# United Kingdom House of Lords Decisions



Die Veneris, 20° Februarii, 1942

Parliamentary Archives,

HL/PO/JU/4/3/973

# REGAL (HASTINGS) LIMITED

Viscount Sankey
Lord Russell of Killowen
Lord Macmillan
Lord Wright
Lord Porter

*V.*

# GULLIVER AND OTHERS.

Viscount Sankey

MY LORDS,

This is an Appeal by Regal (Hastings) Limited from an Order of His Majesty's Court of Appeal dated the 15th February, 1941. That Court dismissed the Appeal of the Appellants from a judgment of the Hon. Mr. Justice Wrottesley, dated the 3Oth August, 1940. The Appeal was brought by special leave granted by this House on the 2nd April, 1941.

The Appellants we're the plaintiffs in the action and are referred to as "Regal"; the Respondents were the Defendants.

The action was brought by Regal against the first five Respondents, who were former Directors of Regal, to recover from them, sums of money amounting to £7,010 8s. 4d., being profits made by them upon the acquisition and sale by them of shares in the subsidiary company formed by Regal and known as Hastings Amalgamated Cinemas Limited. This Company is referred to *as* ″ Amalgamated ". The action was brought against the Defendant, Garton, who was Regal's former solicitor, to recover the sum of £1,402 1s. 8d., being profits made by him in similar dealing in the said shares. There were alternative claims for damages for misfeasance and for negligence.

The action was based on the allegation that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves, with a view to enabling them at once to sell them at a very substantial profit, that they had obtained that profit by using their offices as directors and solicitor and were, therefore, accountable for it to Regal, and also that in so acting

they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. The facts were of a complicated and unusual character. I have had the advantage of reading, and I agree with, the statement as to them prepared by my noble and learned friend, Lord Russell of Killowen. It will be sufficient for my purpose to set them out very briefly.

In the summer of 1935 the directors of Regal, with a view to the future development or sale of their Company, were anxious to extend the sphere of its operations by the acquisition of other cinemas. In Hastings and St. Leonards there were two small ones called the Elite and the De Luxe. Negotiations began both for their acquisition or control by lease or otherwise and for the disposal of Regal itself.

Part of the machinery for the purpose was the creation by Regal of a subsidiary company, the Amalgamated. It was registered on the 26th September, 1935, with a capital of £5,000 in £1 shares. The directors were the same as those of Regal with the addition of Garton. It was thought that only £2,000 of the capital was to be issued and that it would be subscribed by Regal, who would control it.

Then difficulties began with the Elite and the De Luxe as to a lease, amongst others whether the directors of Amalgamated would guarantee the rent. The directors were not willing to do so.

At last all difficulties were surmounted at a crucial meeting of October 2nd, 1935. It was a peculiar meeting, the directors both of Regal and Amalgamated were summoned to attend at the same

place and at the same time. They did so, but, although separate minutes were subsequently attributed to each Company, it is not easy to say from the evidence at any particular moment for which company a particular director was appearing. It was resolved that Regal should apply for 2,000 shares in Amalgamated. It was agreed that £2,000 was the total sum which Regal could find. The value of the leases of the two cinemas was taken at £15,000. The draft lease was approved. Each of The Regal directors, except Gulliver, the Chairman, agreed to apply for 500 shares, Gulliver saying he would find people to take up 500. The Regal directors requested Garton to take up 500. I will deal later with particular evidence applying to Gulliver and Garton, who delivered separate defences.

Thus the capital of Amalgamated was fully subscribed, Regal taking 2,000 shares, the five Respondents taking 500 shares each, and the persons found by Gulliver the remaining 500. The shares were duly paid for and allotted. In the final transaction shortly afterwards these shares were sold at substantial profit and it is this profit which Regal asks to recover in this action.

The directors gave evidence and were severely cross-examined as to their good faith. The trial Judge said: " All this subsequent " history does not help me to decide whether the action of the " directors of the Plaintiff company and their solicitor on the 2nd " October was *bona fide* in the interests of the company and not " *mala fide* and in breach of their duty to the company ", and later on he said: " I must take it that in the realisation of those facts it " means that I cannot accept what has to be established by the " Plaintiff, and that is that the Defendants here acted in ill faith ", and later, " Finally I have to remind myself, were it necessary, that " the burden of proof, as in a criminal case, is the Plaintiffs', who " must establish the fraud they allege. On the whole I do not think " the Plaintiff company succeeds in doing that and, therefore, there " must be judgment for the Defendants."

This latter statement was criticised by du Parcq, L.J., in the Court of Appeal, who says: " To anyone who has read the plead- " ings but not followed the course of the trial that would seem a " remarkable statement on the part of the learned Judge, because " it is common ground that there is no allegation of fraud in the " pleadings whatever . . . but the course which the case has taken " makes the learned Judge's statement quite comprehensible " because it does appear to have been put before him as, in the " main at any rate, a case of fraud."

It must be taken, therefore, that the Respondents acted *bona fide* and without fraud.

" In the Court of Appeal the Master of the Rolls said: " If the " directors in coming to the conclusion that they could not put up " more than £2,000 of the company's money had been acting in " bad faith, and if that restriction of the company's investment had

" been done for the dishonest purpose of securing for themselves
" a profit which not only could but which ought to have been pro-
" cured for their company, I apprehend that not only could they
" not have held that profit for themselves if the contemplated trans-
" action had been carried out, but they could not have held a profit
" for themselves even if that transaction was abandoned and
" another profitable transaction was carried through in which they
" did in fact realise a profit through the shares ... but once they
" have admittedly *bona fide* come to the decision to which they
" came in this case, it seems to me that their obligation to refrain
" from acquiring those shares for themselves comes to an end. In
" fact, looking at it as a matter of business, if that was the conclusion
" which they came to, a conclusion which in my judgment was

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" amply justified on the evidence from the business point of
" view, then there was only one way left of raising the money,
" and that was putting it up themselves. . . . That being so, the
" only way in which these directors could secure that benefit
" for their company was by putting up the money themselves.
" Once that decision is held to be a *bona fide* one and fraud drops
" out of the case, it seems to me there is only one conclusion,
" namely that the appeal must be dismissed with costs". It seems therefore that the absence of fraud was the reason of the decision.

In the result, the Court of Appeal dismissed the Appeal and from their decision the present Appeal is brought.

The Appellants say they are entitled to succeed—

> " (1) because the Respondents secured for themselves
> " the profits upon the acquisition and sale of the shares in
> " Amalgamated by using the knowledge acquired as
> " directors and solicitor respectively of Regal and by using
> " their said respective positions and without the knowledge
> " or consent of Regal;
>
> " (2) because the doctrine laid down in such cases with
> " regard to trustees is equally applicable to directors and
> " solicitors ".

Although both in the Court of first instance and the Court of Appeal the question of fraud was the prominent feature, the Appellants' Counsel in this House at once stated that it was no part of his case and quite irrelevant to his arguments. His contention was that the Respondents were in a fiduciary capacity in relation to the Appellants and as such accountable in the circumstances for the profits they made on the sale of the shares.

As to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial Judge. In my view the Respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides.*

The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee he is bound to account for it to his *cestui que trust.*

The earlier cases are concerned with trusts of specific property, *Keech v. Sandford* (1726) Sel. Ch. Cas. 61, Wh. and Tud. Edition 9th, II, 648, per Lord Chancellor King.

The rule, however, applies to agents, as for example solicitors and directors, when acting in a fiduciary capacity. In *Ex parte James* (1802) 8 Ves. jun. 337; the headnote reads: " Purchase of a
" bankrupt's estate by the solicitor to the commission set aside. The
" Lord Chancellor would not permit him to bid upon the resale,

" discharging himself from the character of solicitor, without the
" previous consent of the persons interested, freely given, upon full
" information ". Lord Eldon said, p. 345: " The doctrine as to
" purchase, by trustees, assignees, and persons having a confidential
" character, stands much more upon general principle than upon
" the circumstances of any individual case. It rests upon this, that
" the purchase is not permitted in any case, however honest the
" circumstances, the general interests of justice requiring it to be
" destroyed in every instance, as no Court is equal to the examina-
" tion and ascertainment of the truth in much the greater number
" of cases." In *Hamilton v. Wright* (1842), 9 Cl. and Fin. III, the

headnote reads: " A trustee is bound not to do anything which can " place him in a position inconsistent with the interests of his trust, " or which can have a tendency to interfere with his duty in dis- " charging it. Neither the trustee nor his representative can be " allowed to retain an advantage acquired in violation of this rule."

Lord Brougham said, at p. 124, "The knowledge which he " acquires as trustee is of itself sufficient ground for disqualification, " and of requiring that such knowledge shall not be capable of " being used for his own benefit to injure the trust. The ground of " disqualification is not merely because such knowledge may enable " him actually to obtain an undue advantage over others." In *Aberdeen Railway Company v. Blaikie* (1853), I, MacQ., 461, the headnote reads: " The director of a railway company is a trustee, " and as such is precluded from dealing on behalf of the company " with himself or with a firm of which he is a partner." Lord Cranworth said, at p. 471, "A corporate body can only act by " agents, and it is of course the duty of those agents so to act as best " to promote the interests of the corporation whose affairs they are " conducting. Such agents have duties to discharge of a fiduciary " nature towards their principal, and it is a rule of universal appli- " cation that no one having such duties to discharge shall be allowed " to enter into engagements in which he has or can have a personal " interest conflicting, or which possibly may conflict, with the " interests of those whom he is bound to protect."

It is not, however, necessary to discuss all the cases cited because the Respondents admitted the generality of the rule as contended for by the Appellants but were concerned rather to confess and avoid it. Their contention was that in this case upon a true perspective of the facts they were under no equity to account for the profits they made. I will deal first with the Respondents, other than Gulliver and Garton. We were referred to the *Imperial Hydropathic Company v. Hampson* (1882), 23, Ch. D., 1, where Bowen, L.J., at p. 12, drew attention to the difference between directors and trustees, but the case is not an authority for contending that a director cannot come within the general rule.

No doubt there may be exceptions to the general rule, as for example where a purchase is entered into after the trustee has divested himself of his trust sufficiently long before the purchase to avoid the possibility of his making use of special information acquired by him as trustee: (see the remarks of Lord Eldon, in *ex Parte James (ubi supra)* at p. 352) or where he purchases with full knowledge and consent of his *cestui que trust. Imperial v. Hampson (ubi supra)* makes no exception to the general rule that a solicitor or director if acting in a fiduciary capacity is liable to account for the profits made by him from knowledge acquired when so acting.

It is then argued that it would have been a breach of trust for the Respondents as directors of Regal to have invested more than £2,000 of Regal's money in Amalgamated and that the transaction would never have been carried through if they had not themselves

put up the other £3,000. Be it so, but it is impossible to maintain that because it would have been a breach of trust to advance more than £2,000 from Regal and that the only way to finance the matter was for the directors to advance the balance themselves, a situation arose which brought the Respondents outside the general rule and permitted them to retain the profits which accrued to them from the action they took. At all material times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors. They framed resolutions by which they made a profit for themselves. They sought no authority from the company to do so, and by reason of their position and actions, they made large profits for which, in my view, they are liable to account to the company.

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I now pass to the cases of Gulliver and Garton. Their liability depends upon a careful examination of the evidence. Gulliver's case is that he did not take any shares and did not make any profit by selling them. His evidence, which is substantiated by the documents, is as follows. At the board meeting of October 2nd he was not anxious to put any money of his own into Amalgamated. He thought he could find subscribers for £500 but was not anxious to do so. He did, however, find subscribers—£200 by South Down Land Company, £100 by a Miss Geering and £200 by Seguliva A.G., a Swiss company. The purchase price was paid by these three, either by cheque or in account, and the shares were duly allotted to them. The shares were held by them on their own account. When the shares were sold the moneys went to them and no part of the moneys went into Gulliver's pocket or into his account.

In these circumstances, and bearing in mind that Gulliver's evidence was accepted, it is clear that he made no profits for which he is liable to account. The case made against him rightly fails and the appeal against the decision in his favour should be dismissed.

Carton's case is that in taking the shares he acted with the knowledge and consent of Regal and that consequently he comes within the exception to the general rule as to the liability of the person acting in a fiduciary position to account for profits.

At the meeting of October 2nd, Gulliver, the Chairman of Regal, and his co-directors were present. He was asked in cross-examination about what happened as to the purchase of the shares by the directors. The question was: " Did you say to Mr. Garton, ' Well, " Garton, you have been connected with Bentley's for a long time " will you not put up £500? ' His answer was, " I think I can " put it higher. I invited Mr. Garton to put the £500 and to make " up the £3,000." This was confirmed by Garton in examination in chief. In these circumstances, and bearing in mind that this evidence was accepted, it is clear that he took the shares with the full knowledge and consent of Regal and that he is not liable to account for profits made on their sale. The appeal against the decision in his favour should be dismissed.

The appeal against the decision in favour of the Respondents other than Gulliver and Garton should be allowed, and I agree with the order to be proposed by my noble and learned friend, Lord Rusell of Killowen as to amounts and costs. The appeal against the decision in favour of Gulliver and Garton should be dismissed with costs.

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Viscount

Sankey
Lord

Russell of

Killowen

Lord

Macmillan

Lord

Wright

Lord

Porter

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REGAL (HASTINGS), LIMITED

*v.*

GULLIVER AND OTHERS.

Lord Russell of Killowen

MY LORDS,

The very special facts which have led up to this litigation require to be stated in some detail, in order to make plain the point which arises for decision on this Appeal.

The Appellant is a limited company called Regal (Hastings), Ld., and may conveniently be referred to as Regal. Regal was incorporated in the year 1933 with an authorised capital of £20,000 divided into 17,500 preference shares of £1 each and 50,000 ordinary shares of one shilling each. Its issued capital consisted of 8,950 preference shares and 50,000 ordinary shares. It owned, and managed very successfully, a freehold cinema theatre at Hastings called the Regal. In July, 1935, its board of directors consisted of one Walter Bentley and the Respondents Gulliver, Bobby, Griffiths, and Bassett Its shareholders were twenty in number. The Respondent Garton acted as its solicitor.

In or about that month, the Board of Regal formed a scheme for acquiring a lease of two other cinemas (viz., the Elite at Hastings, and the Cinema de Luxe at St. Leonards), which were owned and managed by a company called Elite Picture Theatres (Hasting and Bristol) Limited. The scheme was to be carried out by obtaining the grant of a lease to a subsidiary limited company, which was to be formed by Regal, with a capital of 5,000 £1 shares,

of which Regal was to subscribe for 2,000 in cash, the remainder being allotted to Regal or its nominees as fully paid for services rendered. The whole beneficial interest in the lease would, if this scheme were carried out, enure solely to the benefit of Regal and its shareholders, through the shareholding of Regal in the subsidiary company.

The Respondent Garton, on the instructions of Regal, negotiated for the acquisition of the lease, with the result that an offer to take a lease for 35 or 42 years at a rent of £4,600 for the first year, rising in the second and third years, up to £5,000 in the fourth and subsequent years, was accepted on behalf of the owners on the 21st August, 1935, subject to mutual approval of the form of the lease. Subsequently the owners of the two cinemas required the rent under the proposed lease to be guaranteed.

On the nth September, 1935, Walter Bentley died; and on the 18th September, 1935, his son, the Respondent Bentley, who was one of his executors, was appointed a director of Regal. It should now be stated that concurrently with the negotiations for the acquisition of a lease of the two cinemas, Regal was contemplating a sale of its own cinema, together with the leasehold interest in the two cinemas which it was proposing to acquire.

On the 18th September, 1935, at a Board meeting of the Regal, the Respondent Garton was instructed that the directors were prepared to give a joint guarantee of the rent of the two cinemas, until the subscribed capital of the proposed subsidiary company amounted to £5,000. He was further instructed to deal with all offers received for the purchase of Regal's own assets. On the 26th September, 1935, the proposed subsidiary company was registered under the name Hastings Amalgamated Cinemas, Ld., which may tor brevity be referred to as Amalgamated. Its directors were the five directors of Regal, and in addition the Respondent Garton.

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Harry Bentley, who had been appointed a director of Regal only on the 18th September at the end of the Board meeting of that date, enquired from Garton the position as regards the new company Amalgamated. In reply he received a letter dated the 26th September, 1935, in which the position, as at that date, is set out by Garton. After stating that the capital of Amalgamated is £5,000, of which £2,000 is being subscribed by Regal, " which sum " will form virtually the whole of the present paid up capital" of Amalgamated, and that the rent is to be guaranteed by the directors so long as the issued capital of Amalgamated is under £5,000, he concludes as follows: —

> " Inasmuch as it is the intention of all the parties that the Regal (Hastings) Ltd. will not only control the Hastings (Amalgamated) Cinemas Ltd., but will continue to hold virtually the whole of the capital, the position of a shareholder of Regal (Hastings) Ltd. is merely that he has the advantage of a possible asset of the two new cinemas on sale by the Regal (Hastings) Ltd. of its undertaking, so that the price realised to the shareholders of the Regal (Hastings) Ltd. will be the amount that he would normally have received for his interest in such company, plus his proportion of the sale price of such two new cinemas."

On the 2nd October, 1935, an offer was received from would-be purchasers offering a net sum of £92,500 for the Regal cinema and the lease of the two cinemas. Of this sum £77,500 was allotted as the price of Regal's cinema, and £15,000 as the price of the two leasehold cinemas. This splitting of the price seems to have been done by the purchasers at the request of the Respondent Garton; but it must be assumed in favour of the Regal directors that they were satisfied that £77,500 was not too low a price to be paid for their company's cinema, with the result that £15,000 cannot be taken to have been in excess of the value of the lease which Amalgamated was about to acquire.

On the afternoon of that same 2nd October, the six Respondents met at No. 62 Shaftesbury Avenue, London, the registered offices of Regal. Various matters were mentioned and discussed between them, and they came to certain decisions. Subsequently minutes were prepared which record the different matters as having been transacted at two separate and distinct Board meetings, viz., a meeting of the Board of Regal, and a meeting of the Board of Amalgamated. The Respondent Gulliver stated in his evidence that two separate meetings were held, that of the Amalgamated Board being held and concluded, before that of the Regal Board was begun. On the other hand the Respondent Bentley says " It " was more or less held in one lump, because we were talking about " selling the three properties." And the Respondent Garton states that after it was decided that Regal could only afford to put up £2,000 in Amalgamated, which was purely a matter for the consideration of the Regal Board, the next matter discussed was one which figures in the minutes of the Amalgamated Board meeting. Moreover both meetings are recorded in the minutes as having been held at 3 p.m.

Whatever may be the truth-as to this, the matters discussed and decided included the following: (1) Regal was to apply for 2,000 shares in Amalgamated: (2) the offer of £77,500 for the Regal cinema and £15,000 for the two leasehold cinemas was accepted: (3) the solicitor reporting that completion of the lease was expected to take place on the 7th October, it was resolved that the seal of Amalgamated be affixed to the engrossment when available : and (4) the Respondent Gulliver having objected to guaranteeing the rent it was resolved—here I cite the words of the minute —" that the directors be invited to subscribe for 500 shares each " and that such shares be allotted accordingly."

On the 7th October, 1935, a lease of the two cinemas was executed in favour of Amalgamated, for the term of 35 years from the 29th September, 1935, in accordance with the agreement previously come to. The shares of Amalgamated were all issued, and were allotted as follows: 2,000 to Regal, 500 to each of the Respondents Bobby, Griffiths, Bassett, Bentley, and Garton, and (by the direction of the Respondent Gulliver) 200 to a Swiss company called Seguliva A.G., 200 to a company called South Downs Land Co., Ltd., and 100 to a Miss Geering.

In fact the proposed sale and purchase of the Regal cinema and the two leasehold cinemas fell through. Another proposition, however, took its place, viz., a proposal for the purchase from the individual shareholders of their shares in Regal and Amalgamated. This proposal came to maturity by agreements dated the 24th October, 1935, as a result of which the 3,000 shares in Amalgamated held otherwise than by Regal were sold for a sum of £3 16s. 1d. per share, or in other words at a profit of £2 16s. 1d. per share over the issue price of par.

As a sequel to the sale of the shares in Regal, that company came under the management of a new Board of directors, who caused to be issued the writ which initiated the present litigation.

By this action Regal seek to recover from its five former directors and its former solicitor a sum of £8,142 l0s. 0d. either as damages or as money had and received to the Plaintiff's use. The action was tried by Wrottesley J., who entered judgment for all the Defendants with costs. An appeal by the Plaintiffs to the Court of Appeal was dismissed with costs.

My Lords, those are the relevant facts which have led up to the debate in your Lordships' House, and I now proceed to consider whether the Appellant is entitled to succeed against any and which of the Respondents.

The case has, I think, been complicated and obscured by the presentation of it before the trial judge. If a case of wilful misconduct or fraud on the part of the Respondents had been made out, liability to make good to Regal any damage which it had thereby suffered could no doubt have been established; and efforts were apparently made at the trial by cross-examination and otherwise to found such a case. It is, however, due to the Respondents to make it clear at the outset that this attempt failed. Nor was the case so presented to us here. We have to consider the question of the Respondent's liability on the footing that in taking up these shares in Amalgamated they acted with *bona fides,* intending to act in the interest of Regal.

Nevertheless they may be liable to account for the profits which they have made, if while standing in a fiduciary relationship to Regal they have by reason and in course of that fiduciary relationship made a profit

This aspect of the case was undoubtedly raised before the trial

judge, but in so far as he deals with it in his judgment, he deals with it on a wrong basis. Having stated at the outset quite truly that what he calls " this stroke of fortune " only came the way of the Respondents because they were the directors and solicitor of Regal, he continues this—

> ' But in order to succeed the Plaintiff company must show that the "Defendants both ought to have caused and could have caused the Plaintiff "company to subscribe for these shares, and that the neglect to do so caused "a loss to the Plaintiff company. Short of this, if the Plaintiffs can estab- "lish that though no loss was made by the company, yet a profit was cor- "ruptly made by the directors and the solicitor, then the company can claim "to have that profit handed over to the company, framing the action in such "a case for money had and received by the Defendants for the Plaintiffs' "use."

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Other passages in his judgment indicate that in addition to this " corrupt" action by the directors, or perhaps alternatively, the Plaintiffs in order to succeed must prove that the Defendants acted *mala fide,* and not *bona fide* in the interests of the company, or that there was a plot or arrangement between them to divert from the company to themselves a valuable investment. However relevant such considerations may be in regard to a claim for damages resulting from misconduct, they are irrelevant to a claim against a person occupying a fiduciary relationship towards the Plaintiff for an account of the profits made by that person by reason and in course of that relationship.

In the Court of Appeal, upon this claim to profits, the view was taken that in order to succeed the Plaintiff had to establish that there was a duty on the Regal directors to obtain the shares for Regal. Two extracts from the judgment of the Master of the Rolls show this. After mentioning the claim for damages, he says: —

> " The case is put on an alternative ground. It is said that in the cir-
> " cumstances of the case the directors must be taken to have been acting in
> " the matter of their office when they took those shares; and that accordingly
> " they are accountable for the profits which they have made. . . . There
> " is one matter which is common to both these claims which, unless it is
> " established, appears to me to be fatal: It must be shown that in the
> " circumstances of the case it was the duty of the directors to obtain these
> " shares for their company."

Later in his judgment he uses this language: —

> " But it is said that the profit realised by the directors on the sale of
> "the shares must be accounted for by them. That proposition involves that
> "on the 2nd October, when it was decided to acquire these shares, and at the
> "moment when they were acquired by the directors, the directors were
> "taking to themselves something which properly belonged to their com-
> "pany."

Other portions of the judgment appear to indicate that upon this claim to profits, it is a good defence to show *bona fides* or absence of fraud on the part of the directors in the action which they took, or that their action was beneficial to the company, and the judgment ends thus: —

> " That being so, the only way in which these directors could secure that
> " benefit for their company was by putting up the money themselves. Once
> " that decision is held to be a *bona fide* one, and fraud drops out of the case,
> " it seems to me there is only one conclusion, namely, that the Appeal must
> " be dismissed with costs."

My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides;* or upon such questions or considerations as whether the profit would or should otherwise have gone to the Plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the Plaintiff, or whether he took a risk, or acted as he did for the benefit of the Plaintiff, or whether the Plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest

and well-intentioned, cannot escape the risk of being called upon to account.

The leading case of *Keech v. Sandford* (Sel. Ch. Ca. 61) is an illustration of the strictness of this rule of Equity in this regard, and of how far the rule is independent of these outside considerations. A lease of the profits of a market had been devised to a trustee for the benefit of an infant. A renewal on behalf of the infant was refused: it was absolutely unobtainable. The trustee, finding that it was impossible to get a renewal for the benefit of the infant, took a lease for his own benefit. His duty to obtain it for the infant was incapable of performance; nevertheless he was ordered to assign

the lease to the infant, upon the bare ground that if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of *cestuis que trust.* ' This may seem " hard," said Lord King, " that the trustee is the only person of all " mankind who might not have the lease, but it is very proper that " rule should be strictly pursued, and not in the least relaxed ".

One other case in Equity may be referred to in this connection, viz., *ex parte James* (8 Ves. jun. 337) a decision of Lord Eldon's. That was a case of a purchase of a bankrupt's estate by the solicitor to the commission, and Lord Eldon (at p. 345) refers to the doctrine thus: —

> " The doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases."

Let me now consider whether the essential matters which the Plaintiff must prove, have been established in the present case.

As to the profit being in fact made there can be no doubt. The shares were acquired at par and were sold three weeks later at a profit of £2 16s. 1d. per share.

Did such of the first rive Respondents as acquired these very profitable shares acquire them by reason and in course of their office of directors of Regal? In my opinion, when the facts are examined and appreciated the answer can only be that they did. The actual allotment no doubt had to be made by themselves and Garton (or some of them) in their capacity as directors of Amalgamated; but this was merely an executive act, necessitated by the alteration of the scheme for the acquisition of the lease of the two cinemas for the sole benefit of Regal and its shareholders through Regal's shareholding in Amalgamated. That scheme could only be altered by or with the consent of the Regal Board. Consider what in fact took place on the 2nd October, 1935. The position immediately before that day is stated in Garton's letter of the 26th September, 1935. The directors were willing to guarantee the rent until the subscribed capital of Amalgamated reached £5,000; Regal was to control Amalgamated and own the whole of its share capital; with the consequence that the Regal shareholders would receive their proportion of the sale price of the two new cinemas. The Respondents then meet on the 2nd October, 1935. They have before them an offer to purchase the Regal cinema for £77,500, and the lease of the two cinemas for £15,000. The offer is accepted. The draft lease is approved; a resolution for its sealing is passed in anticipation of completion in five days. Some of those present, however, shy at giving guarantees, and accordingly the scheme is changed by the Regal directors in a vital respect. It is agreed that a guarantee shall be avoided, by the six Respondents bringing the subscribed capital up to £5,000. I will consider the evidence and the minute in a

moment. The result of this change of scheme (which only the Regal directors could bring about) may not have been appreciated by them at the time; but its effect upon their company and its shareholders was striking. In the first place, Regal would no longer control Amalgamated, or own the whole of its share capital; the action of its directors had deprived it (acting through its shareholders in general meeting) of the power to acquire the shares. In the second place, the Regal shareholders would only receive a largely reduced proportion of the sale price of the two cinemas. The Kegal directors and Garton would receive the moneys of which the Regal shareholders were thus deprived. This vital alteration was brought about in the following circumstances (I

refer to the evidence of the Respondent Garton.) He was asked what was suggested when the guarantees were refused, and this is his answer:—

> " Mr. Gulliver said ' We must find it somehow. I am willing to find ' £500. Are you willing,' turning to the other four directors of Regal, ' to ' do the same? ' They expressed themselves as willing. He said, ' That ' makes £2,500 ', and he turned to me and said, ' Garton, you have been ' interested in Mr. Bentley's companies; will you come in to take £500?' I agreed to do so."

Although this matter is recorded in the Amalgamated minutes, this was in fact a decision come to by the directors of Regal, and the subsequent allotment by the directors of Amalgamated was a mere carrying into effect of this decision of the Regal Board. The resolution recorded in the Amalgamated minute runs thus—

> " After discussion it was resolved that the directors be invited to sub- " scribe for 500 shares each, and that such shares be allotted accordingly ".

As I read that resolution, and my reading agrees with Carton's evidence, the invitation is to the directors of Regal, and is made for the purpose of effectuating the decision which the five directors of Regal had made, that each should take up 500 shares in Amalgamated. The directors of Amalgamated were not conveying an " invitation " to themselves. That would be ridiculous. They were merely giving effect to the Regal directors' decision to provide £2,500 cash capital themselves, a decision which had been followed by a successful appeal by Gulliver to Garton to provide the balance.

My Lords, I have no hesitation in coming to the conclusion upon the facts of this case, that these shares when acquired by the directors were acquired by reason, and only by reason, of the fact that they were directors of Regal, and in the course of their execution of that office.

It now remains to consider whether in acting as directors of Regal they stood in a fiduciary relationship to that company. Directors of a limited company are the creatures of Statute, and occupy a position peculiar to themselves. In some respects they resemble trustees, in others they do not. In some respects they resemble agents, in others they do not. In some respects they resemble managing partners, in others they do not. In the case of the *Forest of Dean Coal Mining Co.* (10 C.D. 450) a director was held not liable for omitting to recover promotion money which had been improperly paid on the formation of the company. He knew of the improper payment, but he was not appointed a director until a later date. It was held that although a trustee of settled property which included a debt would be liable for neglecting to sue for it, a director of a company was not a trustee of debts due to the company and was not liable. I cite two passages from the judgment of Sir George Jessel, M.R.: —

> Directors have sometimes been called trustees, or commercial trustees, " and sometimes they have been called managing partners, it does not matter " what you call them so long as you understand what their true position is, " which is that they are really commercial men managing a trading concern " for the benefit of themselves and all the other shareholders in it."

Later, after pointing out that traders have a discretion whether they shall sue for a debt, which discretion is not vested in trustees of a debt under a settlement, he says: —

> " Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. ... A director is the managing partner of the concern, and although a debt is due to the concern I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee."

The position of directors was considered by Kay, J., in the case of the *Faure Electric Co.* (40 C.D. 141). That was a case of directors

having applied the company's money in payment of an improper commission; a claim was made for the loss thereby occasioned to the company. In referring to the liability of directors, the learned judge pointed out that directors were not trustees in the sense of trustees of a settlement, that the nearest analogy to their position would be that of a managing agent of a mercantile house with large powers, but that there was no analogy which was absolutely perfect; and he added: —

> " However, it is quite obvious that to apply to directors the strict rules
> " of the Court of Chancery with respect to ordinary trustees might fetter
> " their action to an extent which would be exceedingly disadvantageous to
> " the companies they represent."

In addition a passage from the judgment of Bowen, L.J., in *Imperial Hydropathic Co. v. Hampson* (23 C.D. 1) may be usefully recalled. He says:

> " I should wish ... to begin by remarking this, that when persons
> " who are directors of a company are from time to time spoken of by judges
> " as agents, trustees, or managing partners of the company, it is essential
> " to recollect that such expressions are used not as exhaustive of the powers
> " or responsibilities of those persons, but only as indicating useful points
> " of view from which they may for the moment, and for the particular pur-
> " pose, be considered—points of view at which for the moment they seem
> " to be either cutting the circle or falling within the category of the suggested
> " kind. It is not meant that they belong to the category, but that it is
> " useful for the purpose of the moment to observe that they fall *pro tanto*
> " within the principles which govern that particular class."

These three cases, however, were not concerned with the question of directors making a profit; but that the equitable principle in this regard applies to directors is beyond doubt. In *Parker v. McKenna* (L.R. 10 Ch. 96), a new issue of shares of a joint stock bank was offered to the existing shareholders at a premium. The directors arranged with one Stock to take, at a larger premium, the shares not taken up by the existing shareholders. Stock, being unable to fulfil his contract, requested the directors to relieve him of some. They did so, and made a profit. They were held accountable for the profit so made. The Lord Chancellor (Lord Cairns) stated (at p. 118) that: —

> " The Court will not enquire, and is not in a position to ascertain,
> " whether the Bank has lost or not lost by the acts of the directors. All that
> ' the Court has to do is to examine whether a profit has been made by an
> ' agent, without the knowledge of his principal, in the course and execution
> ' of his agency, and the Court finds in my opinion that these agents in the
> ' course of their agency have made a profit, and for that profit they must
> ' in my opinion account to their principal."

In the same case James, L.J., (at p. 124) stated his view in the following terms: —

> ' It appears to me very important that we should concur in laying down
> " again and again the general principle that in this Court, no agent in the
> " course of his agency, in the matter of his agency, can be allowed to make
> " any profit without the knowledge and consent of his principal, that that
> " rule is an inflexible rule, and must be applied inexorably by this Court,
> " which is not entitled in my judgment to receive evidence, or suggestion, or
> " argument, as to whether the principal did or did not suffer any injury in

" fact, by reason of the dealing of the agent, for the safety of mankind
" requires that no agent shall be able to put his principal to the danger of
" such an enquiry as that."

In the case of the *Imperial Mercantile Credit Association v. Coleman* (6 E. & I. App. 189) one Coleman, a stockbroker and a director of a financial company, had contracted to place a large amount of railway debentures for a commission of 5 per cent. He proposed that his company should undertake to place them for a commission of 1 1/2 per cent. The 5 per cent, commission was in due course paid to the director, who paid over the 1 1/2 per cent, to the

company. He was held liable to account for the 3 1/2 per cent., by Malins, V.C., who said (see 6 Ch. App. at p. 563): —

> " It is of the highest importance that it should be distinctly understood
> " that it is the duty of directors of companies to use their best exertions for
> " the benefit of those whose interests are committed to their charge, and that
> " they are bound to disregard their own private interests whenever a regard
> " to them conflicts with the proper discharge of such duty."-

His decree was reversed by Lord Hatherley on the ground that the transaction was protected under the company's Articles of Association. Your Lordships' House, however, thought that in the circumstances of the case the Articles of Association gave no protection, and restored the decree with unimportant variations. The liability was based on the view, which was not disputed by Lord Hatherley, that the director stood in a fiduciary relationship to the company. That relationship being established he could not keep the profit which had been earned by the funds of the company being employed in taking up the debentures. The Courts in Scotland have treated directors as standing in a fiduciary relationship towards their company and, applying the equitable principle, have made them accountable for profits accruing to them in the course and by reason of their directorships. It will be sufficient to refer to the case of the *Huntington Copper Co.* v. *Henderson* (4 Rettie 294) in which the Lord President cites with approval the following passage from the Lord Ordinary's judgment: —

> " Whenever it can be shown that the trustee *has* so arranged matters as
> " to obtain an advantage, whether in money or in money's worth, to himself
> " personally through the execution of his trust, he will not be permitted to
> " retain it, but be compelled to make it over to his constituent."

In the result I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford, ex parte James* and similar authorities applies to them in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the snares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui quo trust* in *Keech* v. *Sandford* to obtain the lease, nevertheless the trustee was accountable: and the suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

The result is that in my opinion each of the Respondents Bobby, Griffiths, Bassett and Bentley is liable to account for the profit which he made on the sale of his 500 shares in Amalgamated.

The case of the Respondent Gulliver, however, requires some further consideration, for he has raised a separate and distinct answer to the claim. He says—" I never promised to subscribe for " shares in Amalgamated. I never did so subscribe. I only promised " to find others who would be willing to subscribe. I only found " others who did subscribe. The shares were theirs; they were never " mine. They received the profit. I received none of it." If these are the true facts, his answer seems complete. The evidence in my opinion establishes his contention. Throughout his evidence Gulliver insisted that he only promised to find £500, not to subscribe it himself. The £500 was paid by two cheques in favour of

Amalgamated, one a cheque for £200 signed by Gulliver as director and on behalf of the Swiss company Seguliva, the other a cheque for £300 signed by Gulliver as managing director of South Downs Land Co., Ltd. They were enclosed in a letter of the 3rd October, 1935, from Gulliver to Garton, in which Gulliver asks that the share certificates be issued as follows: 200 shares in the name of himself, Charles Gulliver, 200 shares in the name of South Downs Co., Ltd., and 100 shares in the name of Miss S. Geering. The money for Miss Geering's shares was apparently included in South Down Co.'s cheque. The certificates were made out accordingly, the 200 shares in Gulliver's name being, he says, the shares subscribed for by the Swiss company.

When the sale and purchase of the Amalgamated shares was arranged, the agreement for the sale and purchase was signed on behalf of the vendor shareholders (other than the Respondent Bentley) by Garton & Co.: and in a letter of the 17th October, 1935, Gulliver sent to Garton (who held the three certificates) three transfers, viz. (1) a transfer of 200 shares executed by South Downs Land Co., Ltd., (2) a transfer of 200 shares executed by himself, and (3) a transfer of 100 shares executed by Miss Geering. When the purchase money was paid cheques were drawn as follows: a cheque for £360 in favour of Miss Geering, a cheque for £720 in favour of South Downs Land Co., Ltd., and a cheque for the same amount in favour of Gulliver. By letter of the 24th October, 1935, written by Gulliver to the National Provincial Bank, these cheques were paid into the respective accounts of Miss Geering, South Downs Land Co., Ltd., and Seguliva, A.G.

From the evidence of Gulliver it appeared that Miss Geering is a friend who from time to time makes investments on his advice; that the issued capital of South Downs Land Co., Ltd., is £1,000 in £1 shares, held by some 11 or 12 shareholders, of whom Gulliver is one and holds 100 shares; and that in the Swiss company Gulliver holds 85 out of 500 shares.

It is of the first importance on this part of the case to bear in mind that these directors have been acquitted of all suggestion of *mala fides* in regard to the acquisition of these shares. They had no reason to believe that they could be called to account. Why then should Gulliver go to the elaborate pains of having the shares put into the names of South Downs Co. and Miss Geering, and of having the proceeds of sale paid into the respective accounts before mentioned, if the shares and proceeds really belonged to him ? *Ex hypothesi* he had no reason for concealment; and no question was raised against the transaction until months after the proceeds of sale had been paid into the banking accounts of those whom Gulliver asserts to have been the owners of the shares. I can see no reason for doubting that the shares never belonged to Gulliver, and that he made no profit on the sale thereof.

Counsel for the Appellant, however, contended that the trial judge had found as a fact that Gulliver was the owner of the shares; and he relied on certain scattered passages in the judgment, the

strongest of which seems to me to be the one in which the learned Judge said—" I may say this with regard to Mr. Gulliver, that I " have not been misled in any way or led to decide in his favour by " the fact that he handed over his shares to his nominees, but rather " the reverse ". I cannot regard that as a finding by the judge that the shares were subscribed for by Gulliver under aliases, and that the shares and the proceeds of sale in fact belonged to him. It is equally susceptible of the meaning that he allowed others to subscribe for the shares which he could have obtained for himself had he so wished. But if it be claimed as a finding of fact in the former sense, all I can say is that there is no evidence which in my opinion would justify such a finding.

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It was further argued that even if the shares and the proceeds of sale did not belong to Gulliver, he is nevertheless liable to account to Regal for the profit made by the owners of the shares, and that upon the authority of the case of the *Liquidators of the Imperial Mercantile Credit Association v. Coleman,* to which I have already referred. One of the contentions put forward there by Coleman was that his transaction was a transaction for the benefit of a partnership in the profits of which he was only interested to the extent of a half, and that accordingly he could only be made accountable to that extent. That contention was disposed of by Lord Cairns in the following terms: —

> " My Lords, I think there is no foundation for this argument. The "profit on the transaction was obtained by Mr. Coleman, and in the view "that I take was obtained by him as a director of the Association. Whether "he desired ori whether he determined to reserve it all to himself or to share "it with his firm appears to me to be perfectly immaterial. The source from "which the profit is derived is Mr. Coleman. It is only through him that "his firm can claim. He is liable for the whole of the profits which were "obtained; and it is not the course for a Court of Equity to enter into the "consideration of what afterwards would have become of those profits."

I am unable to see how this authority helps Regal if it be assumed that neither the shares nor the profit ever belonged to Gulliver.

It was further said that Gulliver must account for whatever profits he may have made indirectly through his shareholding in the two companies, and that an enquiry should be directed for this purpose. As to this, it is sufficient to say that there is no evidence to ground such an enquiry. Indeed the evidence so far as it goes shows that neither company has distributed any part of the profit.

Finally, it was said that Gulliver must account for the profit on the 200 shares as to which the certificate was in his name. But if in fact the shares belonged beneficially to the Swiss company (and that is the assumption for this purpose), the proceeds of sale did not belong to Gulliver, and were rightly paid into the Swiss company's banking account: Gulliver accordingly made no profit for which he is accountable.

As regards Gulliver, this Appeal should in my opinion be dismissed.

There remains to consider the case of Garton. He stands on a different footing from the other Respondents in that he was not a director of Regal. He was Regal's legal adviser; but in my opinion he has a short but effective answer to the Plaintiffs' claim. He was requested by the Regal directors to apply for 500 shares. They arranged that they themselves should each be responsible for £500 of the Amalgamated capital, and they appealed, by their chairman, to Garton to subscribe the balance of £500 which was required to make up the £3,000. In law his action, which has resulted in a profit, was taken at the request of Regal, and I know of no principle or authority which would justify a decision that a solicitor must account for profit resulting from a transaction which he has entered

into on his own behalf, not merely with the consent, but at the request of his client.

My Lords, in my opinion the right way in which to deal with this Appeal is (1) to dismiss the Appeal as against the Respondents Gulliver and Garton with costs, (2) to allow it with costs as against the other four Respondents, and (3) to enter judgment as against each of these four Respondents for a sum of £1,402 1s. 8d. with interest at 4 per cent, from the 25th October, 1935, as to £1,300 part thereof, and from, the 5th December, 1935, as to the balance. As regards the liability of these four Respondents for costs, I have read the shorthand notes of the evidence at the trial, and it is clear

to me that the costs were substantially increased by the suggestions of *mala fides* and fraud with which the cross-examination abounds, and from which they have been exonerated. In my opinion a proper order to make would be to order these four Respondents to pay only three-quarters of the Appellants' taxed costs of action. The taxed costs of the Appellants in the Court of Appeal and in this House they must pay in full.

One final observation I desire to make. In his judgment the Master of the Rolls stated that a decision adverse to the directors in the present case involved the proposition that if directors *bona fide* decide not to invest their company's funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive therefrom. As to this, I can only say that to my mind the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal.

Viscount

Sankey
Lord

Russell of
Killowen
Lord
Macmillan
Lord
Wright
Lord
Porter

[17]

REGAL (HASTINGS), LIMITED

v.

GULLIVER AND OTHERS.

Lord Macmillan

MY LORDS,

The real question for decision in this Appeal seems unfortunately to have been somewhat obscured by the course of the arguments before the trial judge and to some extent also in the Court of Appeal.

The issue as it was formulated before your Lordships was not whether the directors of Regal (Hastings) Limited had acted in bad faith. Their *bona fides* was not questioned. Nor was it whether they had acted in breach of their duty. They were not said to have done anything wrong. The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. But that does not absolve them from accountability for any profit which they made if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction.

The equitable doctrine invoked is one of the most deeply rooted in pur law. It is amply illustrated in the authoritative decisions whicli my noble and learned friend Lord Russell of Killowen has cited. I should like only to add a passage from Lord Kames's " Principles of Equity," which puts the whole matter in a sentence : " Equity,' he says, " prohibits a trustee from making any profit by

" his management, directly or indirectly." (3rd edition, 1778, Vol. II, p. 87.)

The issue thus becomes one of fact. The plaintiff company has to establish two things: (1) That what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (2) that what they did resulted in a profit to themselves. The first of these propositions is clearly established by the analysis of the whole complicated circumstances for which the House is indebted to my noble and learned friend who has preceded me. The second proposition is admitted, except in the case of Mr. Gulliver, in whose case I agree that on the evidence he is not proved to have made any profit personally. The conditions are therefore in my opinion present which preclude the four directors who made a personal profit by the transaction from retaining such profit.

The position of the Respondent Mr. Garton is quite different. He was the solicitor of the plaintiff company and in no sense a trustee for it. True, he made a profit, as did the four directors, but he subscribed for his shares not only with the knowledge but at the express request of his clients, and I know of no principle on which he could be held accountable to them for any resultant profit to himself.

I should have been content simply to express my concurrence with the views expounded by my noble and learned friend Lord Russell of Killowen, with which I wholly agree, but for the fact that we are differing from the Court of Appeal. For that reason I have thought it proper to state briefly the grounds of my concurrence.

Viscount

Sankey

Lord Russell of

Killowen

Lord

Macmillan

Lord Wright

Lord Porter

[18]

REGAL (HASTINGS), LIMITED

*v.*

GULLIVER AND OTHERS.

## Lord Wright

MY LORDS,

Of the six Respondents, two, Gulliver and Garton, stand on a different footing from the other four. It is in regard to the latter that the important question of principle brought into issue by the decisions of Wrottesley J. and the Court of Appeal call for determination. That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made the profits with the knowledge and assent of the other person. The most usual and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is without the knowledge of his principal) acquired by him in the course of his agency. The authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption.

The Courts below have held that it does not apply in the present case for the reason that the purchase of the shares by the Respondents, though made for their own advantage, and though the knowledge and opportunity which enabled them to take the advantage came to them solely by reason of their being directors of the Appellant Company, was a purchase which in the circumstances the Respondents were under no duty to the Appellants to make, and was a purchase which it was

beyond the Appellant's ability to make, so that if the Respondents had not made it, the Appellant would have been no better off by reason of the Respondents abstaining from reaping the advantage for themselves. With the question so stated it was said that any other decision than that of the Courts below would involve a dog-in-the-manger policy. What the Respondents did, it was said, caused no damage to the Appellant, and involved no neglect of the Appellant's interests or similar breach of duty. But I think the answer to this reasoning is that both in law and equity it has been held that if a person in a fiduciary relationship makes a secret profit cut of the relationship, the Court will not enquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the Court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the enquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if in short interest had not conflicted with duty. Thus in *Keech* v. *Sandford,* Cases Ch., Temp. King, a case in which the fiduciary relationship was that of trustee and *cestui que trust,* the trustee was held liable to convey a lease to the infant *cestui que trust,* though the lessor had refused to renew to the infant. Lord Chancellor King said, " This may seem hard that the trustee is the " only person of all mankind who might not have the lease." It did

not matter that the infant could not himself have got it and that he was not damaged by the trustee taking it for himself. One reason why the rule is strictly pursued is given by Lord Eldon in *ex p. James,* 8 Ves. Jun. 337, " no Court is equal to the examination " and ascertainment of the truth in much the greater number of " cases." In *Parker* v. *McKenna,* L.R. 10 Ch. 96, a most instructive case, the rule is so admirably stated by James L.J. that I cannot resist repealing his language, though my noble and learned friend Lord Russell of Killowen in his speech just delivered, which I have had the opportunity of reading in print and with which I agree completely, has already quoted it to your Lordships. The words of the Lord Justice which I emphasise are " that that rule is an in- " flexible rule, and must be applied inexorably by this Court, which " is not entitled to receive evidence or suggestion or argument as " to whether the principal did or did not suffer an injury in fact " by reason of the dealing of the agent, *for the safety of mankind* " *requires that no agent shall be able to put his principal to the* " *danger of such an enquiry as that."* The italics are mine. I need not multiply citations to the same effect, or illustrations of the different circumstances in which the rule has been applied.

In the present case the four Respondents were acting in the matter as agents for the Appellant Company in their capacity of directors, that is " as commercial men managing a trading concern " for the benefit of themselves and all other shareholders in it" if I may borrow that part of the description applied to directors by Sir George Jessel M.R., in *Forest of Dean Coal Mining Co.,* 10 Ch. D. 450 at p. 452. In the numerous actions, or most of them, which have been brought against directors of companies for profits secretly (that is without the assent of the shareholders) secured in the course of their dealing as directors, the claims have been against them in their capacity as agents. Thus, to take a familiar instance, in *Boston Deep Sea Fishing and Ice Company* v. *Ansell,* 39 Ch. D. 339, the Defendant was held liable to account to the Plaintiff Company of which he was director for secret bribes or bonuses which he had received from persons making contracts with the Company. The Defendant's liability flowed from the fiduciary relationship in which he stood to the Company as its agent. Bowen L.J. said at p. 367, " The ' law implies a use, that is, there is an implied contract, if you put ' it as a legal proposition—there is an equitable right, if you treat it ' as a matter of equity—as between the principal and agent that ' the agent should pay it over, which renders the agent liable to ' be sued for money had and received, and there is an equitable ' right in the master to receive it and to take it out of the hands of ' the agent, which gives the principal a right to relief in equity." But as it was held in *Lister v. Stubbs,* 45 Ch. D. 1, the relationship in such a case is that of debtor and creditor, not trustee and *cestui que trust.* Many instances can be quoted from the books of the stringency with which the Courts have enforced the rule that a director must account to his Company for any benefit which he obtains in the course of and owing to his directorship, even though

the benefit comes from a third person and involves no loss to the Company. I cite as one example *Archer's* case, 1892 1 Ch. D. 322, where a director was held liable to account to the Company for the sum paid to him by the promoter of the Company by way of indemnity against the money which the director had to pay for his qualification shares.

The analysis of the facts in the present case which has been made by Lord Russell of Killowen shows clearly enough that the opportunity and the knowledge which enabled the four Respondents to purchase the shares came to them simply in their position as directors of the Appellant Company. Wrottesley J. clearly so held. He said at the outset

of his judgment, "There is no doubt they (the Respondents) ' did take up in their own names shares which only after ' a few days and certainly only after a week or two they were ' able to sell at a very large profit indeed. There is no doubt that it ' was only because they were directors and solicitor respectively of ' the Plaintiff Company that this stroke of fortune came in their ' way." But he decided against the Appellant Company because he fixed his attention on his view that the Appellant suffered no loss by the Respondents' conduct, instead of fixing attention on the crucial fact that the Respondents made a secret profit out of their agency. I do not think that any different view was taken on this aspect of the case by the Court of Appeal, or that it was questioned by that Court that the opportunity of making the profits came to the four Respondents by reason of their fiduciary position as directors. But the Court of Appeal held that in the absence of any dishonest intention or negligence or breach of a specific duty to acquire the shares for the Appellant Company, the Respondents as directors were entitled to buy the shares themselves. Once, it was said, they came to a *bona fide* decision that the Appellant Company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. But with the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. It is suggested that it would have been mere quixotic folly for the four Respondents to let such an occasion pass when the Appellant Company could not avail itself of it. But Lord Chancellor King faced that very position when he accepted that the person in the fiduciary position might be the only person in the world who could not avail himself of the opportunity. It is, however, not true that such a person is absolutely barred, because he could by obtaining the assent of the shareholders have secured his freedom to make the profit for himself. Failing that the only course open is to let the opportunity pass. To admit of any other alternative would be to expose the principal to the dangers against which James L.J. in the passage I have quoted, uttered his solemn warning. The rule is stringent and absolute because " the safety of mankind " requires it to be absolutely observed in the fiduciary relationship.

In my opinion the Appeal should be allowed in the case of the four Respondents.

In the case of the other two Respondents, I agree with Lord Russell of Killowen that the appeal should be dismissed for the several reasons which he has given in regard to each of them. These appeals turn on issues of evidence and fact, and I do not desire to add to what has fallen from my noble and learned friend.

Viscount Sankey
Lord

Russell of Killowen
Lord Macmillan
Lord Wright
Lord Porter

[21]

REGAL (HASTINGS), LIMITED,

*v.*

GULLIVER AND OTHERS.

## Lord Porter

MY LORDS,

I have had an opportunity of reading the speech which has been delivered by my noble and learned friend, Lord Russell of Killowen and had we not been differing from the view of the Court of Appeal I should not desire to add to what he has said. But as we are reversing the judgment of both the Court of first instance and the Court of Appeal I desire, out of respect for the opinions expressed in them, to state in the briefest possible compass the grounds for the view which I hold.

My Lords, I am conscious of certain possibilities which are involved in the conclusion which all your Lordships have reached. The action is brought by the Regal Company. Technically, of course, the fact that an unlooked-for advantage may be gained by the shareholders of that Company is immaterial to the question at issue: the company and its shareholders are separate entities. But one cannot help remembering that in fact the shares have been purchased by a financial group who were willing to acquire those of the Regal and the Amalgamated at a certain price. As a result of your Lordships' decision that group will, I think, receive in one hand part of the sum which has been paid by the other. For the shares in Amalgamated they paid £3 16s. 1d. per share, yet part of that sum may be returned to the group, though not necessarily to the individual shareholders, by reason of the enhancement in value of the shares in Regal:—an enhancement brought about as a result of the receipt by the Company of the profit made by some of its former directors on the sale of Amalgamated shares. This, it seems, may be an unexpected windfall, but whether it be so or not, the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case

is in fact, as it is in law, an immaterial consideration.

The Plaintiff, the Regal Company, by its pleadings claimed (1) damages for negligence, (2) alternatively the profit obtained on the sale of the shares in Amalgamated as money had and received by the Defendants to the Plaintiffs' use, and (3) in the further alternative damages for misfeasance. No claim for fraud was suggested, and the learned judge at the trial expressly exonerated the Defendants from any liability for negligence or misfeasance. Before your Lordships' House the claim for money had and received was alone persisted in.

The alternative claim for misfeasance, however, seems also to have been presented to the Court of Appeal, but to have been rejected by them, and in common with the rest of your Lordships I unreservedly accept the findings of both Courts.

It remains, therefore, to consider the claim that (in the words of the Master of the Rolls) " in. the circumstances of the case the " directors must be taken to have been acting in the matter of their " office when they took those shares and that, accordingly, they are " accountable for the profits which they have made ". That the shares were obtained by the Defendants by reason of their position as directors of Regal is, I think, plain. The original proposition, when the formation of the subsidiary company was suggested, was that the whole of the shares should be issued to the Regal Company partly for cash and partly for services rendered, and this

proposition was discussed and accepted at board meetings of that company. It was only afterwards when the necessity for finding £5,000 cash arose that the issue to any one other than the company was considered, and then the directors turned to themselves, " There is no doubt it was only because they were directors and " solicitor respectively of the Plaintiff company that this stroke of " fortune came their way," says the learned judge, and I agree with his observation.

In these circumstances it is to my mind immaterial that the directors saw no way of raising the money save from amongst themselves and from the solicitor to the company, or indeed that the money could in fact have been raised in no other way. The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position, or if he does he must account for the profit so made. For this proposition the cases *of Keech v. Sandford* (1726), Sel. Cas. Temp. King. 61, and *exparte James* (1803) 8 Ves. jun. 337 are sufficient authority.

The learned Judge and the members of the Court of Appeal appear to have adopted a narrower outlook with which, with all respect, I find myself unable to agree. " In order to succeed the " Plaintiff company must show that the Defendants both ought to " have caused and could have caused the Plaintiff company to sub- " scribe for these shares and that the neglect to do so caused a loss " to the Plaintiff company " are the words used by the learned Judge.

" It must be shown," says the Master of the Rolls, " that in the " circumstances of the case it was the duty of the directors to obtain " these shares for their company ".

And, again, " The position of the Regal Company would have ' been very much strengthened by having all these shares in the ' two companies in the same hands with the possibility of one ' control. That being so, the only way in which these directors ' could secure that benefit for their company was by putting up the ' money themselves. Once that decision is held to be a *bona fide* ' one, and fraud drops out of the case, it seems to me there is only ' one conclusion, namely, that the Appeal must be dismissed with ' costs."

To treat the problem in this way is, in my view, to look at it as involving a claim for negligence or misfeasance and to neglect the wider aspect. Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself—the profit which he makes is the company's, even though the property by means of which he made it was not and could not have, been acquired on its behalf. Adopting the words of Lord Eldon in

*ex parte James* (supra), " the general interests of justice require it, " as no Court is equal to the examination and ascertainment of the " truth in much the greater number of cases."

My Lords, these observations apply generally to the action, but the cases of Gulliver and Garton stand on a somewhat different footing. As to them, there are additional and special considerations to be kept in mind. I need not set them out or refer to them further than by saying that I find myself in agreement with the reasoning and conclusion of my noble and learned friend, Lord Russell of Killowen, and would submit with him that the Appeal should be allowed so far as concerns the Defendants Bobby, Griffiths, Bassert and Bentley and should be dismissed in the case of Gulliver and Garton. I also concur in the order as to costs which he suggests.

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