The judgment of the Court was delivered by Moss, C.J.O.:—
. . . The defendants contend that the moneys divided amongst them were the property of the defendant F. B. Deacon, who was entitled to receive the purchase-price to be paid by the plaintiff company, that they came to him as representing the vendors, and that he was entitled to dispose of it as he saw fit. No doubt, if he could retain it as against the plaintiff company, he could do with it as he pleased. The question is: had he the right to the amount so divided as against the plaintiff company?

The learned trial Judge found, and it is really not in dispute, that a sum of $27,691, or thereabouts, represented the profit of the defendant F. B. Deacon upon the sale to the plaintiff company. But the learned Judge also found that for this profit the defendant F. B. Deacon was not accountable to the plaintiff company—that it was not a secret profit, but part of a price paid by the plaintiff company for property which it had, through its board of directors, agreed to purchase after due consideration.

But the question is: was the agreement made and entered into on behalf of the plaintiff company by an independent board of directors, to whom full disclosure had been made, and also were fully aware of the interests of the defendants F. B. Deacon and Mooney in the transactions? . . .

It is not questioned that the plaintiff company was the creation of the defendants Mooney and F. B. Deacon for the very purpose of taking over the two concerns in which both were interested. . . . They were promoters of the plaintiff company in every sense of the word. It was not intended that the company to be formed should be one of that class, not infrequent in the present day, in which the shares, or the chief part of them, are to be allotted to the owner or owners of the business concern intended to be taken over in consideration of the transfer of the property and business, such as in the well-known case of Salomon v. Salomon, [1897] A. C. 622. In the case before us it is manifest that from the beginning the intention was that ready money or its equivalent should be paid for the properties and businesses to be acquired, and that the required cash should be obtained by the issue to the public of the shares in the capital stock of the company when formed. The difference between the two cases, which is obvious, is alluded to by Lord Watson in the Salomon case, at p. 37 . . .; and by Lord Macnaghten, at p. 48. . . .

Here the intention and the course adopted were otherwise. For the purposes of procuring incorporation, five persons subscribed the memorandum of agreement, each agreeing to take 10 shares of $100 each. . . . These five persons were the provisional direc-