writers as a follower of the Massachusetts exception, but the case of Gehrke *v.* State, 13 Tex., 568, upon which they rely, does not support their position, nor do the later decisions in the Texas courts regard it an authority. In that case an effort was made to prove insanity not by the knowledge of the witness of the fact of insanity, but by comparison of some other insane person that the witness said he knew, and who was known to be insane. It is true that the Court said that it would be equally improper to receive the vague expression that the prisoner looked or acted like an insane person; but this seems to be on the ground that experts were present who might have been examined had they been called. In Thomas *v.* State, 40 Tex., 60, the Court, in holding the opinions of non-professional witnesses as to insanity admissible, expressly said: "The views here expressed are not in conflict with the case of Gehrke *v.* State. That case is not in point:" McClackey *v.* State, 41 Tex., 125; McClackey *v.* State, 5 Tex. App., 320; Webb *v.* State, Id., 596; Campbell *v.* State, 10 Tex. App., 560.

Maine and Massachusetts alone now maintain the exception to what has become the universal rule.

HENRY N. SMALTZ.

DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,
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KRUMBHAAR *v.* GRIFFITHS ET AL.[1]

Equity—Fraud—Confidential Relation—Officer of Corporation and Stockholder.

Plaintiff, a stockholder in a corporation, applied to defendant, the secretary of the company, for information as to the condition of the company and the value of its stock. Defendant stated what the earnings of the company had been, but did not state that a lease of a portion of the company's property had been made, containing an option to lessee to lease additional property. Defendant then made plaintiff an offer for his stock, which plaintiff accepted. Soon after, the option under the lease having been exercised, the stock rose greatly in value, and plaintiff having demanded a retransfer of his stock and been refused, filed a bill. The master found, as a fact, that at the time defendant bought plaintiff's stock he did not know of anything that was pending, or of any movement in contemplation, likely to cause a rise in the value of the stock.

[1] 31 W. N. C., 244; 151 Pa., 223.

Held, that under these circumstances a reconveyance of the stock would not be decreed.

Whether the relation between an officer of a corporation and a stockholder is of a confidential or fiduciary character not determined.

STATEMENT OF THE CASE.

It was not denied that the plaintiff went to the defendant, who was the secretary of the corporation, for the purpose of finding out what the stock was worth. Prior to that time the highest price paid for the stock in the market had been $42.50 per share. At that time the directors of the company had made a lease to another corporation of certain wharf property of the company, which lease contained an option to the lessee to take all of the company's property of that character, and at that time the president and vice-president of the company were urging the lessee to exercise this option. Plaintiff did not know these facts. The master found that the defendant's only knowledge of the negotiation at the time consisted in the knowledge of the first lease, which was considered rather disadvantageous than otherwise by the officers of the defendant's company, and that the existence of that lease was well known to the stockholders, and defendant had a right to assume that it was known to the plaintiff also. Defendant offered to buy plaintiff's stock, and eventually did buy it at $55 per share. A month later the option of the lessee having been exercised and all the property leased, the stock rose to $125 per share.

The master found that the plaintiff's bill, which specifically charged fraud and misrepresentation, was overcome by the answer, which was responsive; the bill not being sustained by the two witnesses required by the equity rule. He also found independently that no fraud on defendant's part was shown. As a question of law he held that there was no relation of confidence between the plaintiff and defendant under the circumstances of the case.

The last proposition was not referred to in the opinion of the Supreme Court (unless it be covered by the statement that they are not convinced "that there is any sub-

stantial error in the findings of fact or conclusions of law"), but the "controlling facts" were said to be the master's findings that "at the time defendant bought the plaintiff's stock he did not know of anything that was pending, or of any movement in contemplation likely to cause a rise in the value of the stock, and of course he had no knowledge to impart to the plaintiff which he unfairly or improperly concealed;" that the first lease was not considered specially advantageous, and that defendant might presume that plaintiff knew of that.

Relation of Officer of Corporation to Individual Stockholder.

This case suggests, though it cannot be said to determine, an interesting question. That question is the relation which an officer or director of a corporation bears to the individual stockholders.

The relation of the directors or officers to the corporation, that is, to the body of stockholders, is sufficiently well understood, and is usually spoken of as a trust relation, the common expression being that the directors or other officers are trustees for the stockholders. It has been pointed out that this is not strictly correct. In Spering's Appeal, 71 Pa., 11, SHARSWOOD, J., says: "They are undoubtedly said in many authorities to be trustees, but that, I apprehend, is only in a general sense as we term an agent, or any bailee entrusted with the care and management of the property of another; it is certain they are not technical trustees." In Smith *v.* Anderson, 15 Ch. D., 247, p. 275, JAMES, L. J., says: "To my mind the distinction between a director and trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional and casual circumstance. The office of a director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director, and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. That seems to me the broad distinction between trustees and directors."

In many cases the determination of the exact relation becomes important, as, for example, in cases of contracts, leases, dealings between corporations having stockholders or directors in common. These questions are discussed in numerous decisions. (See Morawetz, Private Corporations, §§ 516 *et seq.*; Beach, Private Corporations, Chap. XIII; Bigelow on Fraud, pp. 325 *et seq.*; The Fiduci-

ary Position of Directors, 80 L. T., 299; The Fiduciary Relation of Directors to Shareholders, 26 Can. L. J. 66.)

It would seem that the relation of an officer or a director to an individual stockholder is not, broadly speaking, a fiduciary relation. The question is one which, strange to say, appears to have seldom arisen, for the circumstances of the principal case would seem to be such as might be expected to occur quite commonly. The first impression of the Courts and of the Bar would seem to have been to the contrary effect, apparently owing to the fact that the custom of speaking of the officers and directors as trustees for the stockholders naturally influenced the inquirer to regard this relation as extending to the individual stockholder. The question, however, has been treated in several well-considered opinions, and the result arrived at has been uniformly against the existence of a trust relation.

The earliest reported case appears to be Carpenter *v.* Danforth, 52 Barb., 581 (1868). The defendant, who was a director of the corporation, had stated to the plaintiff that he would give him a better price for his stock than he could get elsewhere, and the plaintiff, without making special investigation, acceded to the terms which were offered. The price paid was the market price of the stock at the time, but it was well known to the defendant, and not within the knowledge of the plaintiff, that the United States government had entered into a contract with the corporation which would prove exceedingly profitable. The question arose, therefore, whether there was a trust relation requiring disclosure on the part of defendant, or whether actual, positive fraud was necessary for a rescission. The Supreme Court of New York, in a carefully considered opinion by Mr. Justice SUTHERLAND, held that there was certainly a trust relation between the plaintiff as a stockholder and the defendant as a trustee or director; but the trust only extended to the "management of the general affairs of the corporation, with a view to dividends of profits;" and that plaintiff's stock was not the subject of trust between them. "My conclusion is, then," he continues, "that this case is not a case of constructive fraud—that there was not any such trust or confidential relation between the plaintiff and Danforth as to make the principle of equity which has been referred to reasonably applicable to the case. In view of the pleadings and of the conceded facts of the case, I think it follows that the sale in question, if set aside, must be set aside on the ground of actual, positive fraud."

The case of Commissioners of Tippecanoe County *v.* Reynolds, 44 Ind., 509; 13 AMERICAN LAW REGISTER AND REVIEW, N. S., 376 (1873), is a leading case. The allegations which the Court seems to treat as established were that the county, plaintiff, owned 570 shares of stock of a railroad company of which defendant was president and principal manager; that this stock was worth $342,000; that the condition of the company had been concealed by the defendant by failing to declare dividends and by representations that the stock was not worth its face, and by failing to show the condition of the affairs of the company; that plaintiff was ignorant of the value of the stock, which defendant knew; that he

represented that the depreciation of the value of the stock had been caused by losses sustained, when he knew that the accumulations were sufficient to pay all debts and losses and leave the stock 1100 per cent. above par; that defendant, through an agent, purchased plaintiff's stock at 90 per cent. of its par value; that defendant was then negotiating a sale of the road and subsequently sold it for 2,500,000, the par value being $250,000. WORDEN, J., said: "defendant doubtless knew much more about the condition of the affairs of the company and the value of the stock, both present and prospective, than the plaintiff. He purchased the stock greatly below its real value, as subsequent events established, but he paid the market value at the time, so far as it seems to have had a market value. Had the defendant not been connected with the company as one of its officers, there is nothing in the case that would furnish any reasonable ground to claim that the purchase was in any manner infected with fraud. It is not shown by the evidence that there was any special trust or confidence reposed in the defendant by the plaintiff, which was violated by the former, or of which he took advantage." He then cites with approval and follows Carpenter *v.* Danforth, *supra.* DOWNEY, C. J., dissented. Deaderick *v.* Wilson, 8 Baxt., 109 (1874) was the next decision, and FREEMAN, J., after citing Spering's Appeal and Commissioners *v.* Reynolds, *supra,* says: "There being no limit to the amount which he (a director) may own, as a matter of course he may purchase it, and if he may do this, he must necessarily do so from an owner, and that must be a stockholder. . . . After all, the simple question involved is whether the officers and directors are free to purchase stock from a shareholder in the corporation on the same terms as others. To this there can be but one answer, that is, they may, unless prohibited by legislative restriction.".

After this came Grant *v.* Attrill, 11 Fed. Rep., 469 (1882), which was to the same effect; as was also, it would seem, so far as it goes, Perry *v.* Pearson, 135 Ill., 218 (1890), Gilbert's Case, L. R., 15 Ch. App., 559 (1870) may, perhaps, be said to be the converse of these cases, since the ruling there was that a director was not a trustee of his *own* stock for other stockholders in the sense that he should be forbidden to rid himself of it, if by so doing he increased their burdens, and the case is approved *re* South London Fish Market Company, 39 Ch. D., 324, but the point we are considering does not appear to have arisen in England.

Finally, the question arose in New Jersey, in the case of Crowell *v.* Jackson, 53 N. J. L., 656 (1891), in an action of deceit, the plaintiff alleging that defendant, who was a director and treasurer of the company, knew of an advantageous sale of the company's property, of which defendant did not know, and as to which there was nothing to put him on inquiry. It is to be observed that this was a common law action of tort. The unanimous opinion of the Court was expressed by MCGILL, C., as follows: "We are of the opinion that, in contemplation of law, there can be no fraud without moral delinquency in other words, that there is no actual fraud which is not also moral fraud. In purchase or sale, if there

be no designed misrepresentation by words or deeds and no active intentional concealment, and no intentional silence where there is a duty to speak, an action of deceit will not lie. A director or the treasurer of a corporation is not, because of his office, in duty bound to disclose to an individual stockholder before purchasing his stock that which he may know as to the real condition of the corporation affecting the value of that stock. He is to some extent trustee for the stockholders as a body in respect to the property and business of the corporation, but does not sustain that relation to individual stockholders with respect to their several holdings of stock over which he has no control. We approve the conclusions reached by the Supreme Court of Indiana in The Commissioners of Tippecanoe Co. *v.* Reynolds, 44 Ind., 509, which are distinctly in point with the questions here raised."

It may seem to have been a waste of time to collect the authorities merely with the result of showing an unbroken line of decisions to the same effect. But, in the first place, the point is interesting and important, and, in the second place, one must experience a feeling of surprise, if not of doubt, on a first reading of these decisions. That such a feeling is not unnatural appears by the comments of the text-writers. Of the Indiana case in particular, which it must be admitted was an extreme case, Taylor in his book on Corporations, § 698, note, says: "The transaction which in this case was allowed to stand seems to the writer to have been eminently unfair, and, indeed, a rule—for which this decision is certainly authority—that directors in their dealings with shareholders are entitled to take advantage of their knowledge of facts not known to the latter, but which the directors are acquainted with by reason of their official position, seems of questionable propriety." And Bigelow says of the same case: "It was held that in the absence of actual fraud the sale was valid. It was considered that such a case did not disclose a relation of trustee and *cestui que trust.* But the decision was not unanimous, and the subject is worthy of further consideration. The Court was perhaps correct in holding that the president of the company was not, in strictness, a trustee toward the vendor; but it is quite another thing to say that no relation of confidence and trust existed between the parties. And that is all that is necessary to require disclosure:" Bigelow on Fraud, 330.

Yet it is hard to escape from the common-sense view of the Tennessee Judge—if directors can buy at all (and their right to do so must be conceded) they can only buy from those who can sell, who are necessarily the stockholders. And it would be difficult, perhaps, to restrict the right without hampering it intolerably. It is easy to imagine a case in which the director has knowledge of matters —for example, pending negotiations—which publicity would ruin and which his undoubted duty to the corporatiion compels him to keep secret. It would be a hardship to lay down a hard and fast rule that a director under such circumstances cannot acquire any of the company's stock without putting himself in the position of losing his money if the negotiations are unsuccessful and the stock depreciates, or losing his stock if the

negotiations succeed and the stock goes up. This would be holding him to the strictest measure of a trustee's accountability. Another point is forcibly made by SUNDERLAND, J., in Carpenter *v.* Danforth, 52 Barb., 586: "It will not do," he says, "to make the principle generally applicable to purchases by directors of the stock of their corporations. As to stocks which have a regularly quoted price or market value, parties generally sell and buy them with reference to this price or value, rather than with reference to their real value, or any opinion of their real value, founded on a knowledge or supposed knowledge of the condition of the corporations or of their affairs. As to such stock, would it do to make the purchase of it by a director, though it happened to be the stock of his own corporation, an exception, and to say that the parties dealt with reference to the real condition of the corporation and the supposed real value of the stock, founded on a knowledge or supposed knowledge of its affairs? Plainly it would not; and plainly, in such case, the application of the principle of equity would be unreasonable. But the duty arising from the mere trust relation must be the same in all cases where the same trust relation exists; for courts of equity, though they deal with special cases, apply general principles."

The rule, then, appears to be that in general the relation is not fiduciary, but is one in which the peculiar circumstances are to determine whether the particular parties stand in such a relation to each other. Equity will relieve in every case in which "influence has been acquired and abused, in which confidence has been reposed and betrayed" (Bispham, Equity, § 231). Thus, beside the ordinary instances of trustee and *cestui que trust*, guardian and ward, attorney and client, parent and child, husband and wife, it has been held that the relations were confidential between partners, principal and agent, physician and patient, persons betrothed, a spiritual "medium" and a believer in spiritualism, sisters, and similar relations: Darlington's Estate, 147 Pa., 624; Beach, Modern Equity Jurisprudence, §§ 125, *et seq.* Such a rule, perhaps, affords to the stockholder as much protection as the courts can safely afford him, without imposing an intolerable burden upon the director or officer. It was the rule applied by the Master in the principal case, and may be so applied as to prevent gross injustice. It is to be observed of the Indiana case, which certainly appears a flagrant instance of unfair dealing, first, that the case is badly reported and the facts not fully stated; and, second, that the wrong perpetrated would seem to have been against the whole body of stockholders, and the right of the plaintiff to maintain a bill might be questioned; and of the New Jersey case, that the action was a common law action of deceit, and not, in form at least, an application to a chancellor for relief.

In reading this case it must be distinctly borne in mind that it proceeds on the assumption that there was no knowledge on the part of the defendant of the materiality of the fact that the contract had been made which proved so advantageous. That being a matter of fact, it is unimportant to the case, as a precedent, whether the fact was correctly decided or not.

J. D. BROWN, JR.