WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 31 | Issue 1 Article 9

December 1924

Promotors--What Are Secret Profits--Duty of Promotors to Disclose Profits

C. L. W.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Business Organizations Law Commons

Recommended Citation
C. L. W., *Promotors--What Are Secret Profits--Duty of Promotors to Disclose Profits*, 31 W. Va. L. Rev. (1924).
Available at: https://researchrepository.wvu.edu/wvlr/vol31/iss1/9

This Student Notes and Recent Cases is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

W.: Promotors--What Are Secret Profits--Duty of Promotors to Disclose

cruelty,[19] or barbarous treatment,[20] habitual intemperance,[21] or adultery,[22] this rule will apply, for the purpose of allowing the wife to sue for divorce. Viewed as an extension of this position is a third treatment of the problem, the view that there is "no reason why a wife who has justifiably left her husband should not have the same choice of domicile for an action for damages that she has against her husband for a divorce.[22] A fourth position is adhered to in at least two jurisdictions, in which a wife can acquire a separate domicile, even though she have no grounds for divorce[23] so that her estate may be administered at the place of her death, despite the fact that the husband's domicile is in another jurisdiction.[24] The theory in these cases is that the separation is just as effectual as if a judicial decree had directed it.[25]

Regardless of the fact that the present tendency of the courts seems to be toward a more liberal interpretation of the principles governing the domicile of the wife, yet there are cogent reasons against the further extension of the Humphreys case. The effect of such policies on the American home might be far from salutary. As long as the husband is the head of the family and is under the duty to support the wife,[26] and is liable for her torts,[27] it seems more logical that he should be allowed to pick the jurisdiction in which he will be held responsible for these duties.

—H. L. S. Jr.

PROMOTERS—WHAT ARE SECRET PROFITS—DUTY OF PROMOTERS TO DISCLOSE PROFITS.—When one undertakes to promote a corporation, it frequently happens that he wishes to convey his own property to the corporation. Under proper circumstances, such a conveyance is perfectly legitimate. But very frequently the transaction is not entirely free from suspicion of unjust profits or actual fraud. A case arose where a promoter had secured an option on

---

[19] Hill *v.* Hill, 166 Ill. 54, 46 N. E. 751 (1897).
[20] Hollister *v.* Hollister, 6 Pa. St. 449 (1847).
[21] Sawtell *v.* Sawtell, 17 Conn. 284 (1845).
[22] Kinnier *v.* Kinnier, 45 N. Y. 536, 6 Am. R.132.
[23] Williamson *v.* Osenton, 232 U. S. 619 (1914).
[24] Schute *v.* Sargent, Note 10 *supra;* Saperstone *v.* Saperstone, 131 N. Y. S. 241, 146 App. Div. 576 (1911); Lyon *v.* Lyon, 30 Hun. 455 (N. Y. 1883). *Contra,* Anderson *v.* Watt, 138 U. S. 694 (1899); Cheely *v.* Clayton, Note 2, *supra;* Loker *v.* Gerald, 157 Mass. 42, 31 N. E. 709 (1892).
[25] Matter of Florence, 54 Hun. 328 (N. Y. 1888).
[26] In *re* Crosby's Estate, 148 N. Y. S. 1045, 85 Misc. N. Y. 679 (1914).
[27] Keller *v.* James, 63 W. Va. 139. 59 S. E. 939 (1907).
[28] Anderson *v.* Davis, 55 W. Va. 429, 47 S. E. 157, (1905); Bogess *v.* Richards, 39 W. Va. 567, 673, 20 S. E. 599, 603 (1894).

Disseminated by The Research Repository @ WVU, 1924

certain real estate for an agreed purchase price of $12,000. He then organized a corporation, to which he conveyed the property for $20,000. The corporation sued to recover the secret profits of the promoter, and upon a showing of fraudulent concealment of the promoter's interest in the property, the corporation was allowed to recover the secret profits.[1] The court is careful in distinguishing this case from an earlier case, where the promoter had paid $6,000 for land, with the intention of organizing a corporation.[2] He sold his interest in the land to the corporation for $8,500, and was permitted to retain his profits. The important distinction between the cases is that in the latter case the promoter entirely and purposely concealed his interest in the property, while in the earlier case he was frankly selling his option to the corporation. It was only natural for all parties to conclude that he was not making the transaction for nothing, but would make some profit for his trouble in securing the option and turning it over to the corporation. In the one case there was good faith on the part of the promoter; in the other there was not.

In a case which relies on the fraud and conspiracy of the promoter for its decision, the court says:

> "If they (the promoters) undertake to sell their own property to the corporation they are bound to disclose the whole truth respecting it. If they fail to do this, or if they receive secret profits out of the transaction, when there are other stockholders, ... the corporation . . . may hold the promoters accountable for the secret profits."[3]

"Secret profits," as they must be regarded in reconciling the statements of the court in the various cases, refer to profits that are concealed, in the sense of being kept from the knowledge of the corporation by such representations or conduct as prevent its learning of such profits, and not to all profits not actually and affirmatively revealed to the corporation by the promoters.

In comparing the cases with reference to this distinction, another important distinction must be borne in mind. That is the varying rule in cases where all the stockholders are promoters, where the promoters later sell their stock to outsiders, and where a later issue of stock is sold to outsiders. When all the stockholders of the new

---

[1] Nickel Plate Land Co., *v.* Broom, 123 S. E. 594 (W. Va. 1924).

[2] Richardson *v.* Graham, 45 W. Va. 134, 30 S. E. 92 (1898). See also Burneagle Coal & Coke Corporation *v.* Henritze, 124 S. E. 224 (Va. 1924), and Bank *v.* Belington Coal & Coke Company, 51 W. Va. 60, 41 S. E. 390 (1902).

[3] North American Coal & Coke Co., *v.* O'Neal, 82 W. Va. 186, 95 S. E. 822 (1918); Camden Land Co., *v.* Lewis, 101 Me. 78, 63 Atl. 523.

corporation are promoters, no fraudulent concealment is possible, and the corporation cannot recover profits from the promoters.[4] The promoters in such a case do not stand in a fiduciary relation to the corporation. They simply sell the property as individuals and buy as a corporation. The rule applied where there are other stockholders than the promoters is that stated in the beginning of this discussion, the rule prohibiting the promoters from making secret profits by such a transfer. This is the situation where the question most frequently arises. In the case where the promoters, who at first are the only stockholders and at the time of incorporation intend to remain so, later individually transfer their sttock to outsiders, the corporation, being uninjured, cannot sue, nor can the new owners of the stock set the conveyance aside or recover secret profits.[5] When the promoters at the time of the purchase of the property own all the stock of the corporation, and later issue additional stock and sell it to the public, the corporation cannot later avoid the sale of the property to it by the promoters, because of non-disclosure of profits according to a decision of the United States Supreme Court.[6] But a contrary decision has been reached in Massachusetts, on the ground that the promoter is a fiduciary to the corporation, and this relation continues to the length of the plan of promotion.[7] The rule of the Massachusetts case is the prevailing rule,[8] and applies both to the corporation and to the individual stockholders buying this later issue of stock.[9] But such subsequent subscribers cannot recover when they subscribed with full knowledge of the facts.[10]

This brief review of the several situations shows the possibility of a misapplication of the various rules to a particular case. A court might very reasonably apply a rule that in a slightly different situation would be entirely proper, but which is unjust in the particular case. To avoid the possibility of having such conveyances from promoters to the corporation set aside, or the profits of the promoters being recovered by the corporation or the stockholders, it is advisable in all cases where a promoter expects to make a profit from a sale to the corporation, that he either provide an entirely independent board of directors and make full disclosure to the corporation through them, or make disclosure of all material

---

[4] Old Dominion Copper Co., *v.* Lewisohn, 210 U. S. 206 (1908).
[5] In *re* British Seamless Paper Box Co., 17 Ch. D. 467.
[6] Old Dominion Copper Co., *v.* Lewisohn, *supra.*
[7] Old Dominion Copper Co., *v.* Bigelow, 203 Mass. 157, 89 N. E. 193 (1909).
[8] 14 CORPUS JURIS, Corporations, § 343.
[9] Richlands Oil Co., *v.* Morriss, 108 Va. 288, 61 S. E. 762 (1908).
[10] Richard Hanlon Millinery Co., *v.* Mississippi Valley Trust Co., 251 Mo. 553, 158 S. W. 359 (1913).

West Virginia Law Review, Vol. 31, Iss. 1 [1924], Art. 9

facts to each subscriber to stock, or procure a ratification of the transaction by vote of the stockholders of the completely established corporation, or the promoters may themselves subscribe for all the shares contemplated to be issued as a part of the promotion scheme.[11] —*C. L. W.*

NEGLIGENCE—LIABILITY OF STATE ROAD COMMISSION FOR PERSONAL INJURIES ARISING OUT OF FAILURE TO REPAIR HIGHWAYS.— In her declaration in trespass on the case, P alleged that she was injured by reason of the negligent leaving of an obstruction in a road by the county court, which had control and supervision of said road. *Held:* A good cause of action is stated. *Clayton* v. *Roane County Court,* 123 S. E. 189 (W. Va. 1924).

In the course of the opinion, the court said, "If the proof shows that the road was under the exclusive jurisdiction and authority of the state road commission at the time of the accident, we cannot on this certification, answer the question certified as to whether the state road commission would be liable . . ." The writer will endeavor to supply the answer. The liability of the county court for such personal injuries is purely statutory and did not exist at common law. *Parsons* v. *County Court,* 92 W. Va. 490, 115 S. E. 473. The reason is that the county court is a quasi-public corporation, whose duties are imposed by law as agents of the public. *Watkins* v. *County Court,* 30 W. Va. 657 at 660, 5 S. E. 654. And a suit against a state agency is, in effect, a suit against the state. *Barber* v. *Spencer State Hospital,* 121 S. E. 497 (W. Va. 1924). So there must be a statute rendering county courts liable expressly as corporations. *Watkins* v. *County Court, supra.* County courts may sue and be sued as corporations. W. Va. Code, c. 39, § 1. Evidently such clause was not enough to impose a liability for personal injuries and the legislature made more specific enactments, rendering the county courts liable for injuries caused by reason of any *county-district* road's being out of repair. W. Va. Code, c. 43, § 167. The county court is under a duty to maintain county-district roads *until* such time as the state road commission, by order entered of record, takes them over, after which they are to remain under the exclusive jurisdiction and control of the state

---

[11] Old Dominion Copper Co., *v.* Bigelow, *supra;* 14 CORPUS JURIS, Corporations, § 342.