the company. As VanHummell says he urged upon the respondent the advantage of such a connection, and as the respondent says, no doubt truly, the terms of payment were so arranged as to give some prospect that the instalments of the subscription price could be made from time to time out of fees earned through his connection with the company. The date at which the company should commence actively to carry on business in Vancouver was, therefore, of the very first importance and the object of the assurance is perfectly clear. Then: Was this assurance a material inducement in bringing the mind of the respondent to assent to VanHummell's proposal? I think there is no room for doubt that it was. There can be no doubt that the main inducement operating on the mind of the respondent was the undertaking given to him to appoint him a resident physician of the company. The virtue of that undertaking, of course, rested in the assumption that the company was to carry on business in Vancouver actively, and that the judgment of the respondent should not have been influenced by the probable date

when active business was to commence is a supposition most difficult to accept. Having regard to the terms of payment of the subscription price one might almost consider it impossible to suppose that it would not be a most material consideration. The evidence of Thomson is explicit to the effect that the assurance did operate on his mind as one of the principal inducements and the learned judge appears to accept the statement of Thomson and the witness Wilmot that, at an interview which took place in October between Thomson and VanHummell at which Wilmot was present, Thomson charged VanHummell with having misled him with respect to the date on which it was expected that the company was to commence business. The learned trial judge seems to say that at that time the respondent honestly believed he had been so misled. That, of course, is strong corroboration of the respondent's statement that he was misled. The view of the learned trial judge appears to be that because the respondent did not insist upon this arrangement being inserted in the written contract between him and the company is conclusive against him on the question as to whether it operated on his mind as the "essential" inducement. If the assurance was relied upon as a condition or warranty I think the learned judge's reasoning would be unanswerable to say nothing of difficulties in point of law which such a contention would raise. But, if the assurance involved a fraudulent representation as to the state of VanHummell's opinion on the point, then it is sufficient that that representation should have been one of the inducements affecting Thomson's mind; and I think VanHummell succeeded in his purpose of producing in the mind of the respondent such a degree of certainty that the company's business would be in

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operation in Vancouver within the two months at the very most, that it never occurred to him to ask for anything in the nature of a written undertaking upon the subject. Consider the situation. When the respondent having finally decided to take shares in the company comes to sign his application and give his cheque he is presented with a formal appointment in writing as resident physician in Vancouver and he insists on having that confirmed by the president of the company as a condition of his subscription. Can it be supposed, if the possibility had suggested itself to his mind of the company not commencing business for nine months, that he would have gone on with the transaction in the form in which he actually did enter into it? I think it is impossible to suppose he would.

The last point is: Were these assurances fraudulent? I think the evidence justifies the conclusion that VanHummell knew he was not in a position to form any belief or opinion upon the point as to when the company would be ready to start business in Vancouver of such a character as could reasonably be regarded as forming a ground for action in any matter of business. As to the probability of the company commencing business in Vancouver as early as the 1st of November, he either did not believe that it would be in a position to do so or he had no actual belief or opinion upon the point at all. That is shewn very clearly by his own evidence. VanHummell, indeed, does not deny that he had no ground whatever for making any such statement as that attributed to him. His defence is that he did not make the statement. Unfortunately there is too much reason to think that on other points also he was not unwilling to deceive the respondent in order to induce him to become a subscriber. The respondent, for example,

says he told him he was vice-president of the company, which was untrue. The respondent also says that VanHummell stated the shares were "treasury" shares. VanHummell admits that he regarded these shares as his own, but denies he made the statement. With regard to all these matters he was given to understand in the clearest way on examination for discovery that his honesty would be attacked. Yet he does not appear at the trial and there is no explanation of his absence. The defence relied upon at the trial by the company in itself involved a grave imputation against the good faith of VanHummell. The defence was, as I have pointed out already, that VanHummell had no authority to act as the agent of the company in the sale of its shares, and that he represented himself as the company's agent is indisputable. At the time of the trial when this defence was set up VanHummell was vice-president of the company; and in face of all this he does not appear at the trial in person. All these circumstances, I think, powerfully supported the inference that VanHummell and the company had few scruples, if any, respecting the means they adopted in order to procure subscriptions.

I should dismiss the appeal with costs.

ANGLIN J. (dissenting) agreed with Davies J.

Appeal dismissed with costs as to The International Casualty Co. and without costs as to VanHummell.

Solicitors for the appellants: *McDougal & Long.*
Solicitors for the respondent: *Deacon, Deacon & Wilson.*