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No. 18 of 1951.

UNIVERSITY OF LONDON  
W.C.I.

-9 JUL 1953

INSTITUTE FOR ADVANCED  
LEGAL STUDIES

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

JAMES JOSEPH GRAY (Defendant) - - - - *Appellant*

AND

NEW AUGARITA PORCUPINE MINES LIMITED  
(Plaintiff) - - - - - *Respondent.*

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## Case for Respondent.

RECORD.

1. This is an appeal from the judgment of the Court of Appeal for Ontario dated the 3rd day of March, 1950, whereby such Court of Appeal varied in minor respects the judgment of the trial judge, the Honourable Mr. Justice McFarland delivered on the 15th day of October, 1949, after a trial on the 6th to 17th days of October, 1947, at the sittings of the Court held at Toronto for the trial of actions without a jury. The trial judge held that the defendant was a director of the plaintiff company, was Vice-President thereof over the relevant period of 5½ years, and also acted as solicitor for the company during such period and had full control of its books and records and assumed charge of its affairs generally, the business being operated from his own law office situate in the City of Toronto. The trial judge then recited the charges by the plaintiff company that the defendant wrongfully and fraudulently conspired to deprive his company of certain shares and of monies, and that through his actions the business of the company was conducted in a faulty and deceptive manner and that the minutes were false and from time to time were altered by or by direction of the defendant to assist him in defrauding the company. He further held that other fraudulent conduct on the part of the defendant as alleged consisted of irregularities in connection with bank statements, books of account, etc., and that the defendant wrongfully had shares of the company issued to himself. He further held that the transactions of 9th December, 1941, being an alleged meeting of the directors of the plaintiff company held on that date, did not in fact or in law constitute a final settlement of the claims of the plaintiff, and directed the entry of judgment accordingly compelling the defendant to account to the plaintiff for all transactions either concerning money or shares of stock during the time that the defendant purported to act as an officer, director and solicitor

Vol. I, p. 333.

Vol. I, p. 327.

Vol. I, p. 330, ll. 11-15.

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Vol. I, p. 330, ll. 16-24

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Vol. I, p. 330, ll. 24-29.

Vol. I, p. 330, ll. 35-38.

of the company covering the period from 13th May, 1936, to January, 1942, and that the plaintiff recover the amount found due on such accounting and that the defendant do return to the plaintiff four certain blocks of shares of stock, or in the alternative do pay to the company the value of such shares, and awarded the costs of the action to the plaintiff.

Vol. I, p. 330, ll. 47-50.

2. The Court of Appeal while not setting aside the alleged transactions of 9th December, 1941, affirmed the findings of fraud and affirmed the liability of the defendant to the plaintiff by way of damages incurred by the plaintiff by reason of the fraud of the defendant which damages it directed be ascertained upon a reference to the Master, and awarded the plaintiff the costs of the action and the reference and the appeal. 10

Vol. I, pp. 333-4-5.

3. When the affairs of the company were taken over from Gray in January, 1942, no cash books, ledgers or books of account whatever were forthcoming, but fortunately the minute book (Exhibit 3 at trial) was salvaged and the company obtained possession of it. Gray was examined for discovery at very great length, and the admissions he was obliged to make on discovery together with the books and records of the Premier Trust Company showing the shares issued to Gray, and to his personal employee, Bourne, for the account of Gray, along with many requisitions signed by Gray fraudulently directing the issue to himself and Bourne (for him) of more than 300,000 treasury shares of the company over the period—constitute largely the evidence which established his fiduciary relationship as a director and solicitor to the shareholders, his continuous breaches of trust, and the enormous blocks of shares fraudulently issued to Gray at his own behest which he did not pay for to his own company and which he sold from time to time for substantial amounts, which he pocketed and fraudulently appropriated to his own use. There were also fortunately salvaged a certain number of cancelled cheques signed by Gray and Bourne as signing officers on the bank account of the company, which were fraudulently and wrongfully paid to Gray and to Bourne (for Gray) and which Gray admitted had not been authorized by the company, and which payments to himself he was entirely unable to explain. Gray suggests that he bought them at a fixed price from his own company and that he sold the shares to the public, but is utterly unable to produce any record of what he received for the shares that he sold. He further admits that Bourne and he were the only ones who purported on behalf of the company to authorize this illegal course. 20 30

Vol. II.

Vol. I, p. 167,  
Qq. 2349-51.

Vol. I, pp. 77-78,  
Qq. 590-94.

Vol. I, p. 78,  
Qq. 596-605.

Vol. I, pp. 383-4-5.

4. Exhibit 15, a group of 20 cheques of the company payable to Gray, were put in and he was utterly unable to say that the directors authorised the payment of these monies to him. As a brazen example—a cheque for \$250.00 dated 16th January, 1941, was shown Gray with teller's figures on the back. He admitted receiving the cash but did not know what it was for, nor what he did with the cash. Another example of his method of misappropriation of company money was a company cheque for \$500.00 dated 27th January, 1941, signed by Gray and Bourne, payable to Gray, and endorsed by him to M. J. Williamson, a Western oil man to whom Gray sent the cheque, and admits that the payment to Williamson was an amount he personally owed Williamson and not any debt by the company. 40

Vol. I, p. 177,  
Qq. 2548-2552.

Vol. I, p. 178,  
Qq. 2558-2566.

5. Although charged with fraudulent conspiracy, breach of duty as a director and also as solicitor towards his client—fraudulent misappropriation to his own use of both money and treasury stock of the company—Gray sat through an 8-day trial listening to the evidence in support of such charges, and did not see fit to enter the witness box to give denial to any one of such charges—nor to risk cross-examination thereon before the trial judge.

6. The mine was not in operation over this five-year period of fraudulent misappropriation, with the affairs of the company entirely in  
10 Gray's own hands in his own law office, and except for some underground work done by a neighbouring company under a contract, there was no real operating of the mine at all during Gray's whole régime. No office was maintained at the property, and Gray cannot say there was any correspondence between him and anyone at the property.

Vol. I, p. 39, ll. 28-42.

Vol. I, p. 71,  
Q.j. 476-479.

7. The Respondent relies on the following findings of fact by the unanimous Judgment of the Court of Appeal, delivered by Mr. Justice Laidlaw and concurred in by Justices Aylesworth and Bowlby: these constitute concurrent findings in the Courts below and cover specific  
20 frauds practised by Gray against his own company while in his fiduciary relationship of director, vice-president and solicitor:—

(A) The company was promoted and organised by the defendant, a solicitor.

Vol. I, p. 336, ll. 20-23.

(B) From 1936 until 1941 the directors were the defendant with Bourne and Miss Lord, employees in his office, and Gray was in "effective control."

Vol. I, p. 336, ll. 33-37.

(C) Minutes of directors' meetings were prepared by the defendant long after their dates.

Vol. I, p. 337, ll. 5-6.

(D) Minutes before alteration by Gray, showed three directors present: Gray, Bourne and Napier Weir, although Weir was never  
30 a shareholder or director, or ever present.

Vol. I, p. 337, ll. 7-9.

(E) By-laws of the company require three directors for a quorum.

Vol. I, p. 337, ll. 15-17.

(F) Business transacted at these illegal meetings covering many alleged contracts with Gray, are reviewed in detail.

Vol. I, p. 337, l. 20,  
to p. 339, l. 39.

(G) Court finds certain remarkable and outstanding facts about the affairs from 1938 to 1941.

Vol. I, p. 339, l. 43,  
to p. 341, l. 1.

(H) Defendant and his employee, Bourne, obtained over 300,000 shares of the treasury stock of the company by false requisitions signed by them.

Vol. I, p. 340, ll. 5-14.

(I) During the period defendant obtained from the treasury  
40 many large sums of money without right or authority so to do.

Vol. I, p. 340, ll. 14-16.

(J) Treasury monies were wrongfully used to buy company shares "to try to hold the price" while Gray was selling at highest obtainable price.

Vol. I, p. 340, ll. 16-22.

- Vol. I, p. 340, ll. 23-44.
- (K) Gray personally raided the treasury without regard to rights of shareholders or requirements of the law.
- Vol. I, p. 340, l. 44.  
to p. 341, l. 2.
- (L) Defendant was guilty of wilful, reckless and gross fraud throughout the whole period.
- Vol. I, p. 341, ll. 26-32.
- (M) Gray claimed specific legal fees.
- Vol. I, p. 342, ll. 9-12.
- (N) Shows purchase by company from Gray of B.E.A.R. and Giant Yellowknife shares.
- Vol. II, p. 75.
- (O) At alleged meeting 19th November, 1941, records admission that Napier Weir was not a director, and authorised alteration of the minutes of ten meetings previously held over a period of 10 two years and eight months.
- Vol. I, p. 342, ll. 40-46;  
p. 343, ll. 1-2.
- (P) Specific finding regarding meetings of 17th November and 19th November, 1941, both held to be a sham and to show defendant had full knowledge at all times of his guilt and the minutes only add to his wrongdoing and guilt.
- Vol. II, pp. 59-69.
- Vol. I, p. 343, ll. 13-29.
- (Q) Deals with secret agreement of 9th December, 1941, between Gray and his two sisters and his four fellow-directors, where Gray and his sisters agreed to vote their shares for two years to re-elect his four fellow-directors, who in turn agreed that they "as directors" will not enter into any agreement to sell more than 20 200,000 treasury shares to anyone other than Preston East Dome Mines Limited for two years without the consent of Gray.
- Vol. I, p. 344, ll. 34-46;  
p. 345, ll. 1-11.
- (R) Makes no finding as to validity or otherwise of alleged meeting of 9th December, 1941.
- Vol. I, p. 345, ll. 37-38.
- (S) Specifically finds the position Gray was in in relation to the company as director, solicitor and having engaged in acts of vicious fraud and being indebted to the company for a large sum in excess of the amount shown on the statement, and forming the basis of the alleged agreement.
- Vol. I, p. 345, ll. 43-47;  
p. 346, ll. 1-5.
- (T) Nevertheless, defendant proposed the settlement—grossly 30 misrepresented his liability, and refrained from honestly and fully disclosing the material facts, knowing that if he had done so, no Board of independent directors would have entered into the transaction.
- Vol. I, p. 346, ll. 5-12.
- (U) Quotes admission by Tovell (a director) that had he known the truth, he would not have countenanced such an affair.
- Vol. I, p. 346, ll. 15-22.
- (V) Comments on the secret agreement between Gray and his sisters and his four fellow-directors.
- Vol. I, p. 346, ll. 23-31.
- (W) Refers to alternative relief claiming damages as in an action for deceit and finds that the facts to found such relief are 40 sufficiently pleaded.
- Vol. I, p. 346, ll. 32-39.
- (X) Suggests that trial judge finding—"that agreement of 9th December, 1941, did not in fact or in law constitute a final settlement"—is inappropriate as also would be an order for rescission.
- Vol. I, p. 346, ll. 40-43.

(Y) Finds adequate and proper relief can and should be afforded by way of damages incurred by reason of fraud of defendant, and directs a reference. Vol. I, p. 347, ll. 1-6.

(Z) Directs the Master how to proceed in fixing types of damage claimed. Vol. I, p. 347, ll. 6-46.

8. The Respondent submits that the relief granted by the Court of Appeal by way of damages for fraud against the defendant is fully justified, and furthermore with great respect suggests that if the Respondent were obliged to rely upon the finding of the learned trial judge to the effect that **10** the alleged arrangement of 9th December, 1941, "did not in fact or in law constitute a final settlement of the claims of the plaintiff against the defendant," such finding is also justified and that the defendant Gray cannot in this case rely for a defence of his undisclosed criminal misconduct on what happened at such meeting on 9th December, as the same is recorded in the minute book (Exhibit 3), for the following reasons:—

Vol. II, p. 81.

(A) No formal agreement on that day or at any subsequent time was ever executed by the company.

(B) Gray during that meeting occupied towards his company the position of—

**20**

- (i) promoter ;
- (ii) Vice-President ;
- (iii) director ;

(iv) solicitor to the company, and his fiduciary relationships created thereby made it compulsory on him in order to make a contract personally with his own company, to make full disclosure to his fellow-directors of all material facts, and also under the provisions of the Ontario Companies Act, R.S.O. 1937, Chap. 251, Section 93, ss. (2), to disclose the "complete nature of his interest."

**30**

(C) The alleged arrangement at that meeting was *proposed* by Gray himself. He used Bouck, with whom he had conferred the day previous regarding the statement (Exhibit 8) (produced at the meeting by Bouck) as his willing tool. Gray admitted that he "did not take any part in the company's side of that settlement—I wasn't on the company's side in that settlement—I was J. J. Gray in that settlement."

Vol. I, pp. 354-5.

Vol. I, pp. 151-2,  
Qq. 2122-24.

(D) By concealment, non-disclosure and misrepresentation he withheld from his fellow directors the following vital facts necessary to enable them to protect their shareholders against him:—

**40**

(1) That by criminal misconduct he had misappropriated by fraud and use of false requisitions, 306,019 treasury shares issued to himself and to Bourne (for Gray's benefit) and sold by him personally.

(2) That he had criminally embezzled money of the company by signing (with Bourne) cheques (Exhibit 58) payable to himself, without any authority, to the amount of \$16,860.94, by

Vol. I, pp. 440-44.

representing that his indebtedness to the company was \$18,765.29 only, whereas he was a defaulter at that time to the company for at least \$91,726.23.

(3) That he had been paid by the company cash in full for the shares of B.E.A.R., Hugh-Pam and Giant Yellowknife and that these shares had been taken over by the company and were then the absolute property of the company, the price for which Gray had been paid in full, which fact he did not disclose to the meeting.

Vol. I, pp. 99-100,  
Qq. 1019-1020,  
Qq. 1030-1031,  
Qq. 1049-1058.

He took over these shares without paying the company 10 anything for them and without charging himself anything for them in the fraudulent, fictitious Bouck statement (Exhibit 8) on which a supposed balance due by Gray was arrived at. There are three references in the minutes to this extraordinary fraudulent conversion of company property, namely :—

Vol. I, pp. 354-55.

(i) “. . . and which statement would ignore any stock transactions, with the exception of Preston East Dome Mines Limited stock.”

The verb “ignore” is entirely inapplicable to the facts, and intended to deceive. The company owned the shares outright, 20 having bought and paid for them. If the minutes had purported to be truthful, they would have read :—

“and the company having decided to make a free gift to Gray of the four blocks of stock.”

(ii) “The statement as prepared by Mr. Bouck after crediting J. J. Gray for all services and charges to date, showed an indebtedness of J. J. Gray to the company of \$18,765.29 after transferring to J. J. Gray 56,300 shares of B.E.A.R. stock, 25,000 shares of Giant stock, 2,500 shares of Hugh-Pam stock and 7,700 shares of New Augarita stock.” 30

Vol. I, pp. 354-55.

The phrase “after transferring” is an absolute falsehood in suggesting that the Bouck statement (Exhibit 8) made any reference whatever to such a transfer.

(iii) “Mr. Gray proposed to the meeting that he would take over the securities mentioned above.”

The adroit use of the phrase “take over” was intended in Gray’s proposal to deceive the directors into thinking that he was taking them over legally, and either paying the company for same or being charged with same. Neither was true. His taking of these securities was sheer theft from the shareholders. 40

Vol. I, p. 180,  
Qq. 2628-29.

(E) That he had been buying New Augarita shares with company money to “try to hold the price.”

(F) That he had fraudulently used the name of Napier Weir and had pretended that Weir was a director and had falsified minutes of ten meetings over a period of two years by inserting the attendance of Napier Weir as a director at such meetings where vast amounts

Vol. II, pp. 59-69.

of treasury stock were allotted and issued to Gray illegally. He admits he dictated these minutes. He also admits he made alterations himself.

Vol. I, p. 63,  
Qq. 342-344.  
p. 67, Q. 417.

10 (G) That he had sold in one transaction 100,000 shares for \$30,490.00 and pocketed this amount personally for shares which he had fraudulently procured to be issued by the company to him. Tovell (a witness called by Gray) on cross-examination admitted Exhibit 69, an option from Gray personally to Tovell and others, and that he took down 100,000 shares and paid Gray cash for same, \$30,490.00, at prices from .27c to .35c.

Vol. I, p. 321, l. 8.  
to p. 322, l. 9.

(H) That in addition to such 100,000 shares, he had sold over a period a further 206,019 shares fraudulently procured by him to be issued, and had pocketed the proceeds thereof at an approximate price of .28½c, making a further profit of \$58,715.48.

Vol. I, pp. 415-417.

Tovell, one of his fellow-directors, made the following admissions on cross-examination :—

“ I recall Gray making the proposal.”

Vol. I, p. 314, ll. 26-30.

“ I did not know that Gray had taken big sums of company money.”

Vol. I, p. 315, ll. 19-29.

20 “ I did not know Gray had been buying New Augarita shares with company money.”

Vol. I, p. 315, ll. 30-37.

“ I did not know Gray had procured shares to be issued to George Bourne for his own private purposes to the extent of 211,550 shares.”

Vol. I, p. 315, ll. 38-41.

9. The Respondent respectfully submits that there was no change of position by Gray as a result of what occurred at the meeting on 9th December, such as would place Gray in a position to successfully resist the rescission of the agreement suggested in the minutes. All Gray did was pay the company over a lengthy period following the meeting, the 30 \$18,765.29 in money which he owed them on that date. Actually, on that date he owed them a very much larger sum, aggregating \$91,726.23. It is respectfully suggested that no case will be found where a director who by criminal conduct had become indebted to his own company for \$91,726.23 and who on a given date procured his company by fraud and concealment to accept \$18,765.29—can thereby escape paying the balance of which he had defrauded them by agreement on the ground that the position of the parties had changed, because he paid the lesser amount which he always owed them. It is further submitted that on these facts no question that the company “ cannot make restitutio in integrum ” 40 arises for the benefit of Gray. The Respondent makes this submission without prejudice to and relying always on the grounds of relief granted by the Court of Appeal by way of damages for deceit and fraudulent misrepresentation and concealment by a director who occupied a fiduciary relationship to his company.

10. The Respondent submits that the meeting of alleged directors on 9th December, 1941, was not a legal meeting because there was not a quorum of three legal directors present, Messrs. Tovell and Seguin never having been previously legally elected as directors, and Bouck, who was

purported to be elected a director at such meeting, was not legally elected at such meeting because there were only two persons, Gray and Buchanan, who were legally directors of the company. Tovell's purported election to the Board was on 17th November, 1941, as appears from the minutes, where on page 72 in Gray's handwriting and obviously written in after the minutes were completed, is the statement :—

Vol. II, pp. 71-72.

“ G. E. Buchanan and J. W. Tovell were elected to the Board of Directors.”

On 17th November, Tovell was not a registered shareholder and held no shares “ *absolutely in his own right* ” as required by Section 87, ss. (1), 10 of The Companies Act. Section 60 of The Companies Act makes it clear that :—

“(60) No transfer of shares . . . shall, until entry thereof has been duly made, be valid *for any purposes whatever*, save only as exhibiting the rights of the parties thereto towards each other.”

Miss Curtis produced Tovell's account in the stock ledger of the company kept by Premier Trust Company, its Registrar and Transfer Agent, and filed a copy as Exhibit 22, which discloses that Tovell first became a registered shareholder on 18th November.

Vol. I, p. 403.

11. *Alleged settlement 9th December, 1941, was never approved by 20 shareholders :—*

The defendant seeks to uphold the alleged settlement of 9th December, 1941, on the alleged ground that it was approved by the shareholders. The very contrary is the fact.

Vol. II, pp. 106-108.

Vol. II, p. 106.

The first shareholders' meeting held after 9th December, 1941, was on 28th July, 1943. J. J. Gray was present as appears in the list of those present in person.

The notice calling this meeting was proven (Exhibit 67). It did *not* set out as a purpose of the meeting that all acts of the directors would be submitted to the shareholders to be ratified and confirmed. Therefore, 30 even had a resolution been passed purporting to ratify and confirm *all acts of the directors*, it would have been invalid because shareholders who did not attend had no indication from the notice that such acts would be brought up for ratification.

Vol. II, p. 106, foot.  
p. 107, top.

But the resolution that was passed confined the shareholders' approval to “ all acts of the *present* Board ”—and as the present Board included Mr. Alex Wilson, such ratification could in any event not have been effective as regards anything done by the directors prior to his joining the Board on 16th January, 1942. See directors' meeting where (on page 86) Wilson was declared elected a director.

Vol. II, pp. 85-86.

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While the two submissions above clearly indicate that this defendant has no shareholders' ratification of what he and his fellow-directors did on 9th December, 1941, there is the further express provision in the shareholders' resolution (top page 107) that any ratification is

“ subject to the shareholders reserving any right of action that they may have against any other directors or officers of the company holding office prior to the 9th of December, 1941.”

This, of course, was aimed at Gray who comes within that description and leaves the shareholders wide open in this present action to attack the conduct of Gray as a director over the lengthy period he controlled the company.

12. By reason of the cunning of Gray, the present shareholders had a difficult and lengthy task to unravel the truth. The shareholders at their annual meeting in July, 1943, having reserved any right of action that they may have against Gray as a director or officer holding office prior to the 9th December, 1941, found it an extremely onerous task  
 10 without proper books or records having been kept, to go back over the Gray régime and unearth the defalcations of Gray, including treasury shares misappropriated and profits thereunder, and cash taken from the treasury and the misappropriation of the Giant and B.E.A.R. shares. Vol. II, p. 107, top.

In June, 1944, the directors authorised the company to consult Mr. J. C. McRuer, K.C. and Mr. Clifford Howard, K.C. This was done and a lengthy investigation by Mr. McRuer was terminated by his elevation to the Bench before the matter was concluded. A public accountant was also retained by the company and conducted a very lengthy investigation. Vol. II, p. 128.

The minutes disclose that after Mr. McRuer became a judge, Mr. Slaght  
 20 was retained to conclude the investigation, and as a result advised that the company should institute a civil action against Gray. Vol. II, p. 136.

It was therefore after very lengthy investigation at great expense that the true facts were ascertained and this action by the company to obtain restitution from Gray for the shareholders, was commenced by writ issued 29th January, 1946.

13. The Respondent submits that the defence of the Statute of Limitations is not available to Gray in this case. By Section 46, ss. (2) of the Limitations Act, being R.S.O. 1937, Chap. 118, the statute provides that a lapse of time is *no* avail to a defendant—

30 “where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use.”

Every dollar awarded against Gray in this action was obtained by fraud and fraudulent breach of trust, and the profits of his wrong-doing are still in his possession or converted to his personal use. The following cases may be useful:—

40 *In Re Lands Allotment Co.* [1894] 1 Ch. 616 *per* Lindley, J., in Court of Appeal at p. 631. (See also reference to p. 632 to the case of *Soar v. Ashwell* [1893] 2 Q.B. 390, 395, and the extract from the judgment of Lord Justice Bowen in that case.)

*Dovey v. Cory* [1901] A.C. 477 (Lord Davey at pp. 488–489).

*Saskatchewan Land and Homestead Company v. Moore*, 5 O.W.N. 183, *per* Kelly, J., at pp. 186–187.

*Halsbury*, Vol. V (first edition) p. 235, Section 377.

14. On the question of a director's obligation when personally entering into engagements with his own company, and the effect of his concealment and non-disclosure, in addition to *The Ontario Companies Act* hereinbefore referred to (clause 8 (b) hereof), the Respondent relies on—

*North-West Transportation Company v. Beatty* (1887), 12 App. Cas. 589.

(See judgment of Sir Richard Baggallay.)

*Imperial Mercantile v. Coleman* (1873), L.R. 6 H. of L. 189.

*Masten & Fraser on Company Law*, 4th Ed., p. 600.

15. On the question of measure of damages, the Respondent relies 10 on—

*Eden v. Rids-Dalos* (1889), 23 Q.B.D. 368.

“Where a director is held liable to account, the company has an option of claiming the property or its highest value while held by the director.”

*Miller v. Diamond Light* [1913] 22 Que. K.B. 411.

“Directors cannot ratify an obligation to a director who has not made a full disclosure.”

*Rountree v. Sydney* [1908] 39 S.C.R. 614–615.

Idington, J. p. 618 : “There may have been culpable negligence 20 on the part of the directors also, but the two blacks could not make a white.”

Also Idington, J. p. 619.

*McNeill v. Fultz*, 38 S.C.R. p. 198, particularly Duff, J. at p. 205.

*Field v. Banfield* (1933), O.W.N. p. 39.

16. The respondent submits that the general principle of law that *omnia præsumuntur* against a wrongdoer applies to the conduct of Gray, who by criminal conduct took away from his company securities belonging to them and deprived them of the power to market them at substantial 30 figures.

17. The Respondent therefore humbly submits that this appeal should be dismissed and that the judgment of the Court of Appeal for Ontario should be affirmed, for the following amongst other

## REASONS.

- (1) BECAUSE Gray throughout the relevant period fraudulently chequed out to himself and misappropriated treasury moneys to his own use.
- (2) BECAUSE Gray during the relevant period by false requisitions procured to be issued to himself and to Bourne, for the benefit of Gray, more than 300,000 40 shares of the treasury stock of the company without legal right or authority so to do.

- (3) BECAUSE Gray after such fraudulent issue, sold such shares and appropriated the proceeds of such sales personally in fraud of his company.
- (4) BECAUSE Gray wrongfully procured the company to buy its own shares "to try to hold the price" for Gray who was selling personally at the highest obtainable price.
- 10 (5) BECAUSE Gray procured by fraudulent misrepresentation, concealment and non-disclosure and without paying for same, the blocks of stock of B.E.A.R., Hugh-Pam and Giant Yellowknife owned by his company for which his company received no consideration whatever.
- 20 (6) BECAUSE the alleged arrangement of 9th December, 1941, put forward by Gray as a defence, cannot constitute a protection to Gray who as promoter, Vice-President, director and solicitor attended the alleged directors' meeting and himself proposed a contract with his own company without disclosing "the complete nature of his interest," and by pretending that his indebtedness to his company at that time was only \$18,765.29, whereas his true indebtedness covering embezzlement of treasury shares and money, exceeded \$90,000.00.
- (7) BECAUSE Gray fraudulently used the name of Napier Weir who was never a director or shareholder, over a period of two years by falsifying minutes of ten alleged meetings of directors where vast amounts of treasury stock were illegally allotted and issued to Gray.
- 30 (8) BECAUSE during the relevant period there are concurrent findings of fact that Gray raided the treasury of his company without regard to rights of shareholders or requirements of the law, and was guilty of wilful, reckless and gross fraud.
- (9) BECAUSE the unanimous judgment of the Court of Appeal for Ontario in its findings of fact as to the obligation of Gray to repay and the basis on which the reference to determine the exact amount which the company is to recover against him, was right for the reasons given.

In the Privy Council.

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**ON APPEAL**

*from the Court of Appeal for Ontario.*

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BETWEEN

**JAMES JOSEPH GRAY**

(Defendant) - - - *Appellant*

AND

**NEW AUGARITA PORCUPINE**

**MINES LIMITED** (Plaintiff) *Respondent.*

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**Case for Respondent.**

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