THE FIDUCIARY DOCTRINE AND ITS APPLICATION TO DIRECTORS OF COMPANIES

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INTRODUCTION

The purpose of this thesis is to consider the nature of the fiduciary duties owed by a director to his company. These duties, which have been said to be "notoriously elusive of definition",[1] are placed upon him because he stands in a "fiduciary relation" to his company. This relationship is, in turn, a species of "a genus styled 'fiduciary relationship'" which is recognised in both South African and English Law[2] and, indeed, in "every civilised system of jurisprudence".[3]

In placing these duties upon the director our courts, with occasional, passing, reference to D.18.1.34.7., have followed English Law.[4] There it has been said that "The fiduciary duties of directors are, basically, identical with those applying to any other fiduciary..."[5] When, however, we turn to consider the "species" of this "genus styled fiduciary relationship" it is found to be a very curious genus indeed and a similarity between the duties owed by the various recognised fiduciaries is not always immediately apparent. It includes the following: the relation between principal and agent, trustee and cestui que trust, guardian and ward, parent and child, fiancé and fiancée (but not, rather cynically, that of husband and wife), spiritual adviser and devotee or penitent, client and legal adviser, medical adviser and patient, promoters and directors of companies, life-tenants and mortgagees (in possession) and mortgagors.[6]

One would think that to most lawyers the reason why the director is so classified lies in the fact that he is under a duty to act in the interests of another. In other words, the source of the relationship existing between director and company is irrelevant. Once the duty to act in the interests of his company is found to exist we may describe this relationship as "fiduciary" and, regardless of whether it arises ex contractu or ex lege, the duty having been established, it follows that he is a fiduciary and therefore subject to the "fiduciary duties".

When, however, we turn to consider the duties to which the fiduciary relationship gives rise, this approach meets with what appears to be an immediate stumbling block for one of the director's fiduciary duties is his duty to act "bona fide in the interests of the company"[7] Thus it would seem that a duty, imposed upon the director because he is a fiduciary, is the very reason for holding him to be a fiduciary.

Is some other relationship, then, the "fiduciary relationship"? Could

it be said that the fact that he is a director creates a relationship between him and his company which gives rise to the duty to act in the company's interests and, for that matter, to all the other fiduciary duties which are imposed upon him? According to the Modern Organic Theory the relation between the board and the general meeting of a company is a structural one, these two bodies being said to be "organs" of the company. Bauthin explains this concept thus "The board is ... recognised to be a primary organ of the company, its relationship with the general meeting being more one of federation than of subordinate and superior."[8] Therefore the director on taking office becomes part of the structure of the company and thus it might be said that this relationship gives rise to the duty.

This seems to be a rather tortuous approach. Why say that the duty does not flow from the office but because of it? In any event if this approach were adopted it would in fact be a denial of the assertion that the director owes this duty "because" he is a fiduciary for certainly such a relationship would be sui generis. What is more, it would be achieved only by resorting to formalism and by totally ignoring the facts. Surely the shareholders in electing a director are electing him to act in the interests of the company and he, in accepting the office, is doing no more than undertaking to do this?

Sealy,[9] pointing to the fact that there can be no "general definition of fiduciary relationships", divides them into four "classes" or "categories". He admits that in so doing we can find "little help from the cases, or even the text books". These are: (a) where a person has control of property which in equity is the property of another, (b) where a person has undertaken to do something for another, (c) where certain persons have a limited or partial interest in property, and (d) those relationships which give rise to a presumption of undue influence.[10] He places the director in "category (a)" because he has control of property which is not his and in "category (b)" because he has undertaken to act for the company.[11] Ignoring, for the moment, the question of equitable ownership, it is clear that in Sealy's opinion the director is a fiduciary not because he is under a duty to act in the interests of his company but because he has undertaken to do so. In other words the undertaking gives rise to the relationship which in turn gives rise to the duty. We have what appears to be a unilateral act which is an independent source of obligation. It would seem, however, that the act itself, alone, does not give rise to the duty - it is the relationship which results from it that creates the obligation. This sounds curiously like contract. But it is not contract. In the first place the fiduciary relationship is a doctrine of Equity and, in the

second place, we find, rather surprisingly, that it does not give rise to an enforceable, positive duty to act at all. Thus Sealy explains: "Equity is not concerned to enforce the undertaking or to see that it is performed; but it is concerned to see that, if the fiduciary acts at all, he acts honestly and in accordance with the undertaking he has given or appeared to give".[12] The duty, therefore, merely ensures that if the fiduciary acts at all, he acts in the interests of his beneficiary. The emphasis has swung from contract to delict.

But of course, this is neither contract nor delict. We are dealing with the mysteries of the Court of Conscience. The undertaking is recognised but not enforced as such. It is seen as creating circumstances which render certain acts wrongful - "constructive frauds". This is the trust concept of Chancery. In the case of the director this means that, because he has undertaken to act in the interests of his company, he must exercise his powers only to the benefit of the company and should he exercise them in other interests he commits a "fraud". The principles involved here can be most clearly seen in Berle's famous submission:

> "..... all powers granted to a corporation or to the management of a corporation, or to any group within the corporation whether derived from statute or charter or both, are necessarily and at all times exercisable only for the rateable benefit of all the shareholders as their interest appears. That in consequence, the use of the power is subject to equitable limitation when the power has been exercised to the detriment of such interest, however absolute the grant of power may be in terms, and however correct the technical exercise of it may have been ... And that, in every case, corporate action must be twice tested; first by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favour of a cestui que trust to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary".(13)

The law does not enforce the undertaking but merely ensures that if the director acts at all, he acts in the interests of the company. Thus it has been said of his fiduciary duties that they forbid "him to pursue his own interests in a manner injurious to the corporation".[14]

This approach can now be reconciled with the idea of the director having a "structural" relationship with his company. Thus it could be said that the director, or rather the board, is given certain powers to act on behalf of the company because they have undertaken to act for it. Because they have so undertaken they must, if they exercise these powers at all, exercise them for the benefit of the company. But, of course, such a reconciliation is only necessary if we are bound to accept one or other of the organic theories.

What is thought to be the great strength of the fiduciary doctrine is that it can be reconciled with any theory of corporate personality. Even if the organic theory is rejected and directors are held to be representatives or agents (in the wide sense of the word), the doctrine is equally applicable. What is more, if the director is held to be a representative, the time-honoured and seemingly insolvable problem as to the exact nature of such representation may similarly be avoided. Since at least Sutton's case[15] the question has been debated whether or not a director is a trustee or an agent or a species of representative sui generis. With the establishment of the fiduciary doctrine this dispute has been gratefully abandoned.[16] As these duties are owed by all those administering the affairs of others there is no need to decide, at least as far as these duties themselves are concerned, the exact nature of the relationship.

If all these questions can be reconciled, or at least left unanswered, by means of the fiduciary doctrine, it is nevertheless true that it is a very costly reconciliation. It is achieved not only by introducing what appear to be totally foreign principles into our law, but also has the universal effect of releasing directors from a positive enforceable duty to act in the interests of their company. If such a duty were recognised none of these questions could be avoided. A positive duty must have some content; one must be able to say that the directors should have done this and were not bound to do that. A solution to such questions can be found only in agreement or in a fixed duty arising ex lege as is, for example, placed upon the trustee or the guardian. In either event the fiduciary relationship as an independent source of obligation would have to be abandoned in favour of contract or some already recognised source of administrative duty or, in the last resort, the acceptance of his position as being sui generis.

When we turn to the other fiduciary duties of directors in English law we find that they are said to be based upon the principle that a fiduciary must not place himself in a position "in which his interests conflict, or may possibly conflict, with his duty." This has also been accepted as being the position in South African law. At first sight this duty sounds very like the duty to act in the interests of the company stated in negative terms. If the director is under a duty to act only in the interests of his company (if he acts at all), is this not the same thing as saying that he cannot act in other interests? Actually, stress is laid upon the fact that this duty requires him not to place himself in a position where there may possibly be a conflict of interest and duty. It is not concerned with actual breaches of the primary duty. Thus Parsons

says:

> "Where the principle forbidding conflict of duty and interest is in play, it is enough to show that the situation is such that the duty to act for the benefit of the company is raised. Proof of breach of the condition is not a condition of recovery."(17)

What actually does this principle require? It has been said, with some justification one would think, that a trustee is always in such a position by the very fact that he acts in the interests of another.[18] There appears to be only one situation where this principle can reasonably be applied and that is where the fiduciary purports to act on behalf of his beneficiary in a matter in which he has an interest. But the principle is given a far wider application than this. Thus Gower deals with the following matters as being applications of the principle: (a) "contracts with the company", (b) "other secret profits", (c) "abuse of confidence", and (d) "competition".[19] How, for example, does a director place himself in a position where he "may possibly" divulge confidential information? We are not told, for under this heading only actual breaches of duty are considered.

Apart from this difficulty, a perhaps even more important problem arises in connection with this principle. If the director is under no duty to act but is merely under a duty to act in the interests of his company when he does in fact act, how can he ever act in such a way that he "may possibly" breach his duty? What is meant by this is, of course, that he must not put himself in a position where his interests may conflict with the interests of the company, which is to say something rather different and which leads to the rather anomalous conclusion that a director may be held to have breached this duty although he never undertook to act for his company in regard to the particular matter.

This leads to the question as to what exactly are "the interests of the company". Strangely enough, although we are constantly reminded that we live in a "corporate society", there is very little agreement upon this point. The arguments are usually seldom purely "legal" in nature, the question being charged with philosophical and political considerations. It is, however, a matter in which writers upon company law have not hesitated to embark and to view as a question to be determined by the courts. Shareholders, whose interests are frequently described as "selfish",[20] have for some time been rather out of favour and a host of other "interests" have been suggested as being in law "the company's interests". These have ranged from the company's employees to the community at large and even to something described as the company "as such" or the company "as an entity".[21]

These questions are the subject of this thesis, the object of which is therefore to consider the following: the nature of the relationship between a director and his company and the interests which he is bound to advance; the principles of the fiduciary doctrine, their compatibility with the principles of our law and the degree to which they are effective in enforcing the director's undertaking.

PART I

THE NATURE OF THE RELATIONSHIP BETWEEN DIRECTOR AND COMPANY

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The nature of the relationship between a company and its directors has, perhaps, been the most important practical question serving to keep alive the controversy as to the nature of corporate personality. It has been said that this controversy is dead,[1] if this were so it would have been a demise due to exhaustion and disappointment, rather than at the hands of the revealed truth. But it is not dead - although it must be something of an exaggeration to say that "As an intellectual antinomy it is now no nearer a final solution than when Parmenides, son of Peres, walked the byways of Velia".[2] To some it is seen as a question which has "... aroused the excited attention of all who have discussed legal theories and of not a few who have professed a profound disinclination to such a discussion".[3] Others have viewed the question with less enthusiasm.[4] Nothing, however, can be said about the director-company relationship without at least making some assumption as to the nature of corporate personality.[5] The cases and text books are so full of examples of this that it would be mere pedantry to cite them. The most frequent statement of this kind is to the effect that directors owe their duties to a "metaphysical entity", which statement is often made even by those who do not show any inclination to espouse the traditional fiction theory.[6]

It is a question that cannot here be ignored. Although it seems to be now customary to make some sort of apology before discussing it, I think none is required and that what Radin says of the subject generally, is particularly apposite here:

> "... this question, which is one deeply entangled in metaphysics, epistemology and logic, is one of the favourite battle grounds of those practical lawyers who are always the sworn foes of metaphysics and frequently the condemners of formal logic. There are few topics which seem more thoroughly theoretical, but surely no subject can be so termed which is declared by the courts to be the basis of their decisions and upon which rights in valuable property have been determined and enormous sums of money distributed."(7)

For the purpose of this thesis, however, we are only concerned with the problem of corporate personality in so far as it concerns the relationship between director and company. What is more, there is no need to examine the traditional theories in any detail. In fact it would seem that everthing that can be said about them has already been said. There are, however, a limited number of approaches to the subject with the result that modern writings appear to be largely either attempts to refine, reconcile or reject the traditional

theories. An outline of these theories thus serves both the purpose of defining the possible points of view which can, in principle, be adopted and of providing the background to modern thinking on the subject.

Before considering these theories, however, one aspect concerning them may appropriately be mentioned here. One frequently finds the holders of one particular theory suggesting that those who hold another, being blind as to the most obvious realities and incapable of grasping the most elementary principles of law, have been misled into holding their untenable views by a misunderstanding of the meaning of certain words. Thus Pollack, advocating the acceptance of the realist theory in England, says that most lawyers would accept "persona ficta" as the latin equivalent of "artificial person" and that "artificial" here does not mean "fictitious", it means rather "in accordance with the rules of art", something created by the lawyer; it does not mean that a company has no existence.[8] Thus too, Nękám rejecting both realist and fiction theories, argues that the word "persona" in Roman Law, even when applied to natural persons, was used in an "artificial and technical" sense.[9] The post-glossators, he says, caused all the confusion by attributing to that word a metaphysical meaning.[10] This forced them to apply the phrase "persona ficta" to associations "using the term not in reference to the fictitious character of every legal concept but in contradistinction to the 'real' or 'natural' legal personality of human beings ... their mistake was to regard the legal personality of men as residing in and conditioned by his physico-psychological personality and to look for the same sort of foundation to explain the legal entity of associations".[11]

This sort of argument does not succeed in denying the existence of other opposing schools of thought. It does, however, suggest that much that has been said results from a misunderstanding of the theories of others.

The Fiction Theory

Said to find its origins in Roman Law[12] and its development in Canon Law,[13] the fiction theory has frequently been regarded as orthodox in England.[14] Savigny, its most celebrated exponent, regarded a corporation exclusively as the product of the law, having no existence apart from the acts of the individual members who made up the corporate group and whose acts, by a further fiction, were attributed to it. To him, says Pound, there was "no reality at all. Legal capacity is considered 'as extended to artificial subjects admitted by means of pure fiction'. Such a subject is a juristic

person - 'a person who is assumed to be so for purely juristic purposes'".[15] Perhaps affected to some extent by realist thinking, Salmond, held that the group or association has a real existence, but no real personality in a philosophical sense, "The law, in creating legal persons, always does so by personifying some real thing".[16] He does, however, say that there is no "theoretical necessity" for this "since the law might, if it so pleases, attribute the quality of personality to a purely imaginary being, and yet attain the ends for which this fictitious extension of personality is devised ..."[17] He thus appears to differ from Savigny only in this, that he holds that there is an element of reality in all artificial persons that have in fact been created by the law. He considers that "although all legal personality involves personification, the converse is not true... Legal personality is not reached until the law recognises, over and above the associated individuals, a single entity which in a manner represents them, but is not identical with them.... A corporation is a group or series of persons which by a legal fiction is regarded and treated as itself a person." They are "constituted by the personification of groups or series of individuals. The individuals who thus formed the corpus of the legal person are termed its members." The concept of legal personality is not restricted to the corporation for in other legal systems we get institutions which are the corpus selected for personification and also funds devoted to special purposes.[18]

Maitland's famous description of the theory is that according to it an artificial person "is capable of proprietary rights: but is incapable of knowing, intending, willing, acting. The relation between it and the corporators may best be compared with that between pupillus and tutor, or that between a lunatic and the committee of his estate. By the action of its guardians it can acquire property, and, if it is to take advantage of contracts, it must take the burden also. To allow it possession is difficult, for possession is a matter of fact, still after hesitation the Roman lawyers made this concession. An action based upon unjust enrichment may lie against it, but it must not be charged with delict. To attempt to punish it is both absurd and unjust, though the state may dissolve a noxious group in an administrative way. Being a fiction of the law, its personality must have its commencement in some authoritive act, some declaration of the State's will."[19]

What actually is the fiction? Geldart says that, according to this theory, "the corporate body is not in reality a person, but is made a person by a fiction of law".[20] Duff says this question is difficult to answer but it

would appear that "What is really meant by saying the personality of a corporation is fictitious seems to be this: to a Fictionist, a corporation is, as Maitland put it, incapable of knowing, intending, willing, acting, but the law feigns it to be capable, treats it as if it was capable of doing all these things."[21] It would seem, however, that he is not going far enough, for the theory in its absolute form appears to be based upon the idea that there is no such thing in reality as a company either as a natural phenomena or as one constructed by man. It is a purely intellectual concept. Wolff's explanation of the theory is perhaps clearer, "According to this, only human beings can be persons, and therefore subjects of rights. Corporations, States, foundations, are not persons, but they are treated as if they were. In contrast to human beings, who are by nature capable of having rights, corporations and foundations are endowed with this capacity by law."[22] Duff does, however, point to what is usually considered to be the principle deduction to be drawn from it.

Not being a "real" person, and thus having no "personality", the corporation therefore has no will or mind and cannot act. Salmond says that "every corporation involves in the first place some real person or persons whose interests are fictitiously attributed to it, and in the second place some real person or persons whose acts are fictitiously imputed to it. "A corporation having neither a soul nor body, cannot act save through the agency of some representative in the real world of men... Whatever a company is reputed to do in law is done in fact by directors or shareholders as its agents and representatives".[23]

The traditional approach of English Fictionists is to state that the company must act through "an agent". This is perhaps unfortunate for under the rules of agency a principal must be able to appoint his agent. It is sometimes thought that this disproves the entire theory; thus Geldart says that statements to the effect that a corporation "cannot act in its own person, for it has no person" are not to be taken seriously because a corporation must at least appoint its agents and the appointment must be a legal act.[24] Or as Radin says "If facere per se is impossible ... facere per alium, must at least be equally impossible".[25] It would seem, however, that few theorists have in fact made this rather obvious error. It is, of course, because of this that Savigny considered that the proper analogy here was that of the lunatic and curator or the minor and his guardian. English jurists such as Salmond clearly speak of "agency" because, holding the director to be a representative, they consider that the representative most analogous, in terms of function, is the agent. He was perfectly well aware that "A legal

person is as incapable of conferring authority upon an agent to act on its behalf, as of doing the act in propria persona" and considered that "The authority of the agents and representatives of a corporation is conferred, limited, and determined, not by the consent of the principal but by the law itself."[26]

In any event, this much is clear. A corporation has no objective existence, it has no mind and no body, therefore its acts are in fact the acts of representatives. There is nothing unique in the attributing of the acts of one person to another, for example the curator, guardian and agent. Nor is there anything unique in the appointment of a representative by the law and not by contract, for example the curator and the guardian. What is unique is that in the case of the corporation the acts are attributed to a fictitious entity.

It is, however, not so much this conclusion in itself which has led to so much controversy and to the rejection of the theory by so many jurists. Rather is it what is deduced from it. Thus Paton says "One deduction drawn from the fictional nature of a corporation was that, as a corporation has only a fictional will imputed by the law, it could only will lawful things. By definition, therefore, it could not make itself liable for certain kinds of wrongful acts - certainly it could not commit a crime involving any mental element..."[27] In other words, if the law only imputes such acts of the representative to the company which he was authorised to carry out, and he was authorised only to carry out lawful acts, his unlawful acts cannot be imputed to the company. Paton regards this proposition as "logically unassailable" for a company is incapable of acting beyond its power. From the turn of the century great pressure has been put upon the courts as the result of economic and sociological factors, to hold companies liable for the wrongful acts of their representatives and it is in the main here that the theory, which is thought to deny the possibility of this, became the subject of severe criticism.

The Organic and Realist Theories

The analogy between the organised group and the individual human being is very ancient. To the Romans the juristic person was a "corpus".[28] Wolff's remarks in this regard, though perhaps irrelevant to the present thesis, cannot be omitted. "The comparison of man's organs with those of juristic persons particularly those of the state," have he says, "in the course

of the ages at times taken on grotesque forms. John of Salisbury, twelfth century scholastic, in his Polycraticus designated the prince as the head, the senate as the heart, the judges as the ears, eyes and tongue, the officials and soldiers as the hands, the treasury and the tax collectors -'qui immensa aviditate innumerabiles, et incurabiles generant morbos' - as the intestines and the belly, the peasants and handicraftsmen as the feet, so that the misery suffered by them became gout... Perhaps the most curious example is that presented by John Caspar Bluntschli ..., the Swiss; he found something corresponding in the life of the state not only to every part of the human body but even to every human emotion, and designated e.g. the foreign relations of the State to its sexual impulses!"[29)]

Behind this imagery lies the idea that an organised group is something which in fact exists, having an existence separate from and different to the existence of its individual members.

With the replacement of the Natural Law Theory by the concept of the "will", a legal right came to be seen as a "power over an object which by reason of the right is subjected to the will of the person entitled."[30)] The wide acceptance of this theory in the nineteenth century led to a reconsideration of the old organic concepts of group behaviour and their restatement in terms of the "realist theory" of corporate personality. Sweeping aside the "anthropomorphic extravagances" of former times, this theory maintained and developed the idea of the objective reality of the group. To this was added the idea that the group has in fact a "will" distinct from those of its individual members. Hence it could be and should be the subject of rights. Dicey's famous explanation of this tenet of the theory is that "when a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but from the nature of things differs from the individuals concerned".[31)] Thus Maitland described the German Fellowship as being "... no fiction, no symbol, no piece of the state's machinery, no collection name for individuals, but a living organism and a real person, with a body and members and a will of its own".[32)] This, the realist theory, was, of course, largely the work of Gierke who, rejecting the fiction theory, which he considered to derive from Roman Law, found authority for this theory in the Germanic Gesaminte Hand. He saw "the group as having a real mind, a real will, and a real power of action".[33)] Wolff's description of the theory is remarkably clear. He says "... a legal person is a real personality in an extra-judicial sense of the word. In contradistinction to

the others, this theory assumes that the subjects of rights need not be human beings, that every being that possesses a will and a life of its own may be the subject of rights and that State, corporations, foundations are beings just as alive and just as capable of having a will as human beings. They are - so it says - social organisms just as humans are physical organisms. Their will ('common will') is different from the will of the members of the corporation or from the will of the founder. Their actions are their own, not carried out by agents or representatives like those of incapables (infants, lunatics) but in the same way as those of normal adults. Man uses his bodily organs for the purpose. Corporations use men."[34)]

The strength in the realist theory is said to lie in this fact, namely, that the actions of those authorised to act for it, provided these persons have acted within the authority conferred upon them, are the acts of the company itself. There is no question of representation whatsoever. This deduction is of great practical importance and the courts in ascribing the actions of a company's directors to the company have frequently resorted to the terminology of this theory. It is here that Wolff considers that the organism theory "marks an advance on the fiction theory". To the fictionist a corporation has no legal capacity. To the realist, on the other hand, this is the very essence of corporate personality.

The theory has been subjected to much criticism. What is an organism? There has of course been much debate on this point and the various definitions have been put forward but "The conception of an organism as a living body, finally, is wrecked completely on the rock of the 'inexplorability' of life itself (Kant)... (W)e cannot take a generic conception 'life' and subdivide it into groups if we know nothing about the generic conception except the one fact that it is inexplicable".[35)] And then, what is a group will? Though a group of people may make a decision which none of them as individuals would have made this still does not prove that we are dealing here with anything other than the acts of will of the individuals concerned. Paton says "... there is also in human personality an 'erational surd' - a feeling of individuality, of self-consciousness, an 'experience centre' which organises experience, not only on the basis of abstract reason, but on the foundation of personal experience. Each individual has a continuity of experience, when he wakes in the morning he has (or should have) no difficulty in knowing who he is or in picking up the threads of his individual life. Attempts have been made to discover a collective consciousness or experience centre for the group, but they have not been particularly successful ..."[36)] It seems to be a little

unfair to choose the early morning as the time for testing group consciousness.

However valid such criticism may be, it is, of course, irrelevant. As both Hart and Wedderburn point out, the theory begins with "the question 'what is a corporation?' and answers 'a corporation is ...' ending (usually) 'by the very nature of things'".[37] "We are lawyers, however, not sociologists"; it is quite obvious that there are many companies in existence which cannot be explained in terms of the realist theory, for example, all one man companies, "technical devices" such as the company set up to avoid taxation, and subsidiary companies. To Gierke these are an abuse of legal conceptions. Whether this is true or not, their existence is fatal to the theory. Then, on the other hand, there are many organised groups which are not endowed with corporate personality. "It has often struck me", said Maitland, "that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock is only a sort of machine into which he puts money and out of which he draws dividends".[38] This, of course, is particularly true in common law systems where the trust device fulfils functions which on the Continent can only be achieved by the use of juristic persons.

It has been said that the theory leads to many fallacious conclusions. Thus Wolff describes how in 1907 an agreement between two companies was set aside by the German Supreme Court in terms of which one was given the sole right of determining the number and appointment of all the others managers together with the right to dispose of any of its property. It was held that the agreement "degraded (the company) to the position of a tool with no will of its own" and that "that one party to a contract should be so effectively tied up by the other; is opposed to the German conception of boni mores".[39] On such reasoning, of course, no subsidiary company could exist. Thurman Arnold suggests that "the tendency to treat great industrial combines as real persons whose liberty and dignity must be defended" has led to their being granted freedom of action so wide in the United States as to tyrannise the consumer."[40]

As far as this thesis is concerned, however, it is the strength of the realist theory, namely the fact that the acts of its directors can be ascribed to the company, which is its weakness. The theory says nothing as to the legal relationship between a company and its directors. In fact, by stressing the extra-juristic nature of corporations, it leads almost inevitably to the conclusion that there is no such legal relationship. The implication is that it is the social scientist rather than the lawyer to whom one must turn for an answer

to this question. Of course it could be said that, although the relation is a factual one, the recognition of the company by the law entails the enforcement of it. To admit this, however, goes a long way towards emasculating the theory. But even if this be accepted, how can an organ of the company be said to owe duties to it? To suggest that "a part" can owe a duty to the "whole" is to plunge once more into metaphysics.

Keeton says that nothing is more striking than the refusal of the English judiciary to commit itself to one or other theory of corporate personality.[41] Thus Pollack, a convinced realist, could merely come to the conclusion that the common law had not accepted the fiction theory and, did so, it is submitted with respect, by placing some rather strained interpretations upon much that had been said.[42] Since then, of course, there have been such cases as Lennards Carrying Company v. Asiatic Petroleum[43] and Daimler Company Limited v. Continental Tyre and Rubber Company (Great Britain) Limited[44] which might be thought to show a tendancy towards realism on the part of the judiciary. What is perhaps rather surprising is that, as Wedderburn says, when it might have been expected that both realist and fiction theories be "quietly forgotten", the realist theory seems to have received a new lease of life. In Willis v. Association of Universities of the British Commonwealth[45] the defendant company had set up a council equipped with "computers and mechanical devices", which was installed in the same building but on a different floor as to the rest of the company. The council was treated separately to a certain extent in that the accounts were drawn up as if the council were an independent body. The question arose in a matter relating to the Landlord and Tenant Act 1954 as to whether the occupation of another floor in the same building by this council would be "occupation" for the company's "business". As Wedderburn points out,[46] "the orthodox legal answer (would have been) to deny the separate 'existence' of the (council)". The court, however, decided that even if the council were a separate entity the premises would be occupied for the purposes of both the council and the company, thus satisfying the relevant section in the act. In the course of so holding Lord Denning M.R. quoted with approval Dicey's famous description of the real nature of companies,[47] and added "this fact has now been recognised by the law. A trade union (which is a body unincorporate) is a separate entity: see Bonsor v. Musicians Union.[48] I think it would be right to recognise that this council is a separate entity."[49] This, of course, was not the recognition of the council as a separate legal persona. It does however, perhaps, demonstrate one aspect of the realist theory which is worthy of note,

namely, that what men treat in fact to be an entity must frequently be recognised as such by the law.

The Concession Theory

The concession theory is of no relevance to this thesis. Neither of its two variants, namely, that juristic personality must be conceded by the state (which is obviously a political theory) or that the law is the only source of juristic personality (which is a truism), can have any bearing upon the relationship between director and company except, perhaps, in the usually stated connection between the concession theory and the fiction theory.

The Purpose Theory

Based on the assumption that there are no persons other than human beings, this theory recognises the existence of subjectless property. "The property supposed to be owned by the juristic person does not belong to anybody: Gaius is strictly accurate in calling it res nullius. But it does belong for a purpose and that is the essential fact about it".[50] Thus what we in fact have is not "a juristic person" but property destined for a particular purpose.[51] To Friedmann, referring to Brinz, this "... perpetuation of a purpose meant to be permanent ... is not only a fascinating and fertile idea; it also leads straight to the political mysticism of Hauriou's "Institution", an idea personified so as to claim the loyalty of those who serve it."[52] The theory is linked rather with those institutions of the Continent which in common law countries would be regulated by trusts.

For others the fact that property can be thus destined for a particular purpose leads to rather less fanciful conclusions. To Planiol we are neither dealing with any addition to the class of juristic persons nor with subjectless property. What we have here is another manner of possessing goods in common.

> "How is it that this phenomenon, so old and so general, passes so to speak unnoticed and that in reading the treatise on law one meets only exposition and study of one species of ownership, the ownership of a field or of a house belonging to a particular individual? It is because the persistence to our times of collective ownership is, so to speak, hidden from our eyes by the existence of fictitious beings to which we ascribe, at least in a certain measure, the attributes of personality which are reputed owners, creditors, or debtors, which make contracts, and sustain legal proceedings like true persons... All collective ownerships are attributed to fictitious persons, of which

> each is reputed the single owner of a mass of goods, and thus collective ownership appears as itself an individual ownership; a conception as false as useless. Consequently, instead of teaching that we have two kinds of ownership, it is taught that there are two kinds of persons."(53)

Pound criticises it on the ground that there are juristic persons known to law which do not hold property.[54] Duff says that "it will never be popular with lawyers because you cannot sue a purpose".[55]

In terms of this theory, a director would presumably be a representative with a "mandate" to manage property for a particular purpose. He would, as such, undoubtedly be a species of representative - almost certainly sui generis. Such a theory would greatly simplify many of the questions relating to his relationship with "the company". Thus the question of its liability for his crimes or delicts would come before the courts in a form unobscured by questions of fiction or will. The courts would simply have to decide whether in the circumstances the property should be attached.

It is usually acknowledged that the theory does point to the one important fact that every juristic person does have a purpose or purposes. It is usually thought, however, that this fact does not assist us in determining their nature. Thus Paton says:

> "All juristic or artificial (or non-human) persons then, are merely legal devices for protecting or giving effect to some real purpose. There is much truth in this, of course, as an observation of social fact. The continuing real theme that seems to be of importance in many charitable corporations or in many associations which have been recognised as legal persons for some purpose or another, such as trade unions, is the continuing fund concerned and the purpose for which it is established. An examination of the nature of such funds and their purposes, however, tells us nothing about the legal device and that is the main purpose of the present enquiry."(56)

It is submitted that this is not correct, that the "purpose" idea does play a very important part indetermining the nature of "the legal device". This will be discussed later.

The Symbolist Theory

Like the purpose theory, the symbolist theory is based upon the proposition that human beings and only human beings can be the subjects of rights. To it a corporation is merely a symbol or bracket placed around a series of complex jural relationships between men.

It is usually said that the theory maintains that we need not think of a

corporation as a person at all, either real or fictitious. Human beings alone have interests and rights and a corporation is only "a labour saving device" to describe a particular kind of right.[57] This is then proved to be false by showing that when we speak of a company having rights we do not mean that these rights are the rights of its members. "My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation."[58] This criticism is sometimes voiced with a greater degree of subtlety:

> "New and separate entities are recognised as units in the legal system by that system itself and such recognition makes possible a clear distinction between the property, rights, and duties of the legal person, on the one hand, and of the individual human beings which may be involved in the make-up of that legal person, on the other. One can hardly make a contract with a bracket. (Unless that bracket has been recognised by the legal system as a legal person.) It is socially and economically false, as well as legally untrue, to say that only individual men can be the bearers of legal rights."(59)

The logic of such criticism is not easy to follow. The theory is that behind such statements lie a more complex series of relationships. It is difficult to know what Paton means by "socially and economically false ... to say that only individual men can be the bearers of legal duties". Whether it is "legally untrue" depends upon whether we mean the same thing when we say "X company has a right to claim R100.00 from B". The symbolists say, with, it would seem, considerable justification, that we do not. Their argument cannot be disproved by merely stating that we do, not. Perhaps the most curious aspect of such criticism is that it is made more often than not by persons who nevertheless accept the concept of "interests" as formulated by Jhering to whom the symbolist theory is attributed.

The theory received a detailed restatement at the hands of Hohfeld whose work will be discussed later. The relationship between this theory and the theory most widely held today, namely, "the theory of the legal entity", can perhaps be seen in the work of Kelsen. He too considered that all that is real consists of rights of human individuals. Adopting a purely formal approach, however, he maintained that legal personality is only a technical personification of complex norms. It is a focal point of imputation which provides a technical means of securing facility of procedure.[60]

From this theory it follows that a director acts on behalf of other human beings. He is a representative. Those persons for whom he acts and the

interests which form the subject matter of his "mandate" must be discovered by examining what lies behind the statement "a director is under a duty to act in the interests of his company".

THE THEORY OF THE LEGAL ENTITY

This is the most widely held theory today.[1] According to it one cannot draw a distinction between "artificial" personality and "natural" or "real" personality. Corporate personality is just as much a "juristic reality" as the personality of the individual human being. Personality is a legal concept and from this point of view the nature of the entity recognised as a legal persona is irrelevant, one kind of legal personality is exactly the same as the other - or, more correctly, there is only one kind of legal personality. Pound explains this purely legal approach thus:

> "One mode of securing interests is to recognise or establish or allow the establishment of certain entities to which rights in the wider sense are attributed; or on which legal rights, powers, and privileges are conferred; in which liberties are recognised, and upon which duties and liabilities are imposed. These entities have been known in the science of law, if not from antiquity, certainly in the modern world, by the name of persons, and have been said to be 'subjects of right and law' or 'subjects of rights' or 'holders' or 'bearers' of rights or 'enjoyers' of rights. For more than a generation in my lectures I have spoken of them as 'legal units' - the units of the legal order as human individuals are the units of the social order. They are units on behalf or in title of which legally recognised and secured interests are asserted. Entities with a de facto existence, or such as the law allows to be set up for economic or social purposes, as well as individual human beings, may be recognised or interests asserted in title of them may be secured in varying degrees."(2)

One of the leading exponents of this theory is Nékám. In his work "The Personality Conception of the Legal Entity" he gives a most detailed analysis of the theory and I have taken his work as the basis for this discussion.

Nékám argues that "the work of jurisprudence as a science can never consist in attempting to find an absolute system of law but only in trying to explore, organise and exhibit the existing ones"[3] and that it is a striving for the absolute which has brought about the controversy as to the nature of juristic personality. We must begin, he emphasises, with the acceptance of the fact that law is the creation of man and is "always an artificial product. There are no natural legal phenomenon, but everything which exists as a legal reality is the result of the emotional evaluation of the community. Natural and legal are in this sense contradictions, and the wide spread belief that they are somehow synonymous can only be explained by the strength of the emotions which underlie legal concepts".[4] It is this error that is made by those who assert that a "subject of rights must be a human being" or, as Savigny said, "every individual man and only the individual man is the subject

of rights". Similarly incorrect is the statement when made in its "milder form" to the effect that "it is the human personality which somehow is the natural substratum of every right".[5]

We must begin by defining what we mean by "subject of rights". "We usually designate by (this term) anything to which rights are attributed in a legal sense". Therefore, "If we want to find out what data enter into the category so defined we cannot endeavour to reach the result by a priori considerations, by analysing the 'essence' of the concept or by deducing conclusions from the nature of things ..."[6] How then can we find out what is included within this category? The only way is "to follow the empirical method and study the legal systems themselves."[7] Here we will see that human beings have not always been subjects of rights, thus the family was probably the only subject of rights known to early law. Furthermore, when the law did come to recognise individual human beings as such, it did not necessarily recognise all to be so, e.g. the slave in Roman Law. "If legal personality were not a creation of the law but a characteristic inherent in the nature of man, it ought to be found even in those to whom the legal system has not given, but this we do not find."[8] On the other hand rights have frequently been attributed where there is no human personality present. Thus rights have been attributed to "the unborn, the dead, spirits, devils, gods, idols, animals and even, in some oriental systems, to plants."[9]

Nékám accordingly comes to the conclusion that everything that the community chooses to regard as such can become a subject and will not if the community chooses not so to regard it. "There is nothing in the notion of the subject of rights which itself would, necessarily, connect it with human personality, or even with anything experimentally existing."[10] If a community looks upon something as a unit having interests which need and deserve social protection it will make it the subject of rights - it is of no significance whether it has a will, or is an objective reality, or possesses a personality, natural or artificial, imagined or proved.

But surely there must be some reality whose interests the law-maker seeks to protect? With this Nékám agrees. "The law-maker must feel that it is something existing to which he attributes juristic protection... But even a cursory survey of legal systems shows that it would be a grave error to think that this reality must be something real in the sense of experimentally existing. The reality behind the subject of rights is on the contrary an entirely subjective requirement."[11] Reality to man is what he believes to be reality. What is more, what man sees as an agglomeration of units from one point of view

he may see as a single unit from another. This is, of course, a question of fact and not law. Subjects of rights are simply those entities so conceived which the law-maker considers as deserving or needing juridic protection because of their social importance. Thus there can be no distinction between "natural" persons and "artificial" persons.[12]

Does this mean that, once we know that a particular entity is a subject of rights, we can, by considering its particular nature, determine from that what rights it will have? No says Nékám for this is jumping the gun. The creation of a right and the creation of a subject of rights are only two aspects of the same process "Their appearance is simultaneous, their meaning complimentary."[13] Just as the subject of a right is a "pure abstraction" so too is a legal right. They are both artificial in the sense that we cannot talk of their having an existence "from the nature of things". The legal entity is thus the legal image of the entity which the community believes to exist and to have socially important interests. Rights are the legal image or the legal abstraction of interests which the community acknowledges. "Whatever the existence of the beneficiary in experimental life may be, the legal entity will possess only those characteristics which the abstraction of the law attributes to it ... As, however, the only qualities of the beneficiary which the law takes into account are those of its interests which are rationalised as rights, the legal entity can have meaning and can be defined only in relation to the rights for which it stands."[14] Thus, however different they may be experimentally, "once they become rationalised from a legal point of view into legal entities there will be as such no more differences among them ... because all those qualities which make for difference disappear in the abstraction. The legal entity is a legal abstraction of the beneficiary from a single point of view from which all beneficiaries are the same... Legal entity is always a relative expression and it has in itself, without reference to the right from the point of view from which we regard it, no meaning at all."[15]

Here we see the second error following from the assumption that human beings are the natural subjects of rights. Such an assumption leads to the conclusion that only such entities as have the same rights as human beings have personality. But this is a fallacy. If we know that something is a legal entity we do not automatically know what rights are attributed to it.[16] Ignoring this fact, those who insist that human personality is the natural substratum of every right seek, not only to find personality in every legal entity, but also to attribute to it all the rights given to man. On the other hand, where they cannot find all these rights, they hold that there can be no

legal personality.

Is human personality irrelevant? Here Nékám draws a distinction between the administrator of rights and the subject of rights. "Every right needs something to dispose of it; (and) every interest to be protected, somebody to look after it."[17] Thus an administrator is required and he must have a "will". But with the administrator the human element stops... The rights themselves are given not for human personality or will but for the interests which the law seeks to protect."[18] It is, he says, merely a coincidence that these conceptions overlap in the case of the normal adult human being and, in any event, this does not always occur, for example the prodigal. Furthermore, in Roman Law we have the case of the slave acting as administrator although not even a subject of rights himself. Failure to recognise this distinction has led to the idea that human beings are the natural subjects of rights and also to metaphysical explanations of the apparent exceptions to this assumption. Secondly, human personality is relevant in that "every right is created or worked by men in order to satisfy some of his subjective needs."[19]

If all subjects of rights are identical for this purpose, then we will have to look either to the real thing (or the thing which we believe to be real) or to the nature of the rights granted to it, in order to make distinctions between different types of entities. From the former we are excluded and thus, if we are to give the word "company" any meaning at all, it must be by examination of the rights attributed to it.

Nékám, however, shows quite conclusively that this cannot be done.[20] We cannot make a list of the essential attributes of a corporation. Thus he takes Blackstone's list of those characteristics which he held to be "necessarily and inseparably incident to every corporation" and which are "as soon as the corporation is duly erected, tacitly annexed of course." These are :

(1) To have perpetual succession.

(2) To sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as natural persons may do.

(3) To purchase lands and hold them.

(4) To have a seal.

(5) To make by-laws.(21)

Of perpetual succession, which Blackstone considered to be "the very end of its incorporation",[22] Nékám says "But what does this mean? ... it cannot mean the immortality or eternal existence of the corporation, but only some

quality which characterises it during its life, whatever its length may be.... In a legal sense it may have only one meaning; it can only say that something which has perpetual succession remains, as long as it exists, the same subject of rights - the same legal entity - and may say nothing more."[23] It tells us nothing as to what the rights of the entity are, nor does it require any special rights nor any minimum rights. Of the right to sue, he points out that this is a remedial right and can only exist where a primary right already exists. Furthermore, it is a question of legal technique and, in any event, there exist corporations where the right to sue and be sued is attributed to some different entity and such corporations do not lose thereby their corporate character. On the other hand, both in England and America, there are entities which are not considered to be corporations but which, nevertheless, have such remedial rights attributed to them.[24] As to the characteristic "to grant or receive by its corporate name, and do all other acts as natural persons may do", Nékám points out that this only amounts to saying that since a corporation is a legal entity there must be certain rights from the point of view of which it will be an entity. No rights are singled out which are said to be essential to the corporation and, indeed, we will find no such rights. What we will find is that every conceivable right which a corporation possesses can belong to entities not regarded as corporations. Blackstone's third incident, "to purchase lands and hold them" is but an extension of this and in any event Coke, in the Sutton's Hospital Case, stated that it "is not of the essence of the corporation, for the corporation is perfect without it",[25] That a corporation must have a common seal is of course today rather the exception than the rule, if indeed it was ever regarded as an absolute requirement. Furthermore, many groups have and do exist which have a common seal and yet are not corporations.[26] Finally, the right to make by-laws is clearly neither an essential nor an exclusive characteristic of corporations.[27]

Therefore, Nékám concludes that "For the purpose of a scientific investigation of the English Law, the word 'corporation' is of just as great or of just as little help to us as the expression 'juristic person' in the study of civil law. It corresponds to nothing precise or well defined, but is a mere label, arbitrarily given to some of the legal entities and arbitrarily denied to some others in the system."[28]

By excluding all considerations as to "the nature of things" and confining the theory to strictly legal criteria, it is maintained that this theory

provides a means by which all corporations can be explained. What is more, it is thought to sweep aside all the old theoretical difficulties as to what acts should be attributed to a company and as to when and when not the courts may ignore the company as an entity. All these problems, it is said, arose because lawyers forgot that they were lawyers and, instead of looking to the law, sought an answer to this problem in such fields as sociology and metaphysics.

It is submitted that the theory does no such thing. Firstly, it gains stature by attributing arguments to both the realist and fiction theories which, in all fairness, few of their exponents ever held. Thus Nékám proves quite conclusively that man cannot be the "natural" subject of rights by simply pointing to the fact that he has not always been the subject of rights and that, in certain systems of law, other things have also been the subjects of rights. But this argument assumes that statements to the effect that human personality is "the natural substratum of every right" must be taken to mean that all legal systems must, and have, recognised all men at all times as such; that it is, and always has been, impossible for a legal system to recognise anything other than a human being as a subject of rights and therefore no legal system has ever done so. On this assumption it is, of course, quite easy to demonstrate that Savigny erred in that he failed to take into account the fact that slavery existed in Roman Law! Then, turning to the realist theory, Nékám states that the mistake in this theory was to assume that there must be something objectively, or experimentally, existing to which the law attributes rights. He then, however, goes on to say that this is not necessary because all that is required is the belief that something exists. This is an absurd argument. After all what exists to us is what we believe to exist - we might be wrong, but that is the best we can do.

When we turn to the theory itself we find that, although the validity of such assumptions is denied, the theory is in fact based on an assumption as to the nature of things. Thus Nékám says that:

> "Everything, therefore, that the community chooses to regard as such can become a subject - a potential center - of rights, whether a plant or an animal, a human being or an imagined spirit; and nothing, if the community does not choose to regard it so, will become a subject of rights, whether human being or anything else. There is nothing in the notion of the subject of rights which in itself would, necessarily, connect it with human personality, or even with anything experimentally existing. The only circumstance which makes a subject of rights of something is the fact that it is looked upon the community as a unit having interests which need and deserve social protection; and it is entirely immaterial whether such an entity really exists as an objective reality or not, whether it has a will of its own or not - or still less, whether or not it possesses a personality,

natural or artificial, imagined or proved."(29)

Thus he cites the usual list of idols, gods, animals, spirits, devils, "and, in some oriental systems, ... plants."

It is of course true that man has at various times attributed interests to such things. It is difficult to see that he attributed any interests to them other than his own.[30] The relevant question is, however, whether our law does so today. In particular, although we may speak of a group of people as a unit for certain purposes, do we believe that the group as such has interests? Of course we talk of group interests, but then we also talk of a "group will". The only difference between this theory and the realist theory appears to be the substitution of the former for the latter. Nor does it make the slightest difference in fact to say that here we are not dealing with things experimentally existing but with entities which we believe to exist.

Nékám makes one very puzzling statement that appears relevant here. He says:

> "Once the initial point of view was emotionally accepted, it was easy, ... to overlook certain legal facts, to class others as artificial or fictitious, and to force the rest by the means of some ever-ready metaphysical explanation within the four corners of the predetermined system. ... The whole legal theory has been transformed and molded to such an anthropomorphic pattern."(31)

Apart from the fact that by attributing interests to non-human entities we appear to be moulding them in "an anthropomorphic pattern", this statement throws some doubt upon the meaning of the word "interest" as used by Nékám. If we hold that an "interest" is a "demand" or "desire" or "expectation" are we not speaking of man's "subjective needs"? Either we have here an entirely new meaning for the word "interest" or what Nékám is saying is that, although other things may have interests, man only will recognise them by protecting them when their fulfilment satisfies his subjective needs. The latter would appear to be the case in the light of what has been said above and, in particular, of those statements to the effect that if a community looks upon something as a unit having interests which need and deserve social protection it will make it the subject of rights, that rights are the legal abstraction of interests which the community acknowledges, and that the only qualities of the beneficiary which the law takes into account are those of its interests which are rationalised as rights.

Can this defect in the theory be overcome? We have seen above that Pound in stating his version of the entity theory does not consider that the

"legal unit" necessarily has interests. The interests are "attributed" to it by the law. The entities of which Pound speaks do not appear to be quite the same sort of entities as those of Někám for they are "... entities (which)have been known to the science of law as persons ... (they are)... the units of the legal order as human individuals are the units of the social order. They are units on behalf or in title of which legally recognised and secured interests are asserted." Thus it would appear that to Někám the law recognises an interest of an entity and thus creates the legal entity whilst to Pound the legal entity is a creation of the law to which rights are attributed. We are thus back to the old argument between reality and fiction. The interesting thing here is, however, that the defects of the theories appear to be reversed.

The fiction theory was said to have one major defect; that it prevented a company from being held liable for the crimes and delicts of its representatives, or, more generally stated, it prevented the application to corporations of those fields of law where a person's capacity determined his rights and duties. This criticism must also hold true of the entity theory as expounded by Někám. If a company has no capacity, has no will, how can it be held liable for the crimes and delicts of its representatives? On the other hand Pound speaks of "... entities to which rights in the wider sense are attributed; or on which legal rights, powers, and privileges are conferred; in which liberties are recognised and upon which duties and liabilities are imposed."[32]

Radin[33] has criticised the entity theory generally. Although it would seem that his criticism is inapplicable to the theory as expounded by Někám, it is, I think, fatal to the theory as expounded by Pound. He says:

> "As long as we think of legal relations as primarily of the form that John may lawfully claim of Richard an act or an abstention, it is readily imaginable that these relations might be listed and checked and that their sum in any given complex might be known ... But if we add to these the privilege-no-claim relation, ... we find before us a number so vast that this listing becomes something of a feat. When we go from rights, either as claims or privileges, to the capacity group, the difficulties become intensified. Indeed it is here that we find manifested the difficulty with any theory that attempts to conceive the law exclusively as a statement of relationships, and tries to detach these as much as possible from the concrete individual persons who are related. ... When we speak, accordingly, of relations between 'persons', if we keep in mind these powers, which are themselves relations and the source of other relations, we find ourselves compelled to take into active account the real concrete human being as a prolific source of relations. ... The 'personality', then, which is the ultimate object of our consideration, at either end of the relation which is stated by the court's judgment and which is generalised into a legal rule, is after all and in spite of all, a man, not a persona ficta, an artificial contrivance of the law."(34)

The traditional theories had one advantage over their modern counterparts. By attributing human personality to corporations they provided the means by which the legal order could be applied to them. Of course, at times, they rather hindered than assisted this process, but, nevertheless, they did provide a formula. By purporting to be a purely legal theory the "legal entity theory" presupposes the existence of a fully developed law relating to corporations. Once this has been achieved there will naturally be no need to apply the rules of law as developed for human beings to corporations by way of formula or analogy and we will, indeed, be able to look exclusively to the law relating to corporations when evolving any theory as to their nature. Today, however, we are very far from being able to draw up that complete list of rights and duties applying to corporations. Of course, Nékám denies that we will ever be able to do so but this, it is submitted, is based upon the idea that we may only attempt to define companies in terms of the rights attributed to them and assumes that the legal order itself does not attribute rights and liabilities to a company because it is a company. It is submitted that neither of these two opinions are correct.

Because we do find it necessary to generalise as to the nature of companies, those holding the entity theory are bound to set about the task of listing those rights the recognition of which form the legal entity of the company, notwithstanding the fact that, as Nékám has demonstrated, this simply cannot be done. Thus Pickering[35] states:

> "... within the limits of their separate objects and the vires allowed at common law all companies possess identical legal capacity or legal capacity of the same nature. In each case this exists entirely separate from and otherwise totally unrelated to the status of the members, either severally or collectively. Nevertheless, both the legislature and the courts have found it necessary, or desirable, to make certain exceptions and to deal with some companies for certain purposes as if they were not entities separate from and independent of their members. These exceptions are of a varied nature but it would seem that an adequate attempt can be made to classify, and perhaps identify, them only if it is recognised that they are exceptions to either of the two basic principles underlying the concept of separate legal entity."(36)

The exceptions referred to by him are those cases where companies have been held responsible for acts which are beyond their powers and those cases where "it has been found necessary to disregard in some cases the separate proprietary, contractual and other rights and obligations of certain companies primarily to effect distinctions between companies with different types of membership."[37] The subject of his article is, however, to examine the "substance" rather than the exceptions of the "corporate entity". To him the essential

elements of the concept are to be found in three groups of principles being those established to "settle the three basic legal issues of the company's existence". These are: the extent of the company's legal competence, the nature of the company's legal capacity, and the manner in which its capacity is exercised.[38]

Of "the extent of the company's legal capacity" he says that companies differ from natural persons in that they can acquire or be subject to a very much more restricted range of rights and liabilities. Companies are subject to "an original limitation and circumscription of their powers by the law",[39] the underlying principle being that a company should be empowered only to the extent necessary to enable it to carry out its objects or purposes. This results in a twofold limitation. On the one hand the law requires companies to state their objects on incorporation - the ultra vires doctrine, and, on the other hand, the common law imposes its own limitations upon corporation capacity. The latter

> "are those restrictions upon the extent of the company's legal capacity at common law which operate, apparently, even if express objects clauses are not requisite. English Law refuses to impute to companies those characteristics of natural persons which appertain to their human and social nature, and which may form the basis of a vast range of individual rights and duties. In particular, at common law a company is recognised as having no physical attributes and no mind of its own."(40)

Thus Pickering cites Buckley L.J. in Continental Tyre & Rubber Company (G.B. Limited v. Daimler Company[41] where he said:

> "The artificial legal person called the corporation has no physical existence. It exists only in the contemplation of the law. It has neither body, parts, nor passions. It cannot wear weapons nor serve in wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators."(42)

He concludes with the statement that:

> "Companies are no more likely in future than in the past to be indictable for murder, capable of marriage, eligible to vote, or liable to National Service."(43)

Of the nature of a company's legal capacity, Pickering considers that this "is identical in nature to that of ... natural persons. In other words, the proprietary, contractual and other powers which a company may possess are in no sense derivative from or dependent upon its members."[44]

Thus the holders of the "legal entity" theory are forced to fall back upon

human personality and they do so contrary to the first principles of their theory. In so doing they make all the old, untenable, propositions as to the nature of corporate personality, perhaps the most striking of which being the assertion that companies do not have capacity to do certain acts because they have no "mind"! The fact is that the "legal entity" theory is completely sterile.[45] In the final analysis, it says no more than that "a company" is a subject of rights as are all other legal persona - because it is the subject of rights. The traditional theories answered the question "What is a company?" by saying that, as man has rights because he has certain attributes, therefore companies are either real things with the same attributes or are fictitious human beings. From this it followed that a subject of rights must, because it is a subject of rights, have certain minimum rights. There can be no doubt that Nékám's criticism of this approach is valid but it does not follow, however, that the word "company" is meaningless. It is obvious that no simple answer can be given to the question "What rights do companies have?" but it is equally obvious that there are certain rights which cannot sensibly be granted to a company and that the reason why this is so must lie in the answer to the question "What is a company?" It is obvious too that we can sensibly incorporate a business but not an oriental plant and, again, the reason for this must lie in the answer to that question.

Neither of the two variants of the theory adds, as such, anything new to the question of the relation between director and company. As we have seen, we find each theory providing an answer which is the reverse of that deduced from the traditional theory to which it is most closely related. To Nékám the director is a representative but Nékám can never tell us anything more than this and, what is more, his theory is based upon unacceptable assumptions as to the nature of things. For those holding that variant of the theory as represented by Pound the question remains unanswered. It is this variant of the theory which appears to be most widely held today. Its explanation of this relationship is the so-called "modern organic theory".

The Modern Organic Theory

This theory is, as has been explained, not so much a theory as to the nature of corporate personality but is rather a theory to explain the relationship between the board of directors, the general meeting and the company. Gower calls it "the organic theory"[46] but it is perhaps better described as the "modern organic theory".[47] True to principle, it sets aside all extra-legal considerations, and,

looking to the substantive law, confines itself to an explanation of the normal business company registered under the Companies Act. It has both an "internal" and an "external" aspect. The theory is, however, seen as one, although, as Gower says, "strangely enough (the lines of cases evolved) entirely independently"[48] of each other.

The external aspect of the theory may be simply stated. The directors of a company are not its agents but rather are they members of the board which is an organ of the company. This of course is a fundamental tenet of the realist theory but here authority is not sought in the "nature of things" but in the law itself. Authority for this proposition is found in Lennard's Carrying Company v. Asiatic Petroleum.[49] The facts of this case are well known. Briefly, they are that under Section 502 of the British Merchant Shipping Act, then in force, the owner of a sea-going ship was not liable to make good any damage unless he himself had been at fault. Here the fault had been that of the managing director of the company which owned the ship and it was argued on behalf of the company that his fault was not the fault of the company. In holding that the company was liable, Viscount Haldane L.C. said:

> "My Lords, a corporation is an abstraction. It has no mind of its own anymore than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation... If Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of Section 502... It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself."(50)

Of this case Gower says that this "new conception of the organic relationship between the company and its managers" may have been influenced by the realist theory of corporate personality. It is, however, a conception which, it would seem, is not confined to directors.[51] In The Lady Gwendolen[52] the plaintiff company sought to limit its liability under the Merchant Shipping Act in respect of a collision between their ship, The Lady Gwendolen, and another vessel. The collision had taken place in fog and it was established that the captain of the plaintiffs' vessel habitually negotiated fog at excessive speeds. The vessel was fitted with radar of which the captain had but little knowledge. Furthermore, the plaintiffs had not acquainted him with or

emphasised the importance of a Ministry of Transport Notice regarding navigation in fog. The supervision of the company's shipping was the duty of one of its assistant managing directors, although there had been no special resolution to that effect. The actual department concerned, however, was in the hands of a traffic manager and a marine superintendent. The court, nevertheless, found that the assistant managing director was a person in respect of whose acts and omissions the corporation could be held personally liable as he had the ultimate duty of supervision over the traffic department. His failure to consider the problems of radar navigation in fog was the personal fault of the company. Willmer and Winn L.JJ., however, went further than this and indicated that the person whose fault is to be taken as the personal fault of a company need not necessarily be a director. Thus Winn L.J. said:

> "... whenever the fault either occurs in a function or sphere or action which the owner has retained for himself or is that of a manager independent of the owner to whom the owner has surrendered all relevant powers of control, it is 'actual fault of' the owner within the meaning of the section."(53)

Thus, as Leigh points out, on this analysis a corporation could be held personally liable for the fault of a departmental manager provided that primary control in fact was placed in his hands.[54] He considers that:

> "The chief value of this decision lies in the pragmatic approach of the court to the problem. There is no hint in the judgment of any metaphysical relationship of a corporate officer to the corporation for which he acts. There is no hint of abstract constitutionalism in the court's approach. Rather, there was a careful factual analysis of the workings of the management of the plaintiff company. This is, it is submitted, commendably sound. By declining to fasten constitutional shackles to personal corporate liability it will be possible to fit corporations with complex, decentralised modes of organisation into a meaningful framework of liability."(55)

The "abstract constitutionalism" mentioned by Leigh is a reference to Gower.[56] Whether this criticism is altogether justified is difficult to say. Gower does not say that the rule is confined to directors and this case is in fact cited by him in the third edition of his work as authority for this aspect of the organic theory. It would seem, however, that Gower here is being inconsistent for the external aspect of that theory is based upon a suggested relationship between the board of directors and the general meeting. A manager's relationship to his company can hardly be said to be "organic".

The principle of attributing acts of a company's directors and managers to the company itself has, of course, received its most extensive application

in criminal law.[57] It has, however, also been applied in determining a company's residence on the basis that where those controlling the company's affairs reside, so too resides the company;[58] wrongful inducement of a company's agents or servants to bring about a breach on the part of the company of its contracts,[59] or to render their performance impossible,[60] and in determining the "intention" of a company.[61] Gower considers that it is "... obviously capable of application to any circumstances in which the ordinary principles of vicarious liability produce injustice". This appears, rather anomalously, to render this principle or corporate capacity dependent upon another, and one would think, in principle, irrelevant rule of law.

This approach appears to have everything to recommend it. Although the need for it has, of course, been felt more pressingly on the Continent than in England where the principle of respondeat superior has frequently rendered it unnecessary, it is clear that no legal system can reasonably avoid adopting such a principle in certain cases. There will always be occasions where, if the courts wish to hold a company liable, they will have to do so by attributing directly to it the actions of certain persons. Thus the problem raised by the Merchant Shipping Act was solved. It seems likely that this approach will always be adopted in cases where the wording of a statute is such as to render ineffective the principles of agency, e.g. Section 4 (i) of our Hire Purchase Act,[62]

There has been much discussion as to the problem of deciding just who is the company's "alter ego" in any particular circumstance. Here the approach of the court in The Lady Gwendolen Case would seem to go a long way towards providing an answer. If the principle be accepted as a general rule, and, admittedly, it can hardly be said that the courts have gone this far, it will follow that where a director or directors act within their powers or commit delicts in the course of carrying out their functions, their acts will be the acts of the company. This has been said to be the major defect in the fiction theory. Now, by abandoning the idea that the company is a fictitious person, there can be no theoretical objection to introducing such a rule. Nor does it require the belief that a company has an objective existence. This can be seen in the very first authority referred to, namely Lennard's Case, where Lord Haldane spoke of the company's existence in terms very far from those used by realists. He said "a corporation is an abstraction".[63]

The acceptance of such a principle, however, appears to raise a problem. If the director's acts as regards third parties are considered to be the acts of a representative then it would seem to follow that his relation to the company is that of a representative. If these acts are not held to be the acts

of the representative, then what is his relation to the company? It seems to imply that it is not that of a representative and it is upon this assumption that the internal aspect of the "modern organic theory" sets out to explain this relation. This is, however, a false assumption for, as we have seen, the acts of a servant of a company may similarly be held to be the acts "of the company".

The internal aspect of the theory finds its first authority in the case of Automatic Self-Cleansing Filter Syndicate v. Cuninghame.[64] Before considering the case, however, it is necessary to consider briefly the law - or at least the prevailing opinion - existing before that decision. It is usually said that before Cuninghame's Case the directors of a company were considered to be the agents of its members. By this it is meant that the prevailing opinion was that the directors were bound to follow the intructions of a majority of the members - which is, it is submitted, a very different thing. Aickin,[65] pointing out that by 1860 this view had already ceased to be universally accepted, says that it "... seems to be derived from a combination of the position of one partner, who would be the agent of all partners, and of the long established rule that a majority of members should prevail in a corporation".[66] He, however, goes on to say, and it is submitted this is most relevant in the present discussion, that "... one should not overlook the fact that it was not uncommon for a partnership deed to contain provisions giving managing partners control of the conduct of the business, thus excluding the other partners from any part or say therein".[67]

Under the influence of these ideas the Company Clauses Consolidation Act 1845 provided that the directors shall have the management and superintendence of the affairs of the company and they may lawfully exercise all the powers of the company, "... and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose...."[68] In Foss v. Harbottle,[69] Wigram V-C., dealing with a company incorporated by private act, said "The result of these clauses is that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings..."[70]

In 1884 the case of Isle of Wight Railway Company v. Tahourdin[71] was decided in relation to a company established by private act and governed by the Companies Clauses Consolidation Act 1845. Here the required number of shareholders had requisitioned a meeting, the objects of which were: (i) to appoint a committee to enquire into the working and management of the company and the means of reducing working expenses, to remove employees and appoint

others and to require and authorise the directors to carry out the recommendations of the committee, and (ii) to empower it to remove and appoint directors. The directors of the company issued a notice convening a meeting to consider only the appointment of the committee. The requisitionists thereupon themselves issued a notice of meeting, specifying all the above matters. The directors responded to this by bringing an action in the name of the company to restrain them from holding the meeting. Kay J. held that all of the first objects, other than the appointment of the committee, were illegal in that the terms of the notice of requisition proposed to transfer the powers of the directors to the committee. The Court of Appeal, however, held that the directors were not justified in excluding from the business of the meeting matters other than the appointment of the committee on the ground that all of the first object was capable of being carried out by a general meeting in a legal manner. It did not decide that any of the actual resolutions proposed would have been valid and effective if passed. Cotton L.J. did however, say, by way of obiter, that "The adjourned special meeting having undoubtedly a power to direct and control the board in the management of the affairs of the company, when they see what the committee recommend..."[72] This case is therefore seen as authority for the traditional view.

In Automatic Self-Cleansing Filter Syndicate v. Cuninghame[73] the company had the power under its memorandum of association to sell its undertaking to another company having similar objects. By its articles of association the general management and control of the company was vested in the directors, subject to such regulations as might from time to time be made by extraordinary resolution. In particular the directors were empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets to a new company formed for the purpose of acquiring them and directing the company's directors to carry the sale into effect. The directors were of the opinion that the sale was not for the benefit of the company and declined to do so. An action was brought by one of the shareholders on behalf of himself, all the other shareholders and in the name of the company for an order that the directors forthwith carry the contract into effect. It was held that the directors could not be compelled to do so. Warrington J. said:

> "The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and condi-

> tions as a simple majority of the shareholders think fit... It seems to me on the true construction of these articles that the management of the company and the control of the company are vested in the directors, and consequently that control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration, of course, requiring a special resolution."(74)

He distinguished Tahourdin's Case in that that case arose under the Companies Clauses Consolidation Act and also on the ground that the decision only dealt with the question whether the court would interfere with the holding of a meeting of the shareholders. His decision was confirmed on appeal where Collins M.R. stated:

> "In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to effect or alter the mandate originally given to the directors, by the articles of association. It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that the analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have no doubt in theory and in law one entity, the company which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be overborne, but that can only be done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority - it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need to say any more."(75)

Cozens-Hardy L.J. said:

> "... if you once get clear of the view that directors are mere agents of the company, I cannot see anything in principle to justify the contention that the directors are bound to comply with the votes or the resolutions of a simple majority at an ordinary meeting of shareholders."(76)

The next case in this series was that of Gramophone and Typewriter Limited v. Stanley.(77) Here an English company owned all the shares in a company carrying on business and registered in Germany. Under German Law this subsidiary was obliged to set aside out of its profits an amount in respect of certain depreciation before distributing its dividends. The Revenue

sought to tax the English company on these undistributed profits. Buckley L.J. said:

> "Further it is argued that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This court decided not long since, in Automatic Self-Cleansing Filter Syndicate Company Limited v. Cuninghame, that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals." (78)

Fletcher Moulton L.J. said:

> "The directors and employees of the corporation are not his (the individual members') agents, and he has no power of giving instructions to them which they must obey... in an English company, by whose articles of association certain powers are placed in the hands of directors, shareholders cannot interfere with the exercise of those powers by directors, even by a majority at a general meeting. Their course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself." (79)

The next case is that of Salmon v. Quin & Axtens Limited.[80] Here, again, the articles of the company contained the standard clause as to the powers of the directors. It also contained a provision to the effect that no resolution of the directors relating to the acquisition or letting of any premises should be valid unless twenty-four hours' notice of the meeting should have been given to each of the managing directors, A and B, and that neither of them should have dissented in writing before or at the meeting. Resolutions were passed by the directors for the acquisition and letting of certain other premises but B dissented from both of these resolutions. At an extraordinary general meeting of the company resolutions to the same effect were passed by a simple majority of shareholders. It was held that the resolutions were inconsistent with the articles of the company and the company was restrained from acting upon them. Farwell L.J. followed Cuninghame's Case and Stanley's Case. He said that, "any other construction might, I think, be disastrous, because it might lead to an interference by a bare majority very inimical to the interest of the minority who had come into a company upon the footing that the business

should be managed by the board of directors".[81] He considered that the decision in Tahourdin's Case was based on the Companies Clauses Act and agreed with the Master of the Rolls in Cuninghame's Case that the provision in that Act to the effect that "the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose", led to that conclusion. In the House of Lords Lord Loreburn dealt with counsel's contention that the word "regulations" as employed in the company's article vesting the management of the company in the directors "subject to such regulations, being not inconsistent with (the articles or the Act) as may be prescribed by the company in general meeting", includes directions whether general or particular, as to the transaction of the business of the company. To this Lord Loreburn said: "now it may be a question for argument, but for my own part I should require a great deal of argument to satisfy me that the word 'regulations' in this article does not mean the same thing as articles, having regard to the language of the first of these articles of association".[82] In support of his contention it should be noted that article 1 of the company's articles read, "The regulations contained in table "A" of the first schedule to the Companies Act 1862 shall not apply to this company but the following shall be the regulations of the company". Gower notes, however, that the articles read, "subject ... to such regulations not being inconsistent with the aforesaid regulations ... as may be prescribed by the company in general meeting" and says "the earlier part of the article prescribes that the delegation is 'subject to these regulations' and the later words are tautologous if Lord Loreburn's view is adopted".[83]

The fourth case is that of Shaw & Sons (Salford) Limited v. Shaw.[84] Here the only directors entitled to vote in respect of this particular matter, resolved that instructions be given for the purpose of issuing writs against two other directors of the company for the recovery of certain debts owing by them to the company. A resolution was passed by the shareholders at an ordinary general meeting directing the chairman of directors to discontinue these proceedings. A writ was nevertheless issued and the defendants pleaded, inter alia, that the action had been brought without proper authority. This defence was rejected. In the Court of Appeal Greer L.J. stated the rule as follows:

> "A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by the directors, certain other powers may be reserved to its shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these

> powers. The only way in which a general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering these articles or, if opportunity arises under the articles, by refusing to re-elect directors of whose actions they disapprove. They cannot themselves usurp the power which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."(85)

Finally, there is the decision in Scott v. Scott,[86] In this case it was held that resolutions of the general meeting, which could be interpreted either as directions to pay an interim dividend or as an instruction to the directors to make loans, were nullities. It was also held that a resolution appointing accountants to "investigate the affairs of the company" was also a nullity on the same grounds in that it interfered with the director's management of the affairs of the company.

From these decisions the internal aspect of the modern organic theory is deduced. To Gower "this means that the old idea that the general meeting is the company whereas the board of directors are merely agents requires modification. It seems that both the general meeting and the board may be the company; the former when acting under the reserved powers, the latter when acting under an express or general delegation. Or, to put it another way, both the general meeting and the board are organs, rather than agents, of the company; this... is how the courts have sometimes described them when considering the company's liability for their acts".[87] He concludes that "relationship between the company and the general meeting ... (is analogous to) the division of powers between the federal and state legislatures under a federal constitution. And... the residual powers are in this case with the directors. This, of course, only applies to companies registered under the Companies Act."[88] Beuthin[89] comes to a similar conclusion. He says:

> "Until about 1906, the directors of the company had been regarded as merely its agents. They were subject to the control of the general meeting of the company, because it was this body that was the company. But with the turn of the century there emerged a new principle. It was recognised that if powers of management had been vested in the directors then they and they alone could exercise those powers. Today, under an article such as Article 83 of Table "A", it is commonplace to entrust the management of the company's affairs to its directors, and when this is done, although the general meeting may remove the directors at any time by ordinary resolution, and change the articles by special resolution, it may neither direct nor control the board in its management of the company nor overrule any decision which the board may have made in the conduct of the company's affairs. In other words modern directors are something more than mere agents or trustees. The board is also correctly recognised to be the primary organ of the company, its relationship with the general meeting being

more of a federation than one of subordinate and superior."[90]

Thus too, Hahlo likens the relationship between the general meeting, the board of directors and the company to that of a constitution. "A company is a dyarchy. Its organs are the general meeting of shareholders and the board of directors."[91]

According to this theory, therefore, the relationship between the directors of a company and their company is not identical, or really even analogous, to the relationship which exists between an agent and his principal. Just as their acts may be viewed "externally" (i.e. from the point of view of a third party) as the acts of the company (and not the acts of its agents), so too may this approach be adopted in regard to the "internal" aspect of this relationship. "The company" is either the general meeting or the board, depending upon which body has given the particular power. Thus the relationship between directors and their company is "organic" or "structural". The concept is, however, by no means clear and just how far those advocating this internal aspect of the theory are prepared to go is difficult to say. Generally, the theory appears to be no sooner stated than it is ignored.

It is submitted that this series of cases does not support the theory. The most that can be deduced from them is that where a company in its articles of association "delegates" certain powers to its directors then the directors, and the directors alone, may exercise these powers; but not all the cases go even as far as this and the rule may well be that a simple majority OF THE MEMBERS cannot THEN IMPOSE THEIR WILL UPON THE BOARD. If the shareholders do not agree with the manner in which the directors are exercising these powers they must either remove the directors or, if their complaint goes further than this and it is their desire to exercise these powers, they must alter the articles of association so as to divest the directors of them. This appears to be an eminently reasonable rule for clearly there could be chaos without it. The rule is based purely on the interpretation of Table "A" and the reasoning of the judges is such that it is quite clear that should the company's articles permit both the general meeting and the directors to exercise the same power this would be perfectly valid. It is submitted that when the judges in interpreting this article said that the directors were not "agents" they were assuming that if the ordinary rules of agency applied the directors would be bound by the decisions of the majority of the members. This assumption is of very doubtful validity. One could just as well say that the normal rules of agency require the unanimous decision of all the shareholders. In any event, even if it is true that directors cease to be "mere"

agents when the shareholders agree among themselves not to interfere in the running of their company, this cannot mean that they are not agents at all. What is more, the question has nothing to do with corporate personality. How can it be said that it follows from these cases that the directors, as a board, are an organ of the company? If a partner were delegated powers and the deed of partnership provided that he alone should exercise them what sort of an organ would he then be? In Cuninghame's Case it was this very analogy which Cozens Hardy L.J. used:

> "Is there any analogy which supports the case of the plaintiffs? I think not. It seems to me the analogy is all the other way. Take the case of an ordinary partnership. If in an ordinary partnership there is a stipulation in the partnership deed that the partnership business shall be managed by one of the partners, it would be plain that in the absence of misconduct, or in the absence of circumstances involving the total dissolution of the partnership, the majority of the partners would have no right to apply to court to restrain him or to interfere with the management of the partnership business... And why? Because it is a fallacy to say that the relation is that of simple principal and agent... I do not think it true to say that directors are agents. I think it more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders."(92)

Many of the difficulties that this theory raises appear to be unanswerable. First and foremost, how can we hold directors bound to act in the interests of their company and yet, at the same time, insist that they are the company? By holding the directors' acts to be the acts of the company as far as third parties are concerned we are doing a very different thing. We are saying that we will not apply the rules of agency in order to determine whether or not a company is liable for a particular act of its directors but, instead, we will apply the rules evolved for determining the liability of a person acting on his own behalf. But to say that the director is the company from the internal point of view is to make use of a most transparent fiction for no other purpose than to add symmetry to a theory. If taken any further it would deny that they are under a duty to act in interests other than their own and this is, of course, not done. Thus we are told that they are no longer "merely" agents. This leads to the next objection. The theory holds that the general meeting of the company exercises its powers in the same way as the board of directors does, namely, as an organ of the company. But it is accepted that the members are not bound to exercise their votes in any other interests than their own. Furthermore, it is quite clear that they may alter the articles of association so as to take to themselves the powers of administering the company. It could hardly be said that such a body is an administrative organ in the sense that they administer the company's

interests and not their own. Then what of the analogy between the general meeting and a state legislature? It would indeed be very strange if the members of a state legislature could take the powers vested in the federal legislature away from it and proceed to exercise these powers in their own interests, that is in the interests of themselves as members of the state legislature. And yet, if this point is ignored, what is left of the analogy? Actually, very understandably, the holders of this theory cannot avoid viewing the powers of the general meeting with considerable distaste. Thus Gower sees the fact that a shareholder may exercise his votes "in his own selfish interests" to be startling and it to be even "more startling... that the directors themselves, even though personally interested, can vote in their capacity of shareholders at a general meeting."[93)]

Then what are the "interests of the company" for which the directors must act? This theory by placing the general meeting and the board upon the same footing leaves this question open. If they are both "organs" of the company what then are the "company's interests" for which they must act? The theory suggests that they must act in the interests of an "abstract" entity and for those to whom this is unacceptable, the answer appears to be a purely arbitrary one. The courts have, of course, held that the directors are not entitled to have regard to interests other than those of the members. To Gower this is "an increasingly anachronistic view".[94)] It is thus argued that other interests can be taken, or rather should be taken, into account, for example the employees, customers and the public. This question will be considered later. For the moment it need merely be said that this is, of course, a question of public policy and one not for the courts but for the legislature - that is if one believes that the legislature should intervene at all.

Then it must be stressed that the theory rests upon the construction of Table "A". Surely it cannot be said that the nature of the relationship between the director, or rather the board of directors, and the company has been so radically altered simply by the wording of the usual clause in Table "A" empowering the directors with the management of the company's business - a clause which was obviously never intended to alter the relation of the directors to their company. In any event we can hardly talk of a "theory" when what we in fact are dealing with is the construction placed upon a certain clause contained in the articles of a company - albeit that this clause is to be found in the articles of most companies.

Finally, it should be noted that the theory has received a considerable blow in the recent case of Bamford v. Bamford.[95)] The case concerned the

purported ratification by the general meeting of an allotment of shares made by the board in breach of their fiduciary duties. The power to allot shares was vested in the board by the articles and it was argued that therefore the general meeting had no power to ratify. Plowman J. after citing the above authorities, came to the conclusion that they are authority only for the proposition that a bare majority cannot usurp the authority (powers) given in the articles to directors. In this he is clearly correct. He went on to hold that the granting of a power to directors always leaves a "residual" power in the company. This is because the board receives its powers subject to the duty to exercise them in the interest of the company. Therefore there remains a residual power to exercise them in interests other than those of the company. The general meeting cannot, of course, exercise these powers in the interests of the company for they have delegated these powers to the directors. (When Plowman J. speaks of "leaving of residual powers in the company" he means the general meeting.) The argument was stated succinctly by counsel in relation to the power of allotment thus; "subject to any provision to the contrary, the power to issue capital validly created is in the company in general meeting. (The article) confers a power of allotment on the directors but this is subject to the built-in limitation which applies to all powers of directors, namely it is to be exercised bona fide in the best interests of the company. This power is less extensive than the company's inherent power, which is not subject to any such limitation. Ergo, the company has a residual power of allotment."[96] Thus the first proposition of the theory is denied, namely, that the powers of the board are not "delegated" to it by the articles but are rather vested in it by the same original process as powers are vested in the general meeting.

The Court of Appeal found it unnecessary to decide upon this point for it held that the power of the general meeting to ratify acts of the directors carried out in breach of their fiduciary duties does not depend upon the existence of such a "residual" power. Commenting upon this Gower says:

> "Plowman J. had held that the general meeting had power to act under the residual powers... The Court of Appeal considered that this question was irrelevant to the issue before them and expressed no view on it. It seems absurd if the directors are forced improperly to take a decision and then ask the general meeting to whitewash them."(97)

This criticism is certainly sound but it is difficult to see how Gower can justify it in terms of his theory. What he in fact does is to hold that although the powers of the board are vested originally in it, the general meeting has certain "default" powers.

> "It seems that if for some reason the board cannot or will not exercise the powers vested in them, the general meeting may do so."(98)

If these powers are seen to be delegated to the board it would, of course, follow that, where it was unable to exercise these powers, the general meeting could do so. To those holding this theory, however, this simple answer is unacceptable. Thus Gower says of these "exceptions":

> "These exceptions are convenient, but difficult to reconcile in principle with the strict theory of a division of powers. Their exact limits are not entirely clear."(99)

The internal aspect of the modern organic theory thus not only fails to satisfactorily explain the director's relation to his company but in fact is a positive obstacle in the way of any attempt to arrive at such an explanation. Although it may be useful at times to speak of "the board" it should not be forgotten that it is a purely descriptive term. The board is not a legal persona. It has no powers and no duties are owed to it. Although the internal aspect of the modern organic theory may be valid as a sociological explanation of certain business undertakings (both incorporated and unincorporated), it obstructs rather than assists any consideration of the legal relationships involved.

WOLFF, HOHFELD AND HART

Wolff's Restatement of the Fiction Theory

The objection was made to that variant of the legal entity theory as stated by Pound that it swept aside the first assumption of the traditional theories - the a priori assumption as to human personality - and replaced it with nothing and that this resulted in a return to the analogy of the human being. Does this mean that an answer to this question may be found in a restatement of the fiction theory?

Stripping the fiction theory of all association with the concession theory and rejecting the proposition that a juristic person is something non-existent, Wolff[1] then added to it "the one considerable progressive element introduced by the organism theory", namely, the attribution of capacity to juristic persons. If this is done "the fiction formula approximates very closely to the other doctrine; for if all juristic persons are treated as if they have wills of their own and are capable of acting, it makes no difference whether you say 'they are real animate beings with wills of their own and so on' or whether you say 'some of them may be and some certainly are not, but the law treats them all as if they were".[2] He thus says of the theory so formulated:

> "The fiction theory is not a theory at all. It does not attempt to explain anything. It is - like every fiction - a formula. Moreover, it does not assert that something non-existent is endowed with personality. No one denies, or at least, no one should deny that corporations and foundations are things that exist - like human beings, like plants, like rivers, like books, like ideas, like rules. But the fiction theory is not prepared to investigate the nature of these existing entities, if only because it recognises that no uniform answer could be given. Legal personality is accorded to certain groups which have arisen naturally, such as nations; to certain groups which have been created by contract, such as companies; to certain permanently secured purposes, such as foundations; to certain merely technical constructions - in short, to a large number of beings of the most varied structure. Moreover, the structure of one and the same being can be changed, while its identity persists... The so-called fiction theory further assumes that lawyers as a rule have no concern with the structural differences underlying the various kinds of legal persons, as that is a question of sociology... all that interests us is that they are endowed by law with legal capacity as if they were human beings. Fiction is not a lie, as Benthan thought, neither a wicked lie nor a foolish one, to use Benthan's words. It is an abbreviation... It is, of course, possible to state all that the fiction formula implies without its help. Instead of saying 'certain bodies not human beings are treated as if they were persons in respect of capacity', we might say: 'Law endows with capacity firstly human beings and secondly certain bodies not human beings'. Both versions are equally correct, because their meaning is identical."(3)

Wolff's submission that the "fiction" is merely a "formula" appears, at first sight, to avoid Někám's criticism of the traditional theory. A "formula" is, after all, not an a priori assumption. Human personality would seem to be inevitably involved in statements concerning juristic persons and this suggests that where the traditional theory failed was that it saw human personality as a first assumption rather than a means of achieving certain ends. If this is so, the first question as to the nature of corporations is "Why do we use the formula?" When, however, we turn to see why Wolff uses this "formula" we find that it is in fact not a formula at all.

Why does Wolff then insist that these entities be treated as if they were human beings? He considers that the wisdom in such a formula lies in the fact that since the abolition of slavery, it has been axiomatic both from a religious and a moral point of view that man has apart from all law a natural dignity or personality and is, therefore, in law capable of having rights. Thus any legal system which does not recognise this fact would clash with the principles of present day civilisation. He therefore retains the natural law basis of the fiction theory.[4)]

If we recognise that those real, non-human entities, which are endowed by the law with personality, have interests of their own in the same way that a human being has interests, then we are either doing something absurd or very silly in attempting to formulate them in terms of human interests. Certainly religion and morality could hardly require us to do so. If, on the other hand, we are merely ascribing human interests to them, Wolff's justification for bringing human personality into the picture is incorrect for it is an essential part of the formula and is not done for ethical reasons but for purely practical objects.

It is submitted that the reason why Wolff feels the necessity for this ethical justification is because he makes the same mistake, in principle, as made in the modern organic theory, namely, to hold that if something is seen as a unit from one point of view it must necessarily be seen as such from every other point of view. If a director's actions are the actions "of the company" from the point of view of a third party then he must always be treated as "part" of the company. To Wolff, once interests have been ascribed to the company (and are thus treated as the company's interests) it therefore follows that they must always be treated as such. In other words they must be "the interests of the company" in the same way as the individual's interests are considered to be exclusively his "own". The result is that we have created a sort of Frankenstein (albeit by means of a fiction). But man has

apart from all law a natural dignity and personality and it is because of this that he is capable of having rights. To grant them to something other than a human being would be to deny this and therefore Wolff considers the fiction must be applied.

It is therefore submitted that Wolff's restatement of the fiction theory fails. In spite of the fact that he maintains that the "fiction" is used as a "formula" it is in fact a dogmatic fiction[5] based upon an a priori assumption as to the nature of things requiring us to treat a juristic person as if it were a human being.

This in turn throws doubt upon Wolff's suggestion that the fiction theory may be simply extended to include the "one progressive element" of the realist theory, namely, the fact that it treats juristic persons as having capacity. Thus it would seem that Wolff is not suggesting that we may treat the acts of certain persons as the "acts of the company" if, in the circumstances, we will achieve a desired end. What he is saying is that we should treat a company as though it had capacity of the same nature as that of a human being. Thus we have, far from a solution to our problem, the combined anomalies of the traditional fiction and realist theories.[6]

Wolff's thesis does, however, point to three important facts. Firstly, there is no reason why an "organic theory" must be accepted before the acts of a director can be held to be the acts of the company. Secondly, that the first assumption of the traditional theories lead to the idea that a company must be looked at from every point of view as a unit in the same way as we look upon an individual. If we abandon the idea that a company is a real or imagined person we should not forget that we are no longer bound to view the company as a unit from every point of view. Thus because we ascribe the interests of certain persons to a company from the point of view of a third party this does not necessarily mean that they have been entirely severed from their human origins and now must always be seen as the "interests of the company". It is here that the Hohfeldian analysis is helpful. Thirdly, that human personality may be used not as an a priori assumption but as a formula. Not as something to make deductions from but as something by means of which ends are achieved.

The Hohfeldian Analysis

"Perhaps the chief use of the Hohfeldian[7] notion of 'power'", says Max Radin, "is to lay that persistent and ubiquitous ghost or poltergeist,

the 'juristic person'".[8] Assisted by the system of procedure which the later Roman administration developed and based on the feudal concepts by which the organisation of society was expressed in "an intricate group of relations", the idea that legal personality can be seen as the sum total of legal relationships existing between a person and other persons can today no longer be accepted. We can no longer accept that relations "are the ultimate units of law" and the fact that our legal rules are, of course, generalisations, does not establish this. This is clearly demonstrated by the Hohfeldian analysis.[9]

Hohfeld points to the fact that we cannot consider legal relations only in terms of rights and duties. If this were all we had to take into account they could probably be "listed and checked... that their sum in any given complex might be known". When, however, one considers "privileges" and, especially, "powers" the task becomes impossible. What is more:

> "When we speak accordingly, of relations between 'persons', if we keep in mind these powers, which are themselves relations and the source of other relations, we find ourselves compelled to take into active account the real concrete human being as a prolific source of relations. No list of relations of persons, considered legally, will be anything like exhaustive which does not attempt to include almost every movement and change of position of the flesh and blood being who is involved. The 'personality', which is the ultimate object of our consideration, at either end of the relation which is stated by the court's judgment and which is generalised into a legal rule, is after all and in spite of all, a man, not a persona ficta, an artificial contrivance of the law. The 'legal person' has no more existence than the 'economic man'".(10)

But Hohfeld's theories not only demolish much of what has been said as to the nature of corporate personality; they also provide a simple answer as to its nature. The answer is, actually, said to be alarmingly simple. "If we apply the Hohfeldian doctrines to this ancient stumbling block it can be avoided by the simple process of kicking it aside".[11] Radin explains what is revealed after the well-placed kick:

> "Even those who find it impossible to abandon their idolon fori admit that the transaction 'in the name' of their fetish must be conducted between actual flesh and blood persons. If, for example, a contract is made with the X company by A, it must be made with B, an agent of 'the company', who derives his power to make it from his election for that and other purposes by C, D, E, and F, the directors of 'the company', who themselves derive their power to select B and to confirm his agreements from the vote of S1 to Sn, the stockholders of 'the company'. And these stockholders again have obtained their power to vote for the directors by the payment of the money to a specified person or the assumption of a duty to pay it to such a person."[12]

He goes on to say that:

> "What we have, consequently, is a chain of powers which begins with the actual person who conducts the negotiation and ends with the public officials whose license of approval permits this chain of powers to be initiated. Indeed, it may still go further, to the sequence of political acts which empower these officials to give these licenses." (13)

Why then do we talk of corporate personality at all? It is, according to this analysis, merely a "shorthand symbol", a "useful device", it is a matter of "necessity and convenience". Instead of stating this long and complex chain of powers, rights and duties all we say is that "X company has made a contract". But this is not merely a matter of verbal convenience. It also provides an easy bookkeeping device for to treat the credits and liabilities of a large number of persons working in co-operation with one another as if they were the credits and liabilities of these persons to another "person" greatly simplifies the necessary entries.[14] Furthermore, a sentence such as "A has contracted with B company" indicates that "That the claims or demand-rights created by the person empowered with this sequence or association are even more conditioned than is ordinarily the case". Thus the judgment creditor not only cannot attach the assets of the debtor over which others have a prior right but also, in the case of the company, only the property created by the contributions of the shareholders. In other words limited liability.[15] Thus it provides a method of accumulating large sums of capital for speculative ventures. Of course the advocates of this approach do not claim that these aspects of corporate personality cannot be achieved by other methods but they maintain this provides the most suitable device upon which to peg them.

Hart[16] has given a most telling criticism of this approach and I will therefore deal with it now in conjunction with a consideration of Hart's analysis of the problem. For the moment it will suffice to note that he disagrees that when we use statements about companies we are simply using a symbol or an abbreviation to state what is in fact a complex series of rights, duties and powers. This is undoubtedly correct. Nevertheless, it is clear that this analysis denies the first assumption of the traditional theories, namely, that a company is an entity from every point of view. Looked at internally there is no entity but merely "a chain of powers".

Hart's Definition

Hart points to the fact that "the language involved in the association

and application of the rules constitutes a special segment of human discourse with special features which lead to confusion if neglected." Here we use certain words which do not stand for any objective reality. Thus it is with legal words, and therefore they require a "special method of elucidation". Thus we cannot answer such questions as "what is a right?" or "what is a corporation?" by indicating any objective thing. These words serve another function. They are words relating to the annunciation and application of rules.[17)]

Any given set of rules may "attach identical consequences to any one set of very different facts" (or, for that matter, similar facts). Thus, for example, by applying the rules of, say, contract to certain given facts we may come to the conclusion that A and B are contractually bound to one another. We have drawn a conclusion "... from the relevant but unstated rule, and from the relevant but unstated facts of the case". There are many different sets of facts which may lead to this conclusion but, having arrived at it, our position is the same in that we look to the law to see what consequences follow from the fact that they have contracted. Thus when we say "A and B have contracted" we are not using this sentence as a shorthand symbol of describing the facts or the rules or both the facts and the rules, which existed and were applied in order to arrive at that conclusion. Nor are we saying that they have created any objective thing. Nor, again, are we making a prediction as to what will next occur. We are simply drawing a conclusion in terms of the law of contract. We do so because in terms of those rules certain other rules apply once that conclusion is drawn - regardless of the facts or rules which we used to arrive at the conclusion. At that point the process which led to the conclusion ceases to be of relevance.[18)]

Thus we see that "the primary function of these words is not to stand for or describe anything but a distinct function". We cannot ask "what is a contract?" or "what is a right?" and expect something experimentally existing to be pointed out to us. The only way such questions can be answered is by taking "a sentence in which the particular word plays its characteristic role and explain it first by specifying the conditions under which the whole sentence is true, and secondly, by showing how it is used in drawing a conclusion from the rules in the particular case".[19)] In other words we have to describe its function in order to explain its meaning.

The incorrect assumption that the realist and fictionist schools make is that some objective reality is thought to be necessary in order to answer such questions. The fictionists, of course, taking the view that, as this cannot be done, we are dealing with a fiction. Furthermore, the Hohfeldian analysis

assumes, again incorrectly, that such a sentence is no more than a convenient method of stating all the facts and all the rules that have been applied.[20]

Any given set of rules may attach identical consequences to any one set of very different facts. They may also attach consequences to a sequence of actions or states of affairs, or to the successive actions of a set of different men, or even prescribe that what is to be done at one point in a sequence shall depend on what has been done or occurred earlier. Here the rules are treating the sequence in a way which unifies them. Again, in the same way, we may apply the rules to the facts and make a statement which functions as a conclusion. Having arrived at that conclusion it will then be a matter of ascertaining what the consequences are in terms of the relevant set of rules. "Here can be seen the essential elements of the language of legal corporations".[21]

In order to explain the function of such words as "company" and "corporation" Hart takes Maitland's question "when Nusquamia owes you money who owes you this?" He says surely this can only be answered "by ceasing to batter our heads against the single word: Nusquamia. Pressing the question 'Who or what when Nusquamia owes you £1,000 is it owes you this?' is like demanding desperately 'When you lost that game what was it that you lost?' To the question so pressed the only answer is to repeat 'the game', as to the other the only answer is to repeat 'Nusquamia'." To explain what Nusquamia means in this sentence we must take the whole statement "Nusquamia owes you £1,000" and describe its use. Thus for example:

> "(1) Here in the territory of Nusquamia there is a legal system in force; under the laws of this system certain persons on complying with certain conditions are authorised for certain purposes to receive sums of money and to do other actions analogous to those required to make a contract of loan between private individuals.
>
> (2) When such persons do such acts certain consequences, analogous to those attached to the similar actions of private individuals, follow, including the liability of certain persons defined by law to repay the sums of money out of funds defined by law.
>
> (3) The expression 'Nusquamia owes you £1,000' does not state the existence of these rules nor of these circumstances, but it is true in a particular case when they exist, and is used in drawing a conclusion of law from those rules in a particular case."(22)

This is the method which we must adopt when seeking to explain the meaning of the word "company":

> "To explain what a limited company is we must refer to the relevant legal rules, which determine the conditions under which a characteristic sentence like 'Smith & Company owes White £10' is true. Then we

> must show how the name of a limited company functions as part of a conclusion of law which is used to apply both special company rules and also rules such as those of contract which were originally worked out for individuals. It will, of course, be necessary to stress that under the special conditions defined by the special rules, other rules are applied to the conduct of individuals in a manner radically different from, though still analogous to, that in which such rules apply to individuals apart from such special conditions. This we may express by stating the familiar principle of our company law 'A company is a distinct entity from its members' as 'The name of a limited company is used in conclusions of law which apply rules in special circumstances in a manner distinct from though analogous to, those in which such rules are applied to individuals apart from such circumstances'. This statement would show that we have to do not with anomalous or fictitious entities, but with a new and extended though analogous use of legal rules and of expressions involved in them"(23)

Hart criticises the Hohfeldian approach in that it seeks a "paraphrase or translation" of terms relating to corporations into terms relating to individuals. It gives us the legal consequence upon the individuals of the original statement but does not give us the force and meaning of that statement itself. It gives us both too little and too much. Too little in that it considers the function of such statements is merely to serve as a convenient method of stating the complex when, in fact, they are used to draw conclusions. Too much in that "it dissipates the unity of the simple statement 'Smith & Company has a contract with Y' and substitutes a statement of the myriad legal rights, duties, powers, etc. of numerous individuals of whom we have never thought nor could have thought in making the original statement".(24)

It is, of course, true that we use the word "company" in drawing conclusions of law and not to describe "... the peculiar process by which the burdens and benefits of the corporate members are worked out". Nevertheless there are a host of "legal words" which serve such a function, namely, to draw conclusions of law. The significance of the use of the word "company" in connection with the problem of corporate personality is not this fact but the fact that, as Hart says, it is "... used in conclusions of law which apply rules in special circumstances in a manner distinct from though analogous to, those in which such rules are applied to individuals apart from such circumstances".(25) What Hart points to is the fact that we do not apply these rules in that way because we have to do so. There is nothing real or imagined requiring such treatment. We apply these rules because they achieve the results we desire. Should a rule worked out for individuals not achieve such a result we would therefore not apply it. This is surely to say that we are dealing with a formula. We draw our conclusion in the case of the word "company" in order

to make use of a formula and the formula so used enables us to apply the rules law evolved for human beings. And we do this by means of a fiction to the effect that we are now dealing with a human being. This is not to say that there is something in the "nature" of companies that requires us to do so. Rather it is the nature of the rules that we apply that requires this treatment. After all the corporate device could be equally effectively achieved by developing a completely new set of rules. Planiol was wrong in saying that the property of the company was held in a type of common ownership not because he misunderstood the nature of things but simply because law does not treat it as such. Thus rather than introduce new concepts into the law of property we apply the rules developed for human beings because we consider that a satisfactory result can be achieved in this way without tearing a large part of our legal system to shreds. We do this by means of a formula which consists of applying rules as if we are applying them to a person. We could apply them in no other way.

This does not mean to say that if we analyse the consequences of our application of these rules we will find them identical to the consequences achieved when applying these rules to the individual. Sometimes the consequences will be very simlar, for example in the law of contract. At other times, however, they will be so different that the question will arise whether we are not damaging the concepts behind the rules in so applying them - as for example when we set out to hold a company liable for the acts of its directors and do so by purporting to apply the rules of delict on the basis that their acts are the acts of the company.

There is one aspect of the problem of corporate personality upon which Hart does not touch. Corporations are clearly not the only example in the law of the treatment of a sequence of actions in a unified manner. Hart points to the fact that the lives of a number of men may overlap and their actions may fall under certain rules of law which make what is done by any one or more of them depend on what was done or occurred earlier. "And then we may speak in appropriately unified ways of the sequence so unified, using a terminology like that of corporation law which will show that it is this sort of rule we are applying". This does not tell us enough. Thus, for example, in the law of partnerships we frequently speak in appropriately unified ways of a similar sequence of acts or states of affairs and the last sentence quoted above would be equally true if it read "And then we may speak in appropriately unified ways of the sequence so unified, using a terminology like that of partnership law..." Why do we apply these rules "in a manner distinct from though analogous to, those in which such rules are applied to individuals?" Hart has correctly

rephrased the question "What is a company?" but he has not answered it.

What follows is not an attempt to formulate a theory. In any event, in the light of what has been said above, this is not what is called for. It is merely what is hoped to be a workable approach to the question as to the director's relation to his company.

SUGGESTED APPROACH

Immediate and Intermediary Interests

We must begin with concepts of the "interest". These are those interests which a human being has regardless of the existence of the legal order. Pound defines an interest "as a demand or desire or expectation which human beings, whether individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behaviour through the force of a politically organised society must take account. It will be noticed that while this is put psychologically, it seeks to avoid controverted questions of group psychology. It does not speak of group demands or desires but of the strivings of men, in, or perhaps we should say through, groups and associations and relations... to satisfy certain demands or desires. The legal order or the law, in the sense of the body of authoritative guides to or grounds of determination of controversies, do not create these interests."[1] Thus he says "We begin then, with the proposition that the law does not create these interests. It finds them pressing for recognition and security."[2]

It is not necessary here to enter into the debate as to whether the subject matter of a right is derived from the exercise of the human will or from the protection of an interest as stated above. We need go no further than to recognise the existence of interests being the wants, claims, or desires of human beings.

We may divide such interests into immediate and intermediary interests. The former are those interests the satisfaction of which is an end in itself and the latter are those interests the satisfaction of which serves to render the satisfaction of other interests possible. Usually, of course, the law draws no distinction between these interests. Thus, for example, A has a business and lives upon the profit which he makes from it. His interest in the running of the business is an interest which he has in order to fulfil another interest, namely that of making a profit. When the adherents of the purpose theory speak of the property of a corporation existing for a specific purpose they are making this distinction.[3] Nevertheless, it is clear that the law does not normally recognise such distinctions. Those interests of a person which it recognises it recognises as "his". Thus, although A draws a distinction between his business and the profit he obtains from it, the law does not. His interest in a contract which he enters into in connection with this business or his interest that others do not damage the property which he has set aside for the purposes of this business are considered to be, in

law, just as much "his" interests as, for example, his interest that no one trespass upon the grounds of his house.

Although the law does not recognise this division or distinction between his interests it is quite clear that A, of course, does. He may recognise this distinction to a lesser or greater degree. Thus he may keep the assets which he uses for the purpose of his business entirely separate from his other assets and, he may even go so far as to include a clause in all his business contracts to the effect that his business creditors will only look to the assets of his business in satisfaction of their claims. When running the business he will not be personally concerned with the nature of the things that he buys and sells but simply as to what profit he will make in so doing for he does not intend to use these things himself. The greater the distinction he makes between his business and his other affairs the greater the distinction between the nature of the interest he has in its affairs and his other interests. The moment he decides to use the assets of the business to satisfy an immediate interest, the distinction is, however, gone. But he may decide never to do so, with the result that many of his rights in regard to them are actually, as far as he is concerned, irrelevant and unnecessary.

The Entity

Nékám spoke of "those human modes of thought which force him to see in something, under certain circumstances, a unit, an existing entity . . ."[4] Thus, in the above example, we have seen that A looks upon his business as an entity in the sense that it is something which provides him with income. People dealing with him may or may not be aware of this distinction which he is making but, for example, the moment he contracts with his creditors to the effect that they will look only to the assets of the business in satisfaction of their claims, the distinction will be brought home to them. Nékám also says that an entity can have interests. That is why rights can be ascribed to it. If, however, we look to the above example we see that the entity does not have interests in the sense that the owner of the business has interests. What has happened is that the owner has drawn a distinction between his interests. It is true that in order to clarify this distinction he may talk of "his interests" as opposed to the "interests of his business" but, in doing so, he is not suggesting that the entity has interests akin to his own - he is simply distinguishing between his own interests.

Should A take on a partner, what was formerly but a useful distinction

now becomes a necessity. In fact A could hardly do so unless the distinction was present in both their minds. They will now almost certainly speak of "the interests of the business" but there will, of course, be no difference in principle. We simply have two people who have distinguished identical intermediary interests.

The Administration of the Entity

A now sees himself as running a business which is an entity, and which he could, if he so wished, sell as such. He draws a scrupulous distinction between its affairs and his own and when running it has but one goal in mind, that of making the greatest profit possible. Instead of selling it, however, he decides that he will appoint someone else to manage it for him. What will be the terms of the manager's mandate? A probably will not instruct him to run the business "in his", A's, interests. He will instruct him to act "in the interest of the business". In so doing he maintains the distinction between the interest he has in the business making a profit and his other interests. Thus B will know that although he is, in fact, acting in A's interests, he is acting to advance only certain of them. Had A instructed him to act in "my interests" he would have appointed him as a general manager over all his affairs. If he had said that B "must run the business in my interests" the mandate would be ambiguous. On the face of it, it would mean that B must not run it solely with the object of profit but must take into account A's other interests. Thus, for example, he might feel bound to purchase goods from a company in which A is a shareholder because, although he could buy the same goods more cheaply from another company, he considers that A will actually benefit more in his capacity as a shareholder than the business will lose as the result of such a purchase. On the other hand, a mandate to act solely "in the interest of the business" is unambiguous.

What would such a mandate amount to? B would be under a duty to run the business to the best of his ability so as to make as great a profit as possible. He will breach the mandate, inter alia, if he fails to do anything at all, if he acts negligently or if he acts to advance other interests, whether those other interests be his own, a third party's or even the "other" interests of A. Nor will he have a mandate to decide whether or not to close down the business, even although he might consider that it would be in A's interests to do so. Nor would he have a mandate to introduce more capital into the business although, again, it be in the interests of A that he do so. These matters relate to other of A's interests, interests in regard to which he has no mandate to act.

Now let us suppose that A decides to appoint C and D to run the business together with B. As he wishes to have the advantage at all times of the combined wisdom of the three, he instructs them only to act together after consultation among themselves. Should they disagree the opinion of the majority will prevail. Furthermore, to ensure this, they may only contract on behalf of the business if at least two of them do so acting jointly.

B, when acting as sole manager, had a power of direct representation. No single manager has such a power. This might result in their talking of their joint actions on behalf of the business as the actions of the "board". This will not thereby create a legal persona or even an "organ" of A. Furthermore, the fact that neither B, C nor D could be classed as agents properly so-called in that none of them would have the power, acting individually, to represent A, it would be absurd to suggest that this relieved them of their duties to act in the interest of the business.

The Formation of the Company

Now let us imagine that A's business is carried on in Professor Hart's "legal Arcadia where rights and duties (are) ascribed only to individuals and all legal theory is banned". A has come to realise that there are many disadvantages and very few advantages in the fact that the business is in law "his own". There is no need here to enumerate the advantages of incorporation and for our present example we will take but one. A realises that if he were able to put more money into the business it would be very much more profitable and fifty of his fellow citizens of Arcadia are willing to put up the additional capital. They and A agree that the business will be run by the same managers, B, C, and D, and each "member" will receive a share of the profits in proportion to that sum which he put into the business. B, C, and D point out to them the difficulties which they will experience in running such a business. For example, contracts with third parties will become a rather complicated affair. Although the scheme would provide abundant economic advantages, it appears to bring with it a host of legal disadvantages. The laws of Arcadia were evolved with only the individual in mind.

Those concerned then begin to rationalise. They see that most of the legal obstacles in the way of their enterprise are in fact rules made to protect interests which, because they are so trading, they no longer have, or, if they still exist, are greatly overshadowed now by other interests. For one thing, many of the rights they would have as owners of the company's assets

they now no longer require and, for another, they no longer wish to benefit directly from any of the rights created in the course of running the business. As long as the assets of the business are protected and they can compel B, C, and D to run the business and can claim the profits, they will be satisfied.

They go to the Prince with their problem who, realising that it will be in the interest of Arcadia that they be assisted, agrees to alter the law so as to permit them to transfer the assets of their business out of their individual estates. His legal advisers, however, tell him that he is creating an entirely new situation which cannot be accommodated within the framework of the existing law. They point out that, for example, no one will be the owner of the property and that the need for B, C and D to be entrusted with fifty-one powers of attorney can only be avoided by making the most terrible inroads into the law of agency. The Prince, however, is unimpressed. He has a copy of Hohfeld's Fundamental Legal Conceptions (which had been given to him by the Censor's Board), and is thus able to show the legal fraternity of Arcadia just how it can be done. But the lawyers continue to insist that the law as evolved for individuals will have to be radically altered or, rather large additional fields of law will have to be added in order to fit such a device into the existing legal framework. Eventually the lawyers arrive at a workable solution.

The Fiction

The solution at which they arrived was, of course, to treat the acts of those acting in these recognised and distinguished interests, as either the acts of a representative or the acts of a principal. Arcadia has a fully developed law of representation and therefore, generally speaking, whatever is done by those acting in these interests can be treated as the acts of an agent (in the wide sense of the word). Where, however, this will produce injustice or will be ineffective, such acts can be treated as those of a person acting on his own behalf.

Hart considers that "... the use of the notion of 'fiction' in the exposition of this branch of law... (has the) peculiar vice (in that it) conceals that when words used normally of individuals are applied to companies as well as the analogy involved, there is also involved a radical difference in the mode in which such expressions are now used and so a shift in meaning. Even in the simplest case of all when we say 'X is a servant of Y & Co.' the facts which justify the use of the words 'X is a servant' are not just the same as the facts which support 'Smith is a servant of Brown' ... Now if we talk

here of 'fiction' we cannot do justice to this radical difference in use of ordinary expressions when conjoined with the names of corporations: we can only distort it ... if we talk of 'fiction' we suggest that we are using words in their ordinary sense and are merely pretending that something exists to which they apply".[5] This is unquestionably true. Yet, it is submitted, however logically correct it may be, it ignores the fact that this is how the courts work for they, who after all do not legislate, have to meet new situations by fitting them within the framework of the existing law. It is here that we do have, and almost certainly will continue to have for some time to come, the use of a "fiction" or, as Wolff more correctly puts it, the use of a "formula" involving a fiction. It is used not as a hypothesis but as the final link between the law and the facts, after they have been analysed and after suitable analogies have been drawn. To deny this is to suggest that much of what has been said by judges over a very long period of time has been based upon a gross misunderstanding and, consequently is both meaningless and absurd. Of course, this is not to suggest that such an approach is the product of pure logic. Experience has, however, taught that there are, very frequently, more important considerations than that.

Finally, it may be noted that this sort of fiction, if fiction it is,[6] has long been used in our law to develop rules for those administering the affairs of others. Thus in D.26.7.27. Paul says "tutor, qui tutelam gerit, quantum ad providentiam pupillarem domini haberi debet".

The Company

In order to explain what has occurred we will begin by reverting to the position where A was the sole owner of his business. He now turns this business into a company. In doing so he has obtained legal recognition of a state of affairs which he had brought about even before incorporation. The law has done this by recognising the distinction he has drawn between his interests. The interests which are so distinguished from his "own" are protected as being interests the fulfilment of which serve to render possible the satisfaction of other interests. When A acted to advance the interests of his business he never considered that he was advancing his own immediate interests - he did not see himself as having a direct interest in his business transactions in the sense that any one of them would, as an end in itself, satisfy his interests. (This is, of course, not to suggest that his interests here were any less intense - this division of interests is not a division between those interests which a man considers important and those which he

does not). Thus when A purchases stock for his business he has no intention of using all of his rights of ownership. All that he requires is the right to possess, and the right to sell and to pass good title. Thus, too, when he contracts in connection with his business he does not consider that he will benefit directly from its fulfilment.

The recognition of the distinction of these intermediary interests has, in the main, the effect of stripping A of rights. He can no longer use and enjoy these assets so set aside nor can he enjoy the benefits of any transactions which he enters into in connection with his business. These were, however, rights for which he had no use. They were rights formulated to protect immediate interests and thus had in fact ceased to protect any existing interests. What is more, they had become a positive emcumbrance and their removal strengthens rather than weakens his position for the fact that he does not have these rights increases the confidence of his creditors and assists him generally in raising money for his business. Certainly they must be abandoned if the law is to limit his liability as far as the business is concerned.

In so recognising this distinction the law has, however, done something which, in a sense, runs counter to its first principles for the law was evolved on the basis that all a man's interests are immediate interests. The modern law of contract is, of course, very flexible and can be adapted to this new situation without much damage to principle. It is certainly because of this fact that the company was fitted into the general scheme of the law without too much difficulty. On the other hand this can hardly be said of certain other branches of the law. For example A most certainly can no longer be called the owner of the assets of his company and yet he can, acting on its behalf, vindicate them. What is more, although he cannot use them for his personal needs, yet he can, presumably, even destroy them provided he does so in the interests of the company. These difficulties are overcome by using a formula to the effect that these intermediary interests of A's are the immediate interests of another.

How far does the recognition of the distinction of these particular interests extend? This is, of course, a question of law. Thus for example, although limited liability might be thought to follow logically from such a scheme of things, there is absolutely no reason why it should necessarily be granted. As however, the object of the device is to distinguish certain interests, the law cannot sensibly go further than recognise their complete distinction. Those interests of A's which are satisfied by these interests so distinguished remain "his" interests and cannot be, or at least should not be confused with

those of the company. A is not acting in the company's interests when he decides to put more money into the business for he is determining the extent of his intermediary interests. So too, A is acting in his own interests when he decides to liquidate the company. And again, for exactly the same reason, A is not acting on behalf of the company when he decides how much of its profits he should pay to himself in dividends for, here again, he is determining the extent of the company's interests. Of course, it has been a much debated point as to whether or not directors are acting, or should be acting, in the company's interests when declaring a dividend. It is submitted that the question simply does not arise for the decision can neither be made in the interests of the company nor against the interests of the company. In our example the "interests of the company" are A's interests in carrying out a particular line of business in order to make a profit and it is absurd to suggest that by distinguishing them he has created something which can have interests contrary to his own.

So far we have considered the position where A is the sole shareholder and manager of the company. The position is unaltered where there are a number of shareholders for what we have are a number of persons with identical, distinguished, intermediary interests. It is here, however, that the question of majority power usually causes untold confusion for it is said that the shareholder is entitled to vote in his own "selfish" interests and that he therefore owes no duty of a "fiduciary nature" to the company. The only limitation placed upon the power of the majority is said to be the rather nebulous doctrine of "fraud on a minority". This is thought to be a shocking state of affairs.

I think this question can best be answered by means of an example. Let us suppose that our company now consists of five members who also manage its affairs and who have decided that differences of opinion will be settled by means of a majority vote. It is clear from what has been said above that none of them can conceivably be under a duty of any kind when voting to act in the interests of any one or more of the others. But this will not, in itself, permit them to have conflicting interests for they have all agreed to act to advance their one common interest - "the interests of the company". Should any one of them attempt to act in connection with the company's affairs so as to advance "other" interests, whether they be his own or those of any one else, he will have breached his duty. This duty is in fact the single essential requirement for the existence of a company. Without it the device cannot exist. Therefore it is incorrect to say that a shareholder has, or should have, a fiduciary duty to act in the interests of the company. The law cannot grant incorporation and yet not impose such a duty. It is surely ridiculous to

suggest that the fact that they have decided to settle their differences of opinion on the basis that the views of the majority will prevail, can in any way alter this rule.

On the other hand there will be decisions to be made which relate to their own immediate interests, for example the payment of dividends, decisions as to increasing or decreasing the capital of the business, the question of whether or not to liquidate the company, and so on. Here again they may decide to settle these questions by counting heads. This question falls outside the scope of this thesis but, again, it is submitted that it is difficult to see why the fact that the members of a particular company have decided to settle their differences of opinion in this manner could be thought to entitle the majority of them to rob the minority.

The "Capacity" of the Company

What do we mean when we talk of a company having "capacity"? Firstly, what do we mean when we talk of the "capacity" of a human being? It is the capacity to perform voluntary acts to which the law attaches the consequences willed by the party and to perform acts to which the law attaches consequences not willed by the party. Clearly we do not mean this when we talk of the "capacity" of a company. There we mean those acts of human beings which we ascribe to the company - something quite different. Thus to say, as Blackstone does that:

> "(A company) can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat, nor be beaten, in its body politic. A corporation cannot commit treason, a felony or other crime, in its corporate capacity... It is not liable to corporal penalties, not to attainder, forfeiture, or corruption of blood... Neither can it be committed to prison; for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed:... Neither can a corporation be excommunicated...",[7]

is utter nonsense. There is nothing in the nature of companies requiring the law to ascribe only the contractual acts of those administering its affairs to it and denying that it may similarly ascribe their criminal or delictual acts. The question is rather whether, in so doing, the courts may appropriately use the terminology of crime and delict.

The Director

We have considered the position where the sole shareholder is also the

manager of the company. There we saw that he acted in his own interests but in interests which he had distinguished from his other interests, a distinction which the law had, with incorporation, recognised. He is bound when managing the affairs of the company to act only in those particular, distinguished interests and in that sense he stands in a position analogous to that of a person administering the affairs of another. From the point of view of a third party, however, there is no reason why such an analogy should be applied. In fact, one would think, there is every reason why it should not be. The contracts he enters into, the delicts and crimes he commits, are "his" and the only question to be decided is whether the company's funds or his "own" funds may be attached.

Where the director is not the sole shareholder there are, from the point of view of a third party, two possible ways of viewing his relation to the company. Firstly, he could be said to be a representative and, secondly, his acts could be seen to be the acts "of the company". There is absolutely nothing in the "nature" of corporate personality which requires us to adopt one of these approaches and reject the other. It is a matter of legal convenience. There is nothing mysterious in holding the director's act to be the act of "the company". We are simply dealing, in most cases, with a form of vicarious liability.

This thesis is, however, concerned with the internal aspect of this relationship, and from this point of view he is a representative. His position here is, in principle, exactly the same as it was before incorporation. His mandate then was to act in certain interests of the proprietors ("the interests of the business"). The law now recognises this distinction and these interests are now called "the interests of the company". These are the same interests of the very same persons. There is absolutely no reason why the law should now require the directors to act in any other interests when it did not do so before incorporation. One might add that, if the law did require the managers of unincorporated businesses to act in interests other than those of the proprietors, then there would, in turn, be absolutely no reason why it should not require the proprietor running his own business also to do so.

The question as to whether, having appointed directors, the general meeting retains for itself the power to act in certain matters, or even to act in the same matters as the directors, is therefore one to which the "nature" of corporate personality gives no answer. Furthermore, it cannot be said, as it is in Bamford's Case,[8] that because the directors are under a duty to exercise their powers in the interests of the company, therefore there remains a "residual" power in the general meeting to exercise such powers in interests other than those of the company. The powers that the members had they could

themselves exercise only in the interests of the company and the act of appointing a manager cannot alter this. It must be stressed that duty is fundamental to the concept of incorporation. Should anyone, be he director or member, make decisions concerning the company's business in interests other than those of the company he acts contrary to the first principle of incorporation. He denies the distinction drawn between the shareholders' interests and recognised by law in the act of incorporation. It is almost invariably said that the director must act in the interests of his company because his duty is to act in the interests of another, because he is representative of one kind or another or is in a position analogous to one. Therefore it is concluded that the shareholders can only be held to be under such a duty if they too are held to act in the interests of another and, if this is not or cannot be done, they therefore may exercise their powers as they please. It is submitted that this is not so. The director is, of course, a representative under a duty to act in the interests of another, but the shareholder is not. He is under a duty to act in the interests of the company because he has obtained the law's recognition of a distinction between an intermediary interest of his and his other interests. The basis upon which this recognition rests is that he will only act in matters concerning the business "in the interests of that business".

From this it follows that where a director breaches a duty owed by him to the company, the members can only condone or ratify such an act if, in doing so, they act in the interests of the company.

Finally, it was said that certain acts done in relation to a company's affairs do not relate to its "interests". Examples of such acts are the increase or reduction of the company's capital and the payment of dividends. These acts determine the extent of the shareholders' intermediary interests recognised by incorporation. A shareholder will decide whether or not to invest more capital in the company by deciding whether a further investment in the company would be more profitable to him than an investment elsewhere. This has nothing to do with the company's interests and it would be absurd to suggest that he can be under a duty to invest more capital in the company. These are matters which concern the shareholders' immediate interests. Invariably the directors are empowered to do these acts, but this cannot alter their nature. The director can no more allot shares "in the interests of the company" than the shareholder can. Directors are usually given such power because the shareholders consider that the directors are in a better position to make decisions concerning these questions. They should know, for example, whether or not further capital can be profitably invested in the company. In exercising these powers

therefore the directors are under a duty to act in the interests of the shareholders. In order to illustrate this let us consider Bamford's Case.[9] There the directors allotted shares in order to foil a take-over bid. They acted, in other words, so as to prevent the majority of shareholders from selling their shares by issuing further shares to a company which was under their control and thus turning a majority into a minority. It is sometimes said that such acts can be done "in the interests of the company", but this cannot be accepted. It is based either upon the proposition that the company's interests are those of persons other than the shareholders (e.g. its employees) or the wholly untenable idea that the company as an "entity" has interests of its own. The question in Bamford's Case was therefore whether or not the directors had acted in the interests of the shareholders qua shareholders. Obviously they had not done so. Nevertheless, the possibility remained that the shareholders might consider, even although the directors had breached their duty (i.e. they had acted with the intention of advancing other interests) that the allotment was in fact their interests. Thus they could ratify the allotment and their power to do so was in no way dependent upon a "residual" power left in the general meeting to act in interests other than those of the company.[10]

PART 2

THE FIDUCIARY RELATIONSHIP

THE FIDUCIARY RELATIONSHIP

Introduction

We have seen that the director's relation to his company consists, primarily in his duty to act in its interests. Whatever other particular duties he may have must arise from, or be related to, this duty. In the case of the unincorporated business these duties arose ex contractu. Incorporation, however, brings with it so much formalism that it is very doubtful whether the director's appointment can be said to constitute a contract. In English Law this problem, at first, took a rather different form. There the question was whether the director could be said to be a trustee. This, however, if anything, rendered the matter even more complex. After much debate, a rather uneasy truce has been called and an answer, apparently acceptable to all, has been found in the equitable doctrine of the fiduciary relationship. "The precise legal category," says Parsons, "in which a director belongs has been debated in academic and juridica writing. All are agreed that he is a fiduciary of some kind, perhaps a kind all of his own".[1] So too, Palmer, pointing to the fact that directors are not strictly speaking trustees, says; "For most purposes it is sufficient to say that directors occupy a fiduciary position and all the powers entrusted to them are only exercisable in this fiduciary capactiy".[2]

"What then is a fiduciary relationship?" asked Fry J. in Ex parte Dale & Company and answered, "It is one in respect of which if a wrong arise, the same remedy exists against the wrong doer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust".[3] We have already mentioned the great number of apparently heterogeneous relationships which fall into this category. In the light of this fact and the fact that, in the words of Lord Chelmsford "That courts have always been careful not to fetter their useful discretion by defining the exact limits"[4] of this relationship, can Fry possibly be correct?

Story,[5] who was one of the first writers to use the term "fiduciary relationship", saw it as giving rise to a species of constructive fraud:

> "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design... to perpetrate a positive fraud or injury upon another person, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore, are prohibited by law... Although, at first view, the doctrines on this subject may seem to be of an artificial, if not an arbitrary character, yet upon closer observation, they will be perceived to be founded in an anxious desire

> of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed... Some of the cases under this head are principally so treated, because they are contrary to some general public policy or to some fixed artificial policy of the law. Others, again, rather grow out of some special confidential or fiduciary relationship between all the parties or between some of them, which is watched with a special jealousy and solicitude, because it affords the power and the means of taking undue advantage, or exercising undue influence over others."(6)

It is, of course, the English doctrine of undue influence that is usually associated with the fiduciary relationship, the relationship being said to give rise to a presumption that such influence has been exercised. Vinter[7] sees the doctrine of undue influence as the general principle underlying the concept.

> "The doctrine of fiduciary relationship connotes an obligation by those placed in certain positions of trust from entering into transactions with those with whom the relationship arises which would enable them to take advantage of such position for their own profit... The doctrine is entirely independent of the law of torts... The doctrine of fiduciary relationship is a doctrine of equity, the rule being that a person must not take advantage of that relationship to obtain a gift or other benefit to himself. Equity treats a breach of this rule as a 'constructive fraud' and although there may be no fraud in fact the transaction is deemed fraudulent, because it is an abuse of some fiduciary relation, or in other words, undue influence is presumed from the confidential relationship. The courts entertain jurisdiction here irrespective of the particular circumstances of the case, to declare void transactions which have taken place under circumstances where, independently of other considerations, from the conditions of the parties and the difficulty which must exist of obtaining positive evidence as to the fairness of the transaction, they are peculiarly open to fraud and undue influence. Further, a party might be enabled thereby to obtain an advantage, even unknowingly, which he ought not to be permitted to retain."(8)

Although Vinter sees undue influence as the fundamental concept being the doctrine, it is clear that he gives the term a very wide meaning. So too did Story:

> "(The constructive fraud which is to be found arising from these relationships usually consists of) some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the difficulty of proof has induced courts of equity to grant relief independent of any such ingredient, upon a motive of general public policy... it is designed, in some degree, as a protection to the parties against the effects of overweening confidence, and self-delusion, and the infirmities of hasty and precipitate judgment."(9)

However difficult it may be to understand how it is that the fiduciary relationship can, as such, be said to give rise to a presumption of undue influence - no matter

how widely it is defined - the English courts, when dealing with cases connected with this presumption of undue influence, continue to state this rule in unqualified terms. Thus for example in Powell v. Powell [10] Farwell J. said, when dealing with a case of a gift made by a child to her parent:

> "It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the other impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the onus is on him) that the donor either was emancipated or was placed by the possession of independent advise in a position equivalent to emancipation."(11)

Thus too in Parfit v. Lawless [12] Lord Penzance said:

> "In equity persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought in question, and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperience overreached by him of more mature intelligence."(13)

It is therefore these stated and defined fiduciary relationships which give rise to a presumption of undue influence.

Where the courts consider that no presumption is to be applied they must find that the relation before them is not such a relationship. In Parfit's Case Lord Penzance had said, contrary to authority, that the husband-wife relationship was a fiduciary relationship giving rise to such a presumption. In Howes v. Bishop and Wife [14] it was argued, largely on the strength of Parfit's Case, that as the wife had signed a promissory note as surety for her husband therefore a presumption of undue influence was raised. The court found that no such presumption existed because this relationship was not a fiduciary relationship. Thus Farwell L.J. said:

> "Taking the findings of the jury (which I accept), the defendant could only succeed if the relation of husband and wife came within the equity laid down in Huguenin v. Basely. I am of the opinion that it does not come within it... If the rule in (that case) applied to the relation of husband and wife, it would be sufficient to say that the wife in the present case had no independent advice, and the contention of the defendant would be right; but I think that the authorities show that it does not so apply."(15)

There are in fact numerous authorities to this effect.[16] Thus it is said that where no such relationship exists the onus is upon the plaintiff to establish that undue influence existed. In Mutual Finance Limited v. John Wetton and Son Limited[17] Lord Porter said:

> "The problem is, I think, well stated in Salmond on Contracts, ... 'Assuming, then the common law of duress has been superseded by the equitable doctrine of undue influence, the question remains, what forms of coercion oppression, or compulsion amount to undue influence invalidating the contract as between strangers between whom there exists no fiduciary relation' (18)

So Chitty says:

> "If there is no special relationship... between the parties, the onus is upon the person seeking to avoid the transaction to establish that undue influence existed." (19)

To him too the undue influence that must be established is "actual coercion" or the fact that the defendant "exercised over the mind of the donor such a degree of general domination or control that his independence of decision was substantially undermined." Nevertheless Chitty[20] goes on to cite the case of Tate v. Williamson as authority for the further proposition that the presumption of undue influence is not confined to the well-known fiduciary relationships.[21] Here Lord Chelmsford L.C. said:

> "The jurisdiction exercised by Courts of Equity over the dealings of persons standing in certain fiduciary relations have always been regarded as one of a most salutory description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of the exercise. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or influence is exerted to obtain an undue advantage at the expense of the confiding party, a person so availing himself of his position will not be permitted to retain the advantage, although the transaction would not have been impeached if no such confidential relation had existed." (22)

That this is the modern view can be seen from the recent case of Antony v. Weerasekera[23] where it was said:

> "It was also referred to in the recent case of Tufton v. Sperni (24) in which the Master of the Rolls examined the case law relating to undue influence in great detail. He observed that the decided cases on the subject established the proposition that the jurisdiction exercised

by the Courts of Equity over the dealings between persons between whom there was a relationship of confidence was 'not circumscribed by reference to defined limits' and that 'the existence of the jurisdiction and the right and duty to exercise it must in every case depend on the special facts of that case and the inference properly to be drawn from them'. He points out that the cases refuted the suggestion 'that to create the relationship of confidence, the person owing the duty must be found clothed in a recognisable garb of a guardian, trustee, solicitor, priest, doctor, manager or the like.'"(25)

Tufton's Case is authority for another important proposition namely that:

"'undue influence' as a matter of law includes both undue influence in the sense of domination of the party charged over the other and also abuse of the duties of care and confidence which may be imposed on one to the other as the result of the particular relationship which emerges from the special circumstances of their association."(26)

The latter type of undue influence therefore can only arise from a relationship. The court, in Tufton's Case, on finding the existence of such a relationship, although it was not one of the "recognised" relationships, held that the onus of proof lay upon the defendant. Thus, on the one hand, we are told that the presumption only arises in the case of certain recognised relationships and that where they do not exist the onus of proof is upon the plaintiff and, on the other, that certain types of undue influence can only arise from a relationship and that such relationships will give rise to a presumption of its existence even although they do not fall within the recognised class of fiduciary relationships. But this is not all. In Smith v. Kay [27] Lord Cranworth, in similarly holding that the doctrine of the presumption of undue influence is not confined to the recognised relationships, argued, rather illogically, that this could be seen from the fact that all such relationships did not give rise to this presumption. He said:

"The principle is not confined to those cases, as was well stated by Lord Eldon in the case of Gibson v. Jeyes in which he says it is 'the great rule applying to trustees, attornies, or any one else'. Now what does 'any one else' mean? It is contended that it applies only to persons who stand in what is called a fiduciary relation. I believe if the principle is examined, it will be found most frequently applied in such cases, for this simple reason, that the fiduciary relationship gives a power of influence: but I could suggest fifty cases of fiduciary relation where the principle will not apply at all. If a man makes me a trustee of an estate, to pay certain securities, and then ultimately to stand possessed of it for him, we deal with one another in purchase, or in another way, perfectly at arms length. I have no influence over him because I am his trustee. It is only a particular sort of trusteeship that gives influence..."(28)

This suggests that some relationships, albeit recognised fiduciary relationships,

do not per se give rise to a presumption of undue influence. This, on the other hand, does not appear to be the view of Cozens Hardy M.R. in In re Coomber, Coomber v. Coomber[29] where he said:

> "I do not think it is true to say that any confidential relationship between donor and donee is sufficient to set up a presumption against the validity of the gift... There are confidential relations in which there is a presumption of undue influence. Take the common case (I say the common case because it is one of which the books are full) of solicitor and client. A solicitor cannot in ordinary circumstances take a gift from his client in a matter in which he is a solicitor, because there is from that relationship in itself a presumption of undue influence..."(30)

To him therefore the distinction appears to be between different fiduciary relationships, some giving rise to the presumption and others not. In that same case, however, Fletcher Moulton L.J. said:

> "It is said that the son was the manager of the stores, and, therefore in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of different types: they extend from the relation of myself to an errand boy, who is bound to bring me back my change, up to the most intimate and confidential relations which can possibly exist between one party and another, where the one is wholly in the hands of the other because of his intimate trust in him. All these are cases of fiduciary relations, and the Courts have, again and again, in cases where there has been a fiduciary relation, interfered to set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever, any of these types of interferences is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of fiduciary relation must be such that it justifies the interference."(31)

Thus too in Tufton's Case Lord Jenkins said of the presumption of undue influenc

> "... it must be shown not merely that there was a fiduciary relationship of some sort, but the fiduciary relationship was of such a character as to warrant the interference of the court."(32)

What is the "character" of the fiduciary relationship between director and company? To suggest that it gives rise to a presumption of undue influence woul appear, at least at first sight, to be absurd. Vinter who, as we have seen, considers the underlying principle of all fiduciary relationships to be that of the presumption of undue influence, not unnaturally finds some difficulty in tackling this particular relationship. He says:

> "The fiduciary relation of a director differs in some respects from the other

> (fiduciary relations)... for the company as a corporate body has no mind which can be unduly influenced. The company, however, acts in the vast majority of cases by its board of directors, and the individual members of the board may be unduly influenced. In other cases it may act by resolution passed at a general meeting of members, and the members of the company may be unduly influenced, and in either case the transaction may be liable to be set aside. In the case where the directors, or a majority present at a meeting of the board unite to carry out a transaction for their own benefit, the case is even worse than undue influence, for the company is powerless to resist and completely at the mercy of the majority present at the meeting."(33)

Vinter thus finds the difficulty here in the nature of corporate personality. The true problem, however, is rather in the suggestion that a director, as such, can be presumed to be in a position to unduly influence either his fellow directors or the members of the company - that is if "undue influence" means "domination". When we turn to examine those duties of directors which are usually said to be his "fiduciary duties", we find, of course, that they have nothing to do with undue influence. Yet we must bear in mind that, as was pointed out in Tufton's Case, the term has a wider meaning than this. It includes "also abuse of duties of care and confidence which may be imposed on one to the other as the result of the particular relationship". Does this provide the link between the concept of undue influence and the fiduciary duties of directors? The director's fiduciary duties are said to require him to act bona fide in the interests of the company, not fetter his discretion to exercise his powers in those interests and not place himself in a position where his interests conflict with his duty. His obligation to account for "profits" is usually said to follow from the last mentioned for these duties. Although these duties are not usually associated with the presumption of undue influence, it has, nevertheless at times, been expressly stated that they are in fact based upon it. Thus in Jacobus Marler Estates v. Marler[34] Lord Parker said:

> "It is no doubt well settled that in equity an agent cannot, without the consent of his principal given with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence retain any profit acquired by him in transactions within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf and insist of its being accounted to him..."(35)

This was cited with approval by Solomon J.A. in Robinson v. Randfontein Estates Gold Mining Co. Ltd.[36] Another rule following from the conflict of interest and duty principle is that relating to contracts between the director and his company. Of these Palmer says:

"... just as a sale by an agent to his principal is voidable until the principal with full knowledge of the material facts and free from undue influence ratifies the transaction, so it is between a company and a person in a fiduciary relationship towards the company."(37)

Gower says "The fiduciary duties of directors are, basically, identical with those applying to any other fiduciary and discussed in works on Trusts and Agency".[38] This statement clearly requires modification. It does appear, however, to be true to say that his fiduciary duties are those, or at least similar to those, of the trustee and the agent. Thus a trustee cannot place himself in a position where his interests conflict with his duty and must account for all profits made as the result of his position. Seldom in the textbooks do we find any mention of undue influence in connection with these duties. Thus Snell says "A person occupying a fiduciary duty must not take advantage of his position to make a personal profit for himself in any case where to do so might create a conflict between his duty and his interest. He holds as constructive trustee the profit acquired through his position".[39] This rule, he goes on to say, "... is absolute in its application to trustees, personal representatives, agents and others in definitely fiduciary positions, even though they have acted bona fide."[40] Thus Lewin says "The principle that a trustee must not benefit from his trust applies to agents, solicitors who are also mortgagees, guardians who are trustees to the extent of the property come into their hands, directors of a company, a secretary of a company, promoters of a company, inspectors under creditor deeds, the mayor of a corporation, the governor of a college, one co-partner selling to another a share in the partnership business, a servant using his master's property to make a profit for himself, and generally all persons clothed in a fiduciary capacity, including of course, a custodian trustee."[41] Secondly, he says "A trustee is absolutely and entirely disabled from purchasing the trust property, whether it be real estate or a chattel personal, land, or a ground rent... The rule under consideration applies in its strict form not only to trustees strictly so-called: it applies also to all who, though differing in name, are invested with the like fiduciary character, such as an executor or administrator, an executor in his own wrong, trustee of creditors, or an agent."[42] So too in works on agency we find these same rules stated[43] and, again, they are stated to be the identical fiduciary rules as applied to "... trustees (or, for that matter, executors, administrators, guardians and so on)..."[44]

The fiduciary duties of directors, trustees, agents etc. certainly bear no obvious relation to the doctrine of undue influence. Yet, as we have seen, in

certain cases dealing with this doctrine it has been said that the presumption of undue influence is neither confined to nor necessarily arises from, the recognised "fiduciary relationships". This suggests that the "fiduciary relationship" cannot be defined in terms of the duties to which it gives rise.

"Confidence" is the ancient source of a great area of the jurisdiction of Chancery. Here we find the origins of the use and the trust and here, Sealy[45] maintains, can be found the principle underlying the concept of the fiduciary relationship. He points to the fact that before the trust became a recognised institution the Chancellor referred to many situations as situations of "confidence" or "trust".[46] With the development of equity as a legal system and the corresponding use of more technical vocabulary, "Descriptive words, like 'confidence' ... gave way to precise terms". Thus the word "trust" acquired its modern technical meaning. The result was that "... other situations formerly described vaguely as 'trusts' were now without a name (and, after some hesitation)...(e)ventually it seems to have become established usage to concede that in those situations there was no trust and instead to assert merely their relationship was similar to that between trustee and cestui que trust. The word "fiduciary" (which earlier had received very little judicial support) was adopted to describe these situations which fell short of the now strictly-defined trust."[47] Sealy considers this use of the term, "fiduciary relationship", began during the middle of the nineteenth century, although, he admits, the word "fiduciary" is still sometimes used in an indefinite or descriptive sense so that it embraces all trust-like situations including the trust itself..." It is, however, more precisely used "... in contrast with the trust proper, in reference to those situations which are in some respects trust-like but are not, strictly speaking, trusts... (Although) the rules and principles governing these relations are - in essence and in origin - the same as those of the law of trusts."[48]

This argument appeals in that it appears to be flexible enough to cover all the fiduciary relationships, suggesting that they are based upon a principle which may include, but does not arise solely from, the concept of undue influence. In that it points to the common origins of these fiduciary duties as the reason for their being so classified, it is undoubtedly correct. Whether Sealy is correct in holding that the term was coined to cover those "trust-like" situations not falling within the precise definition of a trust is, however, doubtful. A similarity between certain of the recognised fiduciary relationships and that of the trustee-cestui que trust relationship is hard to find. The best that can be said here is that they all include some element of "trust" or "confidence" in the very widest sense of these terms. But this, of course,

would be to use the term "trust-like" to include the entire original jurisdiction of the Chancellor in regard to "confidence". It is therefore submitted that the traditional use of the term "fiduciary relationship" to include that of the trustee-cestui que trust relationship is correct.[49)]

Be that as it may, Sealy's thesis points to the indisputable fact that the nature and content of fiduciary duties can only be understood against the background of the jurisdiction as exercised by the Chancellor.

The Court of Chancery

The fiduciary relationship is a doctrine of the Court of Chancery and its principles find their origins in the early jurisdiction of that court. There is some uncertainty as to when the Chancellor began to exercise a judicial function. Maitland[1)] suggests that this occurred in about the middle of the fourteenth century whilst Barbour[2)] considers that it occurred during the early fifteenth century. There is, however, no dispute as to why he came to exercise this jurisdiction. This was an age when local government in England had all but broken down and the common law, with its dilatory and technical procedures, was totally incapable of meeting the ensuing chaos. But the fundamental factors which brought about the Chancellor's civil jurisdiction are to be seen in the chaos itself. The common law was to a very large extent the product of feudalism. It was a system of law in which little distinction between subjective law and procedure existed and was almost exclusively concerned with land. With the passing of feudalism many of its rules and institutions were becoming anachronisms and, frequently, very inconvenient anachronisms at that. Furthermore, the growing complexity of society required not only freedom from the old rules but also new rules to regulate the novel situations to which it was giving rise.

The common law, constructed out of the static concepts of feudalism, was ill-suited to meet these changes. This in itself would have been a difficult enough obstacle to overcome but added to it was the fact that the common law at this time was going through a period of rigidity extreme even for that age. It would seem that it had simply turned its back on change.[3)] Thus Barbour says "... the law became so rigid and inflexible, its practitioners were so absorbed in nice questions of form and pleading, that there was no longer room for equity. This has become the situation in the early fourteenth century; as a result a new field for the Royal perogative is found and equity is administered in the council for which in the next century the Court of

Subjective ?

Chancery breaks off".[4] Thus Holdsworth says, "The defective state of the common law, both substantive and adjective, and the disturbed state of the country, which not only rendered its cumbersome procedure useless but even enabled litigants to abuse it to promote injustice, give rise to a need for the growth of a set of equitable principles outside and even opposed to the common law".[5]

It was in order to meet these needs that the Chancellor's jurisdiction arose from that reserve of justice which remained in the King. It is frequently said that these circumstances gave rise to a need for a system of equity in the true sense of the word, a jurisdiction to meet those cases where the general rules of the common law failed to do justice. This is, however, by no means the whole truth. It is this point that Holdsworth is making when he speaks of the need for "... equitable principles outside and even opposed to the common law".[6] The rules themselves frequently gave rise to injustice and were equally frequently ineffective. Thus the Chancellor began to exercise jurisdiction not only in respect of matters which were truly equitable but also where the common law said nothing or where it was ineffective or produced injustice. Nevertheless, it is very unlikely that he saw himself as administering a body of substantive law different from that of the common law. Rather, did he administer the law in cases which "escaped the meshes of the ordinary courts".[7] The enforcement problem of the age required him to intervene to protect the weak against the strong and the rigidity of the common law required him to intervene in those cases where it had, or would produce, injustice. His task was to supplement the law. It is frequently said in this regard that equity is best understood as a "gloss".[8] By this, however, it must not be understood that the Chancellor attempted to expand and develop the common law. In the first place the common lawyers would never have permitted this and, in the second place, it simply could not be done for the common law had no principles upon which such an expansion could be made. A new remedy could never be justified on the basis that it was the logical outcome of its principles for it was a system that either gave a remedy in certain circumstances or it did not. To introduce a new remedy would always be to run counter to it. Rather, if equity is to be understood as a gloss, it must be in the sense that it sought to supplement the law.

The Chancellor's jurisdiction was supplementary in two senses. Firstly, he acted only where the common law gave no remedy or gave a defective one and, secondly, even within this area, he could not displace it. He had always to acknowledge the legal rights and obligations of the parties and to act, not by

altering these, but by compelling the parties to exercise them in a manner which would bring about an equitable result. Hence, to begin with at least, the principles that "equity follows the law" and that "equity acts in personam" went hand in hand. That the Chancellor acted by compelling the defendant to exercise his legal rights in an equitable manner provides a key to the understanding of the fiduciary concept.

Thus we see that the Chancellor's jurisdiction was in fact determined by the common law. Its area was that lying beyond the effective operation of the common law and the juristic nature of its rules was determined by the nature of the rules which the Chancellor was bound to follow. The rules which he evolved and, in particular, those which have crystallised into the modern fiduciary concept, cannot therefore be understood without a brief consideration of the common law at this time.

The Common Law

As has been said, the common law at this time was feudal in character. It was a law of actions of which there were a very limited number. A fact which, as Plucknett points out, is "proof that the King's Courts only intended to intervene occasionally in the disputes of his subjects."[1] When they did so their purpose was to ensure the proper administration of the realm. It was therefore a law almost exclusively concerned with crime and real property.

That the law of real property should hold such an important place is, of course, not surprising. The hierarchical structure of feudalism was composed of relationships based upon the individual's interest in land. The common law was inevitably in the main a reflection of this. The King's Courts were therefore primarily involved with land law, not simply as a matter of private law, but because its "... elements were so combined that they served the place of public law and a constitution".[2] By this time the mould of the common law had been caste "... a mould which neither the passage of time nor the conscious efforts of legislation have been able wholly to destroy."[3] "It is," says Plucknett, "universally admitted that the great historical feature of our law of real property is its feudal character, and that in order to understand the reasons which brought about a good many doctrines of real property it is necessary to regard the matter from a feudal point of view."[4] The overwhelming importance of real property in the feudal scheme of things had the effect of underlining the natural distinction between land and goods. In order to secure the performance of feudal services without impairing the

fixity of tenure for which they were rendered, land itself was placed "... beyond the pale of property, by outlawing it, as it were, from the domain of ownership. The King was to be the only landowner. His subjects had to be content with artificial interests to which the law annexed what qualities it pleased..."[5] These were the "estates" which determined the tenants place within the feudal hierarchy. With, however, the breaking down of feudalism these obligations began to cease to serve their original purposes and became simply burdensome.

The fact that the common law was essentially the law of land had implications even more far reaching than this. It resulted in the law looking upon most rights as rights in or to property and, because of the complexity of feudal land law, a clear cut division between rights in rem and rights in personam scarcely existed. Again, as it was the land-owner who was the main concern of the law, its procedure tended to be directed against the land rather than against the person. Its procedure was therefore "...generally patient and long-suffering, for it well knew that the tenants land at least could not be removed from its jurisdiction. It knew also that haste was practically undesirable, for agriculture was an exacting pursuit which made it impossible for a land-owner to leave his estate at a moments notice..."[6] But society was changing and litigation now began to concern matters not always directly related to land. In such matters it was vital that parties be reached quickly by means of a procedure directed against their persons. This was, however, by no means the only defect in the procedure of the common law. It was both expensive and technical. No joinder of defendants or plaintiffs was possible, wager of law was a defence to many actions and the system of pleading was so complicated as to render litigation frequently positively hazardous. What is more the method of getting evidence of the facts in issue were, as Holdsworth puts it, "most rudimentary".[7] When litigation had been concerned only with land the courts had to deal with either records and documents or facts which were publicly notorious such as seisin. The result was that the courts were slow to admit witnesses, reliance being placed on the knowledge of the jury, a jury which was fast ceasing to have first hand knowledge of the facts. Perhaps most startling is the fact that the parties themselves could not give evidence.

The common law, as has been said, was a law of actions. The writ "was the main spring of the law"[8] and if a party wished to bring an action he must discover a writ appropriate to the facts of his case. If none existed he had no action. As Fifoot says "No writ, no remedy, no remedy, no right -

whatever expansion the common law might undergo, this was its inexorable logic".[9] It was by means of the writ that the Crown had established its civil jurisdiction. The earliest of these, the Writ of Right, was at first merely a command to the feudal lord of the two contestants to do justice between them, a command to him to determine which of the two had the better title to the freehold in question. It then, however, was used to deprive him of his jurisdiction. Its subsequent variant, the Praecipe in Capito, the first encroachment upon seignorial jurisdiction, instructed the Sheriff to command the defendant to render to the plaintiff the land which he claimed, and, if he failed to do so, to summon him before the King or his justices.[10] The principle established, there then followed the so-called "Possessory Assizes" to protect wrongful ejectment, the most famous of these, the Assizes of Novel Disseisin, being thought by Maitland to be "perhaps the greatest even in the history of English Law". That these were not simply civil remedies can be seen from the fact that, as Plucknett points out,[11] disseisin contained both a criminal and a delictual element. This points to the danger of classifying any of these early writs too rigorously in modern terms. Then followed the Writs of Entry concerned with the restoration of land where the possessor's title or right to possess had terminated.

There were, nevertheless, one or two rare cases where the courts were prepared to intervene in matters which did not involve land - rare because this was an age in which property, other than land, played a relatively insignificant role. It is, however, in the undeveloped state of the law in regard to these matters and the defective nature of those few writs which did exist, that the origins of the fiduciary concept can be found.

When considering these writs two factors must be borne in mind. Firstly, a law of torts in the modern sense of the word is not to be found in medieval law nor had this state of affairs altered much by the beginning of the fifteenth century. The law concerned itself almost exclusively with the outward visible act. A fact which is, as Potter points out, rather remarkable when one considers the centuries of training under a religious system supposed to be based on the purely abstract conceptions of God and morality.[12] Nevertheless, it is also true that in those times most wrongs were acts of violence causing either damage to person or property and this is probably the reason why importance was attached to physical action rather than to motive. In any event, as we have seen, the common law courts made no provision for the trying of the intention of man, neither the evidence of the wrong doer nor of his victim being admissible. When one considers the institution of Wager at Law

it will be realised that religious influences probably worked in the opposite direction for "It had to be sufficient that he did it, though in ordeal a merciful God might intervene to save the innocent. Indeed, the very character of the proof made the moral question of little account: who was medieval man that he should question the Divine judgments".[13]

Winfield has, however, expressed the opinion that at no time even in Anglo-Saxon law was there any rule of absolute liability nor does he consider that in the ages succeeding these it was ever the law that a man acted at his own peril.[14] Holdsworth says of the period ending in 1485, that "The general rule is that man is liable for the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally".[15] Potter considers that these two views are, however, not really so far apart as might seem at first sight. Holdsworth, he says, emphasises the general rule whilst Winfield points to the exceptions. In any event, what is important as far as this thesis is concerned, is that intention played a very minor role.[16]

As far as contract is concerned the position may be simply stated. No such concept existed. Agreements between private persons were not considered, as such, to give rise to legal obligations.[17] It is only in the sixteenth and seventeenth centuries that a law of contract is developed. It has been said that the ecclesiastical courts did enforce certain agreements. They did not however do so on any general contractual principles but rather on the ground that a breach of a solemn undertaking made in the face of God was a wrong. If the jurisdiction as exercised by these courts had any influence on the subsequent development of the law, it was an influence felt in Chancery and not by the common law.[18]

To return to those writs which did not involve land; the first of these which we will consider is the Writ of Debt. This action originally lay both for the recovery of a certain sum of money and the recovery of a chattel in certain circumstances. This latter aspect, however, subsequently fell away and was covered by the Writ of Detinue.[19] At the time with which we are now concerned it lay to recover money lent, the price of goods sold, arrears of rent due under a lease for years, money due from a surety, a fixed sum promised by a sealed document and to enforce various statutory penalties. Modelled on the proprietary writs, it looks very much as if it were a real action. Maitland said of it "We are tempted to say that Debt is a 'real action', that the vast gulf which to our minds divides 'give me what I own' and 'give me what I am owed' has not yet become apparent".[20] Potter suggests that "Originally, money, being very scarce, was regarded in much the same light as a chattel..."[21]

Although the real element appears to be strong (Potter speaks of the writs "proprietary character"[22]), this cannot be taken too far. Nevertheless, it is clear that the action was not based on any notion of contract. Barbour says "... the action of Debt was wider than contract. It was based upon the duty to pay money or goods, a duty which arose from some source recognised by the law. No one thought of a promise as the basis of the action. If money was promised for making a release, and the release was made, Debt would lie for the money promised; but it was the act of making release, the something done, which supported Debt, not the promise to pay".[23] And again, the idea that a debt was a grant throws some light on the conception of debt itself. The "claim in the action was that the defendant owed a certain sum; he was conceived to withhold something from the plaintiff, which it was his duty to surrender... Hence it followed logically that the claim must always be for a sum certain".[24] To Plucknett there is no historical ground for the notion that the action was real. He considers that the twelfth century lawyers in the King's Court were not given to metaphysical speculation but, being practical administrators simply saw the need for enforcing the commoner types of debt. In doing so they propounded no theory. All they did was to establish a procedure for compelling debtors to pay their "obvious dues".[25] But the real element was strong and, as Potter says, "(t)he whole principle of this action clearly shows the failure to distinguish at that time between proprietary remedies and remedies for tort or breach of contract".[26]

The action was therefore only reasonably comprehensive. It suffered from certain obvious defects. Unless a sealed debt was produced law could be waged. Unless the exact amount of the debt was proved the action would be lost. Finally, as with all the old actions, a complicated system of pleading grew up around it. By the time of the advent of the Chancellor's Court there was a strong tendency to avoid using it.

The Writ of Detinue lay for the recovery, in certain circumstances, of a specific chattel. Detention of a chattel is clearly a wrong to property, and the Writ of Detinue was thus essentially proprietary. Ames maintained that detinue depended from the first upon contract[27] but this view is not generally accepted today.[28] The Year Books lend no support to this contention and "there is no indication in pleading or argument that the lawyers thought that they were enforcing an agreement between the parties".[29] The essence of the matter lay for them in the right of the plaintiff to get his property back.[30]

The writ was of rather limited application. It lay only to recover a

specific chattel but, as the common law did not give specific performance, the defendant could not be compelled to deliver up the chattel but only its price. Furthermore, law could be waged as in Debt and there was no remedy where a chattel was returned in an impaired condition.[31]

The importance of Detinue as regards contract lies in the fact that all bailments were left to its protection. In bringing it the plaintiff was asserting ownership of the chattel claimed and although Barbour does not think that one can go so far as to state that the action was in fact considered to be proprietary, his reason for so holding is that he believes the medieval lawyer had no theory at all as to the nature of the writ -- the only question that was asked was whether the writ could be brought in the given facts.[32]

The Action of Account was used from about 1200 to compel the defendant to render a "reasonable account i.e. to supply details of sums owing by him to the plaintiff where the defendant alone knew these details".[33] Originally it was used by the lord of the manor to compel his bailiff to account for the profits of the manor. Later it came to be extended and included further classes. There is some disagreement as to how wide this extension in fact was. Potter says, "The action covered a multitude of miscellaneous cases where the defendant had received property, or money, on behalf of another... Casual receipts of money or goods were not liable to this action. The defendant would generally be a person who had to keep accounts from the outset. The cases were then extended to commercial agents and partners".[34] Barbour on the other hand thinks that the action never received such a wide extension. He says "account was confined to a narrow orbit. Indeed, the common law recognised as accountable only three classes of persons: guardians, bailiffs and receivers..." He adds, however, that "There is some indication in the early cases that the primitive arrangements, which to modern eyes suggest partnership or agency, were attempting to take shelter beneath the mantle of account" but that "The action never required sufficient flexibility to serve any useful purpose for merchants or traders".[35]

Perhaps the most interesting aspect of this action lies in the generally accepted fact that it provided a remedy where money was held for investment or otherwise to the use of the plaintiff. Potter suggests that "the fact that this remedy did not lie for land similarly held may have been largely responsible for the growth of trusts".[36] Fifoot speaks of the defendant rendering an account "of his stewardship in some fiduciary capacity".[37]

It is agreed that the action was not founded on contract, "rather was it an independent creation of the law itself".[38] Potter considers that it was

"not necessarily based on contract" but it would seem that his view in fact differs little from that generally accepted for he adds "... it lay whenever the law imposed a duty to account".[39]

The action contained serious defects. In most cases wager at law was possible. It became procedurally extremely cumbrous and the action was suspended in the case of death. In addition, neither damages nor profits were recoverable and once the account was settled the plaintiff was compelled to proceed by way of Debt. As Barbour points out, perhaps its most serious defect was that "The only adequate remedy was specific performance: that is the defendant must be compelled to account: to the accomplishment of such a purpose the machinery of the common law was ill-adapted".[40]

Thus we see that the above three writs all sought to recover something, be it land or goods or money, on the ground that the plaintiff was entitled to that which was claimed. It seems that however cogently it be argued that these were not real actions, they were conceived by minds unable to rid themselves of proprietary concepts. Note for example the fact that Debt and Detinue were originally one action, Glanvill seeing no need for a distinction between the recovery of money and the recovery of a chattel.[41] For this reason Debt lay only for a fixed sum - i.e. that sum of money which belonged to the plaintiff. On the other hand there was no theory of contract. The defendant was never considered to be bound by a personal obligation towards the plaintiff in a contractual sense but rather was he thought to be retaining something which belonged to the plaintiff. Of course, the medieval conception of proprietary rights was a very different thing to that of Roman Law. Many of the rights and duties attached to land were essentially personal and therefore the wide gulf between real and personal rights did not exist. To the medieval mind the matter to be decided was whether what the plaintiff claimed was "due" to him. The circumstances gave rise to the obligation.

Covenant appeared soon after the time of Glanvill, first manifesting itself in connection with agreements relating to land, by the time of Bracton it was regarded as a general remedy.[42] While retaining the form of Praecipe, it did not require the defendant to "render" anything to the plaintiff but rather required him to keep the terms of the covenant. Thus it appears at first sight to be a general contractual action. Fifoot speaks of it as being "a first experiment in the field of contract".[43] Barbour calls it "the most purely contractual action" in the early period of the common law.[44] For more than two centuries it was the only vehicle for enforcing executory contracts which gave unliquidated damages.

Despite this, however, the action never fulfilled its promise. It was too plagued with all the defects of inflexible formalism. The judges "transmuted" the rule that a sealed document must be deemed to state the truth into the requirement that a seal was a condition precedent to the main action.[45] The parties were bound to the exact wording of the deed, not being permitted to deny or explain anything which they had written. Furthermore, the covenant could not be maintained without a deed - unless the document itself was produced no action lay.[46] In fact it was not until 1789 that secondary evidence was permitted.[47] Again, proof that the covenant had been performed was only possible by a fresh deed and, unless such a deed existed or the defendant saw to it that the original deed was destroyed after he had performed, performance did not terminate his liability. Furthermore, strangely enough, covenant did not lie for a sum certain but only for liquidated damages for the breach of the covenant. The assessment of the plaintiff's damages was in the hands of the jury who could never grant him a sum greater than the amount he had claimed. Great exactitude was required in the pleading, the precise point in which the covenant had been broken and the manner in which the damages had been sustained had to be stated with great particularity.[48]

As Barbour says, the medieval lawyers' "eye never penetrated beyond the seal to the genesis of the contract; to him a deed was more than evidence, it was the contract itself."[49] In fact this was carried so far that one can hardly consider the action to be truly contractual at all. For instance, if a person lost his seal and it was wrongfully attached to a deed, the owner of the seal was bound even though he knew nothing of the "contract". Again, the defendant could plead neither fraud nor mistake, the only defence being that of duress.

With the Writ of Trespass[50] we have a departure from the proprietary formula, the defendant being commanded to make right his wrong by his own act. It took the form of a summons calling upon the defendant to show why he had done something to the damage of the plaintiff "by force of arms and against the peace of our Lord the King". Said to be the first English personal action which might be called injuria,[51] it too, like the lex Aquilia, was the product of troubled times - in this case the Barons' wars. By the early fourteenth century it had developed three branches dealing with the disturbance of peaceful enjoyment of land, disturbance to goods and personal injuries. It did not lie for the recovery of the actual chattel but merely for damages.

It was, as the wording of the writ reveals, essentially based on violence. The degree of violence that had to be shown, however, did not need to be

excessive; "The slightest assault, the first invasion of the plaintiff's boundaries, the 'scratching of a carriage panel', these were sufficient to disturb the peace and incur the wrath of the King".[52] Like early aquilian liability, there had to be direct application of force by the defendant. Thus, for example, if a log was placed across a road so that the plaintiff stumbled over it and was injured, he would have no action.[53] The violence had to be done by the defendant to the plaintiff and the violence must have disturbed the plaintiff's possession. Thus he had no action against a third party who had come into possession of his land or goods, even although that third party had come into possession of them unlawfully from another who had had lawful possession. The writ was not granted to a plaintiff out of possession and therefore he had no remedy if he had authorised the defendant's possession and the damage had resulted from the defendant's misuse of that possession. Consequently a bailee could damage the chattels delivered to him and trespass would not lie for he had not violated the plaintiff's possession. Similarly, no action lay for damage done to property by a person to whom it had been handed in order that he work upon it. Thus it was said in 1482 "If I bail to you my horse for pasture and you wound it, I will not have a general Writ of Trespass for you have possession by my delivery".[54] Nor did it lie for loss suffered by the return of a damaged chattel. And finally, the action gave no remedy where the damage suffered had been caused by the omission of another for this could not be said to have been caused by force of arms. Intention was not pleaded for "... as practice came to harden the law, it became unnecessary to plead or prove it".[55]

It has been said that at this time the province of the common law was that of land and criminal law, what Fifoot terms "the insistence of medieval law upon crime and property".[56] If Debt and Detinue were essentially proprietary, the affinity of Trespass was with crime. The defendant had committed a breach of the King's peace and was summoned to appear before not Common Pleas but King's Bench. Fleming says that "... the law of trespass was ... for quite a long time little more than a shadow in the wake of criminal law."[57] Although of course we cannot insist upon classifying these writs in modern terms, trespass was certainly "a species of the genus crime".

Thus the writ which had been seen by Glanvill as a flexible means by which the law of the King's Courts could be expanded, became, with the rise of the professional lawyer in the thirteenth century, the very means of legal conservatism. An attempt was made to remedy this by the Statute of Westminister II which authorised the clerks of the Chancery to frame new writs for cases analogous to those covered by the already existing writs. It is

usually thought that this Statute gave rise to the form of writ which subsequently became known as Trespass on the Case. Whatever its exact origins, by the end of the fifteenth century it had come to be regarded as something quite distinct from trespass, providing a remedy where it was thought that a breach of the King's peace had occurred but not as the result of force of arms - i.e. no allegation of physical violence was necessary. Fitzherbert in his Natura Brevium of 1534 states that under this extension of the writ a person would be liable for a warranty. The example he gives is "If a man do sell unto another a horse and warranty him to be sound and good and the horse be lame or diseased that he cannot work, he shall have an action on the case against him... But note, it behoveth that he warrant it to be sound, otherwise the action will not lie. For if he sells the horse without warranty it is at the others peril..." Fifoot, after noting that certain cases of negligence, nuisance and deceit were now covered by the writ, says; "Negligence, nuisance and deceit are all to be found in the index of the modern law of torts, and though, according to the jurists dichotomy of obligations breach of warranty should slip over the border into contract, its inclusion is a significant reminder of an age in which classification was not a fetish but a fallacy."[58] Be this as it may, the reasoning was undoubtedly that of tort - although there had been no violence, there was a wrong, namely, that the defendant in giving an untrue warranty had been guilty of deceit.

As has been noted, the Writ of Trespass lay only where damage was done by a person who had no authority to deal with the property. If, however, a person placed his property in the care of another or authorised him to do some act with regard to it, he would not be liable for any damage which might result. Liability to such cases was extended in two ways. Firstly, duties were placed on certain persons or classes of persons who stood in a particular position. Thus a duty was imposed on inkeepers, common carriers and smiths to show a certain amount of diligence in their work and, later, a duty to undertake such work. This sort of approach is typically medieval with its distinction between various classes of people.[59] Secondly, the concept of assumpsit was developed.[60] Trespass on the Case was extended to cover cases where the defendant undertook to do work for the plaintiff and performed it negligently or improperly with the result that the defendant* was damaged.** Damage had to result from the defendant's misdoing what he had undertaken to do. Liability here became established during the fifteenth century. It was based on the reasoning that "a covenant was converted by a matter ex post facto into a tort. The breach of the undertaking was not itself the source of liability. The promise or undertaking was laid merely to make an action wrongful to which otherwise there

* plaintiff's ** harm's

attached no consequences".[61] Why was the allegation and proof of assumpsit necessary to support the action? Ames has suggested that the insistence upon an express assumpsit it derived from the medieval notion of liability. "If I voluntarily hand over my horse to the care of a horse-doctor, he treats the animal at my invitation and therefore at my risk. If, however, he undertakes to cure it, and I on the faith of that undertaking allow him to treat the horse, then the risk falls upon him and I have suffered a wrong if my horse is the worse for his treatment. When this is understood it will be seen that assumpsit is not treated as basing the action upon contract, but as one of the elements leading up to damage to the plaintiff's person or property: the defendant undertook to do something, and did it so badly that the plaintiff, who had relied upon the undertaking suffered damage at the hands of the defendant".[62] This is important for two reasons, firstly, in that this concept of liability lies at the root of the fiduciary duty and, secondly, because, although the liability here is not contractual, it relates to what we today would consider a contractual situation. We have contracts enforced, or at least partially enforced, via tort.

This development still left the plaintiff without a remedy where the defendant failed to act at all. As Barbour points out, "so long as the action on the case in the form of assumpsit was confined to cases of active misconduct on the part of the undertaker, the action sounded purely in tort".[63] A very clear indication of the way in which the lawyers of this time thought is provided by the fact that the problem of non-feasance was also solved through tort. The original concept of trespass could, of course, not be stretched to cover this case and the new principle here was found in the idea that such a breach of an undertaking was a deceit. The old Writ of Deceit was orginally concerned with abuse of legal procedure but during the fourteenth century it had, as we have seen, been extended to enforce express warranties under Trespass on the Case.[64] An untrue warranty was considered to be a deceit. From here it was not a great step in legal reasoning to also to view the breach of an express assumpsit in the same light. This was accomplished during the fifteenth century but during this century the principle was, however, limited by the requirement that the defendant had to have done something to make it impossible for him to fulfil his undertaking. Thus for example in 1433 in, Somerton's Case,[65] the defendant undertock to purchase or lease a manor for the plaintiff but "falsely and in deceit of the plaintiff" he negotiated its lease to a third party. It was this that was considered to be the deceit. At the beginning of the sixteenth century this limitation was dropped. It was still, however, necessary to prove that the plaintiff in reliance upon the

the defendant's promise had suffered damages by, for example, parting with his money. Thus the action remained delictual in concept.[66] It was only with the introduction of Indebitatus Assumpsit during the sixteenth century and its final acceptance as an alternative to the writ of Debt in Slade's Case[67] in 1602 that this element was removed. The decision in this case was, however, by no means entirely salutary for it was made in an age that was now becoming aware of the concept of contract and it, as Plucknett says, "obliterates the distinction between Debt and Deceit, between contract and tort."[68]

It was against this background that the Chancellor evolved those principles from which the fiduciary doctrine was later developed.

The Principle of Conscience

The jurisdiction of the Chancellor was "loose, liberal, large and vague".[1] Informality was the key note of early equity procedure and "(t)his fluidity and informality may be regarded as the reflection or even the image of the wide discretion exercised by the early Chancellors in mitigating and supplementing the medieval common law, not only in its civil but in its criminal jurisdictions".[2] Although it was necessary for the petitioner to show an absence of remedy at common law and his failure to do so meant that his bill must be dismissed, the Chancellor did not interpret this limitation strictly but recognised a variety of circumstances where such remedy did not exist. But the petitioner had to show more than this. "The mere fact ... that the common law provided no remedy for a particular case was not in itself enough to induce the Chancellor to intervene. Something else must exist. And so we find a petitioner always bases his claim for relief on a principle, ordinarily expressed by two words, 'reason and conscience' ... whenever a matter of conscience arises, remedy is to be found in Chancery, though there be none at law".[3]

Equity gave judgment "secundum conscientiam et non secundum allegata."[4] Chancery is the "Court of Conscience" and the Chancellor is a "Judge de conscience".[5] "The King willed and commanded," runs an entry in the Rolls of 1468, "that all manner of matters to be examined and discussed in the Court of Chancery should be directed and determined according to equity and conscience and to the old course and laudable custom of the same court..."[6] Thus Holdsworth writes "The ecclesiastical Chancellors, ... based their equity on the more restricted idea that the court ought to compel each individual litigant to fulfil all the duties which reason and conscience would dictate to a person in his situation".[7] Thus too Barbour quotes "an interesting argument, which

unfortunately is reported only in an abridgment", where Prisot C.J. expressed very strongly a legal analogy: he was interrupted by Fortesque C.J., who said "Nous sumus a arguer la consciens isy et nemy la ley..."[8] This, says Barbour, "is an important admission in that it recognises 'conscience' as a juristic principle which finds its proper application in Chancery".[9]

Holdsworth writes "Reason and conscience must decide how and when injustice caused by the generality of the rules of law was to be cured".[10] Thus to Holdsworth Chancery was a true Court of Equity. Such is the equity spoken of by Allen when he says "... no generalisation can be completely general. ... but in the domain of law the effect of exceptions may be... detrimental. Law and justice exist for the regulation of actual rights and duties; and the incompleteness of the generalisation, which is certain to make itself felt at some point or other, may produce results which are antithetic to the very purpose of the generalisation".[11] This conception of equity finds its origin in the Greek philosophers.[12] Vinogradoff makes this same point. To him "conscience" provides the guiding principle upon which equity is applied to a particular case. Thus he writes:

> "As we have already seen, St. Germain's definition of equity is drawn through Gerson from Aristotle: equity comprises the guiding principles for the adaptation of the general rules to particular cases, and especially to cases which transcend the rules in one way or another. The Greek philosopher, however did not specify from what particular source such guiding principle should be derived: he dwells rather on the necessity of taking into account all the complex circumstances of each single case. The Canon lawyers did discover a guiding rule in conscience, and it is important from the outset that in the jurisprudence of the English courts of the time this principle came to be accepted on all sides - by common lawyers as well as by Chancery lawyers - although there was much dispute as to the limits between the two spheres of law...St. Germain formulates distinctly the proposition that equity excepts from the law on the grounds supplied by reason and conscience, and it is on the strength of conscience that remedies in equity are commonly granted".(13)

It is submitted, however, that to view the "equity" of the Chancellor only in this light leads to a serious misunderstanding of the nature of his jurisdiction. He did not merely act when the generality of the rules of the common law produced injustice. He also acted where they provided no remedy or where the remedy was in itself generally inequitable. To ignore this is to deny that the Chancellor himself made general rules.

It is submitted that the philosophic concept of equity as stated by Aristotle finds its guiding principle in the law itself. The law sets out to achieve justice but because it must generalise, cases will arise where the application of its

rules will not achieve justice. Equity therefore acts to achieve the very same goal as that of the law. Thus Aristotle writes,

> "What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law makes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over simplicity, to correct the omission - to say what the legislator himself would have said had he been present and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice - not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality". (14)

It is therefore not correct to say that Aristotle did not specify a guiding principle. The fact is that the common law had become formal and the principles of justice and equity which it had once espoused had largely disappeared. In its place had arisen the principle of equality before the law which, if anything, tends to run counter to such concepts.

The Chancellor was therefore bound to look elsewhere for such a principle. He found it in the ideas of equity contained in the prevailing philosophy and belief of late medieval, catholic, scholastic, Europe. It was a concept of equity fundamentally opposed to that expounded by Aristotle. Vinogradoff explains it thus:

> "(The Doctor in St. Germain's treatise begins) his treatment of conscience as a source of legal decisions by a disquisition of that curious product of Christian thought on ancient philosophy - Sinderisis - ... and takes (his) learning from J. Gerson's treatise. Gerson followed closely St. Thomas Aquinas who took it from Albertus Magnus, who was dependant directly or indirectly on St. Jerome. What it comes to in substance is the admission of a power of discerning between good and evil and of inclining towards the good, apart from conscience proper, which deals with the subsumption of individual cases under the general rules laid down by Sinderisis and developed by reason". (15)

Thus man has the power to discern good from evil and has a tendency towards the good. "Conscience" applies the general rule to the particular case. Hence we have a concept upon which to construct a legal system - a "lex divina". Such principles can only be used for the application of equity in the true sense

of the word where the legal system is based upon exactly the same concept.

Of course the circumstances in which the Chancellor found himself did not require, nor would have permitted, the reception of another system of law. The fact is, however, that the Chancellor did make general rules although he did so by dealing only with particular cases. I do not mean by this to say that, in the early days of his court, he actually formulated and stated general rules. Of course he did not. What is meant here is that he frequently found general circumstances which would render the exercise of a particular legal right unconscionable. This was the reason why the common lawyers frequently looked upon his jurisdiction with such dismay. What is this "conscience" which avails the Chancellor? It is "A thinge of great uncertaintie; for men thinke that if they treade upon two strawes that lye acrosse, that they ofende in conscience, and some man thinketh that if he lake money and another hath too moche that he may take part of his with conscience; and so divers men divers conscience; ... to me seemth that if the Kinges subjects be so constrayned to be ordered by the discretion and conscience of one man, they should be put to a great uncertaintie ..."[16] Thus it is the Chancellor says that each rule of law is or ought to be conformable with the law of God and finds the remedy furnished by conscience.

Of course the circumstances in which the Chancellor stood neither required nor permitted him to introduce a new system of law. What he did do was to compel the individual litigants to exercise their legal rights in a manner dictated by reason and conscience - a process of building one legal system out of another. Thus "(e)quity is not an independent self-sufficient system of law. It has built itself into and around another system, and if the common law should be swept away, equity would be left, so to speak suspended in the air".[17]

Vingradoff saw the "daring reformers ranged under the banner of equity" challenging a common law "testifying in no less degree than Gothic Cathedrals to the power of the medieval mind."[18] If this was in fact what the Chancellor did, he certainly found his justification for doing so in the very centre of medieval thought. As we have seen, it was in the scholastic concept of conscience that he found his guiding principle and in accepting it he had certainly been influenced by the Canon law. Holdsworth says he followed "the current ideas of the Canon lawyers,"[19] Barbour says "the Chancellor... probably carried with him into the Chancery the principles and theories of the ecclesiastical court,"[20] Allen speaks of "a process of indirect reception of Canon law".[21] Although these views have not gone unchallenged,[22] more recent research suggests that this link was even stronger than it was first considered to be. De Luca[23] suggests that English equity derives from a

special action, developed in the Canon law of the middle ages, the denunciatio evangelica. This action rests upon the words of the Evangelist: "If thy brother sin against thee, go, show him his fault between thee and him alone: if he hear thee, thou has gained thy brother. If he hear thee not, take with thee one or two more, that at the mouth of two witnesses or three every word may be established. And if he refuses to hear them, tell it unto the church and if he refuses to hear the church also, let him be unto thee as the gentile and the publican". During the course of the twelfth century this became a regular procedure in terms of which reparation for wrongs could be obtained on the basis that he who has sinned in, for example, failing to pay a debt could not do sincere penitence unless he paid. Thus the denunciation of sin was combined with a legal claim. Later, a distinction was drawn between the denunciatio brought in order to obtain material redress and that brought in connection with penitence, the former being called the denunciatio judicialis privata. Here the plaintiff had to prove his claim and that the defendant was in bad faith. The procedure was informal and summary, evidence was partly oral and the judge played an active role. The action was limited to certain types of cases which gave this jurisdiction a supplementary character. Apart from ecclesiastical crimes it was admitted in two cases of "defectus justitiae"; firstly, where there was a denial of justice on the part of the ordinary courts, although the law provided an action, and, secondly, where there was an "obligatio naturalis" which could not be enforced by an action of law. Basically penitentiary in character, the material question was "whether the defendant was committing a sin (and) this could be decided only in accordance with the moral teaching of the Church, based on the 'lex divina' and 'lex naturalis'. The duties of conscience, as determined by Christian ethics thus became the standard by which the judge had to assess the obligations of the parties. The positive law alone could not be decisive: a person might comply with the positive law and yet commit a sin". Thus Coing considers that "(i)f we try to sum up the sources of law for the judge in the jurisdiction here discussed, we find no better words than those used by Vinogradoff, Reason and Conscience".[24] Thus the jurisdiction was supplementary and did not replace the ordinary law, its substantive rules were based on the same principle as that used by the Chancellor, and the judge must take into account the good faith of the parties as well as their material interests. Thus Coing concludes "Considering that the equity jurisdiction of the Court of Chancery grew up in the fourteenth century and that the Chancellors were mostly ecclesiastics, the conclusion seems not unfounded that the denunciatio evangelica was the model of early English equity".[25]

Procedure in Chancery

The limitations of the procedure of the common law courts have already been noted. Procedure in Chancery was strong where the common law was weak. The plaintiff's bill was an untechnical document praying for a subpoena to be issued to secure the presence and examination of the defendant. If the bill was "misconceived" the complainant was permitted to amend for the Chancellor was prepared to use any means within his power to arrive at the truth. Both plaintiff and defendant were examined under oath and witnesses could be produced for similar examination. The result was a speedier procedure capable of handling situations of considerable complexity. This enabled the Chancellor to handle far more easily questions relating to the administration of assets for he was able to "take a comprehensive view of the rights and liabilities of the estate and of the conduct of the personal representatives, and settle in one legal proceeding the various equities as between the personal representatives and those interested in the estate".[1)]

The Chancellor's Jurisdiction

"These three give place in the court of conscience,
Fraud, accident, and breach of confidence".

Thus runs the old rhyme attributed to Sir Thomas More. It is obvious that the principle of conscience covered all questions which were in principle delictual and here the Chancellor's jurisdiction was limited only by the common law. Neither these cases nor cases of "accident", however, concern us here. It is upon the concept of breach of "confidence" that the fiduciary duty was evolved. Barbour says that the application of the principle of conscience in Chancery resulted in the formulation of three distinct classes of cases which found protection in the subpoena: (1) cases in which the parties had failed through ignorance or carelessness to avail themselves of their rights, (2) cases of transactions based on confidence, (3) cases of parol contract.[1)] The second class involves matters which are "essentially equitable in the modern sense of the word".[2)] Class (1) need not concern us here. The distinction between those cases falling into class (2) and class (3) is of vital importance for in Equity a breach of confidence was not considered to be a breach of contract, express or implied. "Confidence" is an entirely separate and distinct source of obligation and it is, of course, the source of the fiduciary's liability. In order to understand this distinction we will

briefly consider "contract" in Equity.

The Chancellor and Contract

Perhaps the major defect in the common law at this time was its ignorance of contract. There has been much controversy as to how far the Chancellor went in enforcing contracts. Fifoot speaks of "a stream of petitions" being directed to him which were "essentially matters of contract".[1] It is nevertheless clear that these represented only a very small portion of the petitions addressed to him. Avery considers that about 6% of the cases that came before the Chancellor in the 1450's were concerned with contract.[2] To what extent did the Chancellor enforce "contracts"? Barbour has made an extensive survey of the question of contract in Chancery and what follows is largely a summary of his work.[3]

Firstly, many of the petitions here related to matters where the common law in fact already provided a remedy. These matters would be addressed to the Chancellor because the plaintiff wished for a speedy remedy or because the unsettled state of the country prevented him from obtaining remedy at common law.[4] Then there are petitions relating to obligations under seal. The rigours of the common law relating to covenants has already been mentioned. Here the Chancellor acted in reason and conscience to protect the debtor. He came "to the aid of the unweary, the simple people, the fatui, who through ignorance or carelessness, or because they repose confidence in obligee, paid their debts but took no acquittance".[5] Also here would fall those cases where a parol condition was annexed or the covenant was varied by parol agreement or where the obligation was excuted for a specific purpose or, again, where the obligor had obtained no benefit.[6] The Chancellor also acted for the recovery of debts where the common law provided no remedy, for example, where no definite sum was agreed upon, where the promise to pay was implied, where the benefit was conferred on a third person or where the debt had been assigned.[7] In the case of sales of chattels the Chancellor also gave a remedy where the common law would not; he gave damages to the vendor where the vendee had sold to a third party, to the vendee where the vendor had no title to the property and to both where the sale was of uncertain goods.[8] It is, however, in the case of sales of land that the Chancellor's jurisdiction displayed its most contractual features. Here the cases that came before him related to parol agreements as the common law, of course, provided an adequate remedy in covenant. Barbour submits that here the petitioner need not have suffered damage and

"There is no conclusive reason for believing that any payment of price was a pre-requisite to bring the subpoena. In fact there are indications which point the other way".[9] Specific performance could, of course, be obtained in Chancery and Barbour concludes that "(i)t seems probable, then that in the majority of cases the petitioner was seeking to compel the vendor to perform his part of the contract, even though he asked merely that he be compelled to do what reason and conscience required".[10]

In support of his contention that the Chancellor did enforce contracts, Barbour also refers to the jurisdiction exercised by the Chancellor in regard to matters of agency. Here of course the common law said very little indeed. He points to the fact that the Chancellor was prepared, whilst the common law was not, to hold a principle bound by the act of a person who was "generally known" to be his agent, and considers that there is also some evidence that the Chancellor recognised the principles of ratification and of the undisclosed principal. These do not, however, it is submitted, appear to be rules that flow inevitably and necessarily only from a contractual approach to liability.[11]

Also cited here are the remedies for the recovery of chattels. It is clear that the Chancellor, by compelling the defendant to carry out his orders under threat of penalty, was able to provide a more effective remedy than the common law. So too, it is clear that his remedy was far wider than that provided by detinue.[12] What is, however, not immediately apparent is how Barbour relates this to contract. This is particularly so when one considers the reasons why the Chancellor's remedy was wider than detinue; "Though the chattel had been bailed, it was not necessary in equity to connect the defendant's possession with that of the bailee, want of privity did not bar the subpoena... It was not necessary to allege bailment, nor to decide the manner in which the defendant obtained possession of the chattel. Apparently, it was enough to show that the complainant had the right (at least a moral right) to recover, and that the defendant in reason and conscience should give up possession".[13] And again, "Though the owner were effectively divested of possession, as by tort, he was not barred from enforcing his claim to recover this property in equity. At common law his only remedy was by way of damages, but it seems that the Chancellor would enable him to follow his property to whosoever hands it came".[14]

The same criticism appears to be true of his discussion of partnership. Pointing to the fact that the common law provided no remedy as between partners, he says that here the petitions usually alleged that the goods were "held in common to be employed to use of both parties... without alleging any express

promise on the part of the defendant to pay over the just share... The principle upon which equity acted is simple and plain. The property was held jointly, even without an express agreement the situation of the parties conferred upon each a right to a share of the profit".[15] Here again we seem to be dealing with proprietary considerations.

Barbour also submits that as far as suretyship was concerned, a parol contract was recognised and enforced in Equity - "at least where the creditor could show that the defendant's promise was the inducement to the extension of credit to the principal debtor".[16] Here, however, the Chancellor's approach appears to be directly analogous to the assumpsit-delict approach of the common law. Finally, he considers that there were also other heterogeneous contracts" which the Chancellor enforced which had in common one factor, namely, breach of promise.[17]

It therefore appears that, although the Chancellor did enforce certain parol agreements, it remains doubtful as to how far he did so on contractual principles. Ames considers that the Chancellor acted "only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff or upon the principle of preventing the unjust enrichment of the defendant".[18] Barbour considers that this places too much emphasis on tort. The Chancellor, he says, enforced parol agreements on the principle of "reason and conscience" and this was in essence a contractual approach.[19] He states the question thus "If then it be said that the promisor is under an obligation to perform his promise, upon what principle did the Chancellor enforce this obligation? Now every breach of contract which is accompanied by damage bears a strong analogy to tort, if in fact it does not amount to one. But an obligation arising from a tort is plainly distinguisable from one arising in contract. In the one case it proceeds contrary to the will of the person bound, in the other it is in accordance with, and in fulfilment of, his will. Does the Chancellor then enforce the obligation, because the breach of promise amounts to a tort to the plaintiff, or because he holds that one who has for legitimate cause made a promise ought to carry it out?"[20] In the common law a breach of promise came to be conceived of as a deceit. This was done in order to bring a breach of contract within the scope of an action which sounded in tort. "In equity the situation is different. There is not procedural necessity for treating a breach of contract as a tort... We stand, so to speak, before breach of contract as a question of first impression. Analysis may lead us in the direction of tort or contract; both ways are open, there is nothing to compel us to take the one in preference to the other. I wish, therefore, to submit such evidence

as I have been able to find which indicates the attitude of the Chancellor in questions of contract".[21] I have summarised this evidence as follows.

Firstly, the Chancellor was an ecclesiastic and therefore probably brought with him to Chancery the principles of the ecclesiastical courts. The ecclesiastical courts had assumed jurisdiction over breaches of faith; laesio fidei. "What more natural, than that of the Chancellor should proceed upon the ground of breach of faith?" Barbour however, qualifies this by stating "I do not think it necessary to base the Chancellor's jurisdiction on breach of faith alone... In this connection I do not wish to consider breach of faith except in so far as it tends to point to the promise as the essential factor in the Chancellor's consideration of parol contract".[22] Secondly, an examination of the petitions reveals that it is the promise of the defendant upon which stress is laid. "If in fact the Chancellor did consider breach of promise a deceit to the plaintiff, it is very curious that the pleaders who were constantly appearing before him do make use of so convenient an allegation".[23] Thirdly, there are certain cases where the beneficiary is granted relief although he is not the promisee. Here "the principle upon which the subpoena is allowed cannot be detriment to the promisee, for the complainant is not the promisee, it cannot be a tort to the plaintiff, for there is nothing but breach of promises".[24] The reason why such contracts were enforced, Barbour submits, lies in the circumstances under which the promise was made and this is suggested of the fundamental canonistical doctrine of causa. Marriage seems to have been an adequate "cause" for a promise. And it is for the enforcement of promises given for marriage that we most frequently find beneficiaries appealing to equity.[25] Fourthly, we find cases where the plaintiff had stood surety for the defendant, had paid and was now claiming what he had paid from the defendant. In none of these cases is there an express promise but, says Barbour, a promise is raised by the relation in which the parties stood to each other. "As the petitioners phrase it, in as much as the petitioner has been put 'in charge' for the duty of the defendant and at his request, reason and conscience require that the defendant should discharge him". He goes on to say that even where, under similar circumstances, there is an express promise, the same process of reasoning is adduced to support its enforcement. Thus he concludes, reasoning from the implied to the express contract, a promise is enforced because there is some imperative reason why the promisor should fulfil his obligation and this is to be found "in the circumstances under which the promise was made".[26] Fifthly, the suits brought for specific performance of contracts to convey

land "lend support to the view here advance". Here there are many cases where the petitioner had paid nothing but alleged that he was ready to pay. The only damage sustained was the "loss of the bargain". The obligation is, says Barbour, therefore contractual and there is not "the faintest suggestion of tort".[27]

Barbour accordingly comes to the conclusion that, while the common law looked to the promisee and compelled him to show that he had sustained damage other than that which resulted directly from the breach of contract (he must convert the breach of promise into a tort), equity scrutinised the position of the promisor. If the promise was one which in reason and conscience ought to be performed, the immediate detriment to the promisee was a matter of secondary importance, "...the promise and the cricumsances under which it was made held the centre of the stage... I believe that the Chancellor held that one might make a valid promise to do anything which was reasonable and possible, and that the obligation resulting from such a promise ought to be performed because the promisor had deliberately and intentionally assumed the obligation. By this I do not mean that the Chancellor enforced any and all promises. But... he did not require... that the promisee should have been deceived... Rather did he enquire whether the enforcement of a particular promise would further some general interest".[28] Some promises, he considers, were enforced because of the object for which they were made and here we see that it was to the Canon law with its doctrine of "causa" that the Chancellor looked rather than to the Common law.

It is submitted that it is going very far indeed to say that in many of these instances Chancery was enforcing a "contract". It is true that the Chancellor was very probably influenced by the jurisdiction of the Church Courts in regard to agreements. But, as Potter says:

> "In this action of the ecclesiastical courts there was no true development of the modern contractual conception, since it emphasised 'fides' rather than 'agreement'. It was the solemnity of the obligation in the face of God which rendered it so wrong to commit a breach. It was 'laesio fidei' (the breach of faith) that called for the remedy..."(29)

The fact that deceit was not alleged is, of course, not surprising. The plaintiff's allegation was that the defendant had acted contrary to "reason and conscience". "Whenever a matter of conscience arises, remedy is to be found in Chancery, though there be none at law". The fact that the beneficiary was not always the promisee again stresses that it was the promise, as a unilateral act, and its breach which concerned the Chancellor. Furthermore, there had

to be factors which rendered its breach actionable. To speak of "causa" in the context of Chancery can never mean anything more precise than that it was the defendant's breach of his promise, in the circumstances, which gave rise to the remedy. A promise deliberately made with some definite end in view would seldom have been enough. In any event, the position is obscure and it seems generally accepted that one can go no further than Plucknett who says "(i)t may perhaps be true that the Chancery's theory of contract was some form of causa".[30]

Equity was no doubt moving towards the enforcement of contracts. In most cases, however, a promise was seen as a type of representation but in a few (probably only those concerning the conveyance of land) the promise alone may have been sufficient and, even then, its breach was an "unconscionable act". The development of assumpsit at common law therefore took very little away from Chancery which it already had. Rather, it prevented further development and left that court to enforce undertakings as best it could by means of principles which were essentially delictual. These situations now fall within the province of "Confidence".

Confidence

The Chancellor intervened when he considered that the defendant in conscience ought or ought not do something. In a sense it is impossible to attempt to classify his jurisdiction in terms of such concepts as contract and tort. In "conscience" a man's obligations could arise for many reasons and, in such a scheme of things, there is little need to distinguish between the various circumstances giving rise to such obligations. The natural distinction is between the different reasons why acts are "unconscionable". "Confidence" is such a distinction. A man's breach of his undertaking could be an "unconscionable act" but an undertaking is but one of many circumstances which might render an act unconscionable. Thus the only definition of "things of confidence" is that given by Allen, namely, it is "(t)he enforcement of obligations dictated by conscience rather than by a positive vinculum juris".[1]

Thus "confidence" in Chancery did not amount merely to the enforcing of agreements by way of tort and property. It was a far wider concept. On the one hand, as Barbour points out, the Chancellor looked to the promisor and, if he was thought to be bound in conscience to carry out his undertaking, this, in itself, was enough. On the other hand "confidence" was not exclusively concerned with undertakings. It might require a person to refrain from doing

something which he was at law perfectly entitled to do, even although there was no undertaking. The Chancellor might, perhaps, have been slow to place an obligation on one person to do something for another where he had made no promise, but clearly he would feel no such constraint upon his jurisdiction where he merely sought to restrain a person from doing something. Thus if he considered that the natural relationship in which the parties stood to one another resulted in one of them placing confidence in the other in the sense that he believed the other would never act contrary to his interests, the Chancellor would prevent "advantage" being taken of this confidence without feeling obliged to find that the defendant had undertaken not to do so. This distinction is blurred, to a certain extent, by the fact that damages could only be obtained at common law. Thus the Chancellor had very limited means at his disposal by which to enforce a positive undertaking. Frequently all he could do was to prevent a person from doing something contrary to his undertaking as opposed to actually enforcing the undertaking as such.

Of course, this handicap placed upon the Chancellor's jurisdiction must not be exaggerated. The vast majority of cases that came before him concerned property. In such cases the remedy was exactly the same whether the plaintiff alleged that the defendant was holding the property (or had transferred it) contrary to an undertaking or whether he alleged that the defendant had obtained it by taking advantage of the confidence reposed in him. It was only in later age, when litigation frequently concerned the defendant's failure to do something, that a distinction between contract, delict and property was required - a distinction which the Chancellor was never able to make.

In considering all these situations to be similar in that all gave rise to "confidence", the Chancellor was certainly not being inconsistent. Such classification only becomes incomprehensible when one attempts to identify "confidence" with or distinguish it from, contract. In truth this cannot be done. The single principle here was "That if a confidence is reposed, and this confidence is abused, a court of equity shall give relief".[2] When we consider those situations of confidence which give rise to positive duties we may, generally speaking, consider them to be the enforcement of undertakings. Here we may distinguish between those cases where "(the) equitities are enforced in bilateral obligations" (for example the use) and those cases where "a unilateral obligation is imposed" (for example executors). The most important institution of confidence was, of course, the use and an understanding of it and its development into the trust is essential for a proper understanding of the fiduciary doctrine.[3]

As land was by far the most important asset in these times and would remain so for many years to come, it is not surprising that the most important aspect of Chancery's jurisdiction related to it. Here the common law was most developed and it was not in order to supplement it but to change it that the use was introduced.[4] The dispute as to the origins of the use are not relevant here, it being sufficient to note that the English word "use" here is derived from the latin "opus" - the phrase being A tenet ad opus B, A holds for the benefit of B.[5] The concept antedates the rise of the Chancellor's court and was even used in the common law in connection with chattels.[6] Although it has been pointed out that the common law knew no action for the enforcement of the use, this by itself does not explain why it was the Chancellor who developed it into a comprehensive institution. This is clear when one considers the purposes for which it was orginally developed. These were the relief from feudal burdens attached to land, the desire to dispose of land by testamentary disposition, secrecy of conveyancing, the evasion of the claims of creditors and the evasion of the Statutes of Mortmain.[7] It was in order to assist in the first three of these purposes that the Chancellor was prepared to enforce it - purposes, as Hanbury points out, offending merely against feudal policy.[8] They were clearly desired by all classes. Of course, the use need not always have been used only to mitigate feudalism for, as has been frequently pointed out, it received early application in the time of the crusades when those leaving England charged others to hold their lands to their use.[9] Also, as Plucknett points out, a land-owner could not change his estate without the intervention of strangers and thus, for example, if he wished to make his wife a joint-tenant with himself, the only method available was to convey the lands to a feoffee who would then reconvey to the husband and wife jointly. Thus too a tenant in fee simple could create an entail for himself and a particular class of heirs and limit remainders only by first of all conveying to feoffees, who would then reconvey on the limitations agreed upon. Here the validity of such a settlement depended on the feoffee having a real and effective seisin and the tenant would be entirely dependent upon his good faith.[10] Nevertheless, the use struck at the very foundation of feudalism for it separated the enjoyment of land from the legal title and "(t)he interposition of feoffees to uses between the beneficiary and his feudal lord would introduce endless complications into the feudal incidence and might, indeed, completely destroy them..."

By the close of the fourteenth century the use of land had become fairly common. The obligation incumbent on the feoffee to use was at first of a

purely honorary character. With the realisation that the Chancellor would invariably enforce it more and more petitions were addressed to him concerning it and Avery considers that by the middle of the fifteenth century about 96% of the matters that came before the Chancellor concerned the use and that "(t)he most important single force behind the growth of the Chancellor's equitable jurisdiction was undoubtedly the desire of land-owners to deal with their lands as they wished".[11] The result was that "these situations (are now) grouped together under one legal concept of the use".[12] By the end of that century it is accepted that the Chancellor will enforce its observance not only against the original feoffee to uses but against all those into whose hands the legal estate might come, other than a bona fide purchaser for value.

On what principle did the Chancellor enforce the use? Maitland says:

> "Meanwhile the Chancellor had begun to enforce these bargains. Why should he do so? Why should he not do so? Let me repeat once more - I shall have to come back to this over and over again - that use, trust or confidence originates in an agreement. As to the want of valuable consideration for the trustee promise, it might, I think fairly be said that even if there is no benefit to the promisor, the trustee, there is still at all events detriment to the promisee, the trustor, since he parts with legal rights, with property and possession. Men ought to fulfil their promises, their agreements; and they ought to be compelled to do so... You will say that the Chancellor begins to enforce a personal right, a jus in personam, not a real right, a jus in rem - he begins to enforce a right which in truth is a contractual right, a right created by a promise... The right of the cestui que use or cestui que trust begins by being a right in personam. Gradually it begins to look somewhat like a right in rem. But it has never become this; no, not even in the present day."(13)

Why was it not thought to be the enforcement of a contract? Here Maitland says:

> "From the first men seem to feel that a contract binding the trustee to the author of the trust... is not what is wanted... The notion of contract is not that with which the Chancellor works in these cases: perhaps because the old Courts profess to enforce contracts... It is the destinatory who has the action, and he may be a person who was unborn when the trust was created. This is of importance for, curiously enough, after some vacillation our Courts of Common Law have adopted the rule that in the case of a pactum in favorem tertii the tertius has no action."(14)

Maitland's views have not gone uncriticised. Thus Hanbury says:

> "On the nature of equitable rights, Maitland was never tired of reiterating that, though they have come to look very like iura in rem, they can never gain a place in this category, from which they are excluded by the bona fide purchaser for value of the legal estate... No real doubt has ever

> been on the inviolable position of the bona fide purchaser for value of the legal estate, but the vital law, which spoils the completeness of Maitland's scheme, rests in the right of the beneficiary to follow the trust funds."(15)

In truth we have something here which can only be explained historically thus Radcliffe and Cross consider that there can be no doubt that the use was seen:

> "... chiefly as giving a personal right against the trustee but as Chancery came gradually to enforce the trust not only against the original trustee but against persons to whom the legal estate was transferred from him with knowledge of the trust, or in such circumstances as they ought to have known of it if they had made reasonable enquiries, the beneficial interest under the trust came to wear the appearance of a right of property enforceable against all the world save the bona fide purchaser for value of the legal estate from the trustee."(16)

It would seem that what we have here is the enforcement of an undertaking; the enforcement of a personal obligation by means of a right to property which later becomes a right in property that is not available against all the world. Viewed from the stand point of Roman Law this might be thought to be rather confused thinking but, on the other hand, viewed against the background of feudalism such a concept can be readily understood. The dividing line between such a concept and a jus in personam ad rem acquirendam is very fine especially when one considers that lucrative successors and particular successors are, in our law, bound to respect such rights. That we are not dealing with something essentially proprietary in nature can be seen from the fact that the beneficiary was not at first given a right against third parties - the institution existed independently of this right. Again, the cestui que use was never bound to follow the property. He could proceed against the feoffee upon his breach of his duty, his "constructive fraud". Then again, when we come to consider the Statute of Uses we see that it did not effect the "active" use. Thus Maitland says:

> "But the statute only applies where there is a simple use, trust or confidence - it does not apply when there is an active trust... The line which divides the simple use, trust or confidence, which is within the statute, from the active trust, which is not within the statute, is often a very fine one. The test seems to be this, Does the instrument before us merely tell A that X is to have the enjoyment of the land or does it impose upon A some more special duty? Thus I convey unto A and his heirs upon trust to permit X to receive the profits of the land during his life. This is a simple use, trust or confidence - I am only saying in effect that A is to hold for X's benefit. The statute operates and X has a legal estate. On the other hand, I convey to A and his heirs upon trust to collect the

> rents and profits of the land and pay them to X during his life. Here I impose an active duty upon A, he is to collect the rents and pay them to another. Here the statute does not come into play, and the legal estate remains in A... If the instrument in question leaves any discretionary power to A - if, for example he is to divide the income between X, Y and Z in such shares as he will think proper, that of course is a ground for holding that he is and they are not to have the legal estate."(17)

It was of course, the passive use that was, to begin with, by far the most common and its object was, undoubtedly, proprietary. This could hardly be said of the active use, and yet the fact that the Chancellor was able to consider both passive and active uses to be but aspects of the one institution indicates clearly that it was the undertaking of the feoffee that the Chancellor was enforcing. This he did by holding an act done contrary to that undertaking to be a wrong and by granting a remedy in property.

Chancery as a Court of Law

The subsequent history of Chancery until the time of the Restoration need not concern us. The first half of the seventeenth century had been a most varied time for the court. It began with the triumph of Lord Ellesmere and ended with the near abolition of the Court during the Commonwealth.[1] Forced by circumstances to retain the court, the government of Cromwell planned its eventual destruction. The Barebone Parliament of 1653 "... in which few lawyers sat among the Saints," had in fact "light heartedly voted the abolition of the Court after a single day's debate".[2] Although this was, of course, never carried out, the court during this period languished in the hands of a Commission whose members had little experience in its administration. In fact, as Yale says, it "continued under sufferance".[3]

In contrast, the latter part of the seventeenth century was a time of great development for the court. In fact, this was a most important period for English Law generally. Holdsworth says; "It is during this period that English Law, like the English Constitution, assumes its modern aspect. The law sheds many of its medieval rules and much of its medieval machinery. Similarly modern equitable doctrines begin to emerge, and equity begins to attain fixity and system".[4]

Before considering the effect of these changes on equity, a few of the more important changes in the common law must briefly be noted. It will be seen that these changes profoundly affected the Chancellor's jurisdiction in the sense that they clearly excluded it from certain fields of law. The

most important change here is that relating to contract. It is during this period that a law of contract properly so-called begins to be developed "Lawyers (are beginning to become) conscious of the difference between contract and tort". The development of assumpsit has led to the emergence of such concepts as implied contract and quasi-contract. Indebitatus Assumpsit can now be brought for a debt even although there was no express promise to pay subsequently made. The main principle of the doctrine of consideration has also been developed.[5] In tort the courts are beginning to differentiate between cases in which a man is liable for an illegal act which damages another and cases in which he is liable for such act only if it is accomplished by wrongful intention or negligence. The old Writ of Detinue has been by now succeeded by that of Trover. In the law of real property, as we have already seen, most of the feudal tenures have been abolished. Generally speaking there is a marked decline in medieval land law and in corresponding development of the law regulating the relations between private persons.

"It is from the period of the Restoration in 1660 down to the beginning of the eighteenth century that Equity finally achieves its new form of a consistent and definite body of rules, and the Chancellors accept the conclusion that Equity has no place for a vague and formless discretion: in short, Equity is now, for practical purposes, a body of law which can only be defined as the law which was administered by the Chancellor".[6] This change was, however, far from complete by the end of the seventeenth century. It is, as Fifoot points out, really only at the close of Lord Eldon's tenure in office in the earlier part of the nineteenth century that the development is completed.[7] What does occur during this period is a fundamental change of approach. Generally speaking the Chancellor no longer considers that he is exercising a discretionary jurisdiction based on the moral ideas of medieval Christianity.

Attempting to rid equity of the stigma of medievalism and at the same time to introduce into it greater objectivity, it is now said that the conscience of the Chancellor is not his "natural and private conscience" but a civil and official one - "Civilis et politica" and not "naturalis et interna".[8] The introduction of such limited, and in any event rather doubtful, objectivity does little to change the discretionary nature of his jurisdiction. Thus in Lord Chesterfield v. Janssen[9] we find counsel arguing that it is in fact even more arbitrary than the old principle - "misera servitus est ubi lex est vaga. Nothing more miserable than the rules of property should be precarious and uncertain, and yet, according to the arguments of the plaintiff's counsel, though my contract is legal, and equitable too, it may be for speculative reasons bad; this is

punishing a man who has done no wrong. There are a great many reasons alluded to but no fixed rule provided, but it is said that the court will set it aside, for reasons concerning the public."[10)]

It is of course by accepting the principle of precedent and defining the area of the court's jurisdiction that this transformation was brought about. Both as evidence of this tendency and as a means of making it possible reports of the Chancellor's decisions now begin to appear. Apart from incidental Chancery cases in the Year Books, the publication of equity cases begins in the second half of the seventeenth century, although these reports refer to cases dating back to the second half of the sixteenth century. The publication of these reports coupled with the natural tendency to cite precedent gives rise, during the following century to an accepted system of precedent transforming the court into a court of law.[11)] Fifoot says "... the establishment of a settled jurisdiction, the publication of reports which encourage the natural inclination of judges to follow tradition, and the predominance of purely proprietary interests which engaged the attention of the court, combined to define and restrict the principles upon which it acted."[12)] The change, however, was not a sudden one. The origins of the court's acceptance of precedent can be seen at least as far back as the Chancellorship of Lord Bacon and the fact that Tothill's reports include cases going back to 1559 indicates a perhaps even earlier date. On the other hand, it was a very long time before the principle received complete acceptance. Here reference may be made to the frequently quoted statement of Chief Justice Vaughan in 1670, when he expressed surprise that precedent should be cited in Chancery for, as he said, logically enough, "if there be equity in a case, the equity is a universal truth, and there can be no precedent in it". To this Lord Keeper Bridgman replied "in them we may find the reasons of equity to guide us, besides the authority of those who made them is much to be regarded... It would be very strange and very ill if we should distrust and set aside what has been the course for a long series of times and ages".[13)] By the beginning of the nineteenth century the change is complete. Thus we find Lord Eldon giving his reason for a particular decision as "I cannot find any decision authorising me to say that ..."[14)]

Precedent, fully developed, completely eliminates all elements of pure equity. Just as the speed at which this principle gained acceptance must not be over emphasised, so too must not the extent of the change which it brought about be exaggerated. Equity, properly so-called, or, what Fifoot calls "the unsophisticated conception of equity", acts only in those circumstances

which are so unusual that the law cannot make general rules concerning them. "What occurs once or twice... the law givers pass by". It does not in fact alter the law, but the exceptions it makes are felt to relate to the unique. For the law to be altered, for it to state these exceptions in terms of rules, is thought to only weaken the general rule at the expense of a situation which will in all probability never reoccur. But the moment it is felt that the circumstances before the court are likely to come again before it in the same or in a reasonably analogous form, it is necessary to make general rules concerning them and this should be done, at least logically, by the law itself and not by a court of equity. For historical reasons equity in England never hesitated to act in such situations. The principle of conscience might have been admirably suited for a purely equitable jurisdiction but it was equally capable of being used to develop rules of law. (This is of course true of any general principle such as, for example, "justice"). The fact that the Chancellor justified his jurisdiction within the general scheme of English Law upon the theoretical basis that his was, indeed, a court of equity should not obscure this fact. Now, however, when the court is deliberately turning its back upon discretion, one would think that it would no longer be able to advance this justification.

In one area of the court's jurisdiction this justification had long been unnecessary. The Chancellor had from early times evolved general rules as to the use and no one was under any misapprehension that here Chancery was acting as a court of law. The use was reconciled with the common law upon the theory that "equity follows the law". Now, however, the question arises as to why the trustees' duties are enforced. If they are not to rise ex conscientiae then the court must acknowledge that it is enforcing his undertaking. This in fact does not happen and instead the trust becomes attached to the land itself. Thus Lord Hardwicke said "An use or trust heretobefore was (while it was a use) understood to be merely an agreement, by which the trustee and all claiming from him in privity, were personally liable to the cestui que trust, and all claiming under him in like privity. Nobody in the post was entitled under or bound by the agreement. But now the trust in this court is the same as the land..."[15] So Holdsworth writes on eighteenth century Chancery "... the growing distinctness of these equitable estates, which was made possible by the view that the modern trust, unlike the medieval use, was attached not to the conscience of the trustee but to the property itself, made it clear that the Chancellor had created an equitable ownership which was different from legal ownership and the nature of this equitable ownership and its relation to legal ownership was peculiar to English Law."[16]

As far as the use was concerned equity had in truth acted "in personam". Disobedience to the court's order was punished "by imprisonment until it had been purged by compliance". But social conditions have now changed and, as important as such a remedy is, it is no longer sufficient. What is needed are now rights in property. The method of compelling the defendant on pain of punishment to do as the court orders was well suited for the troubled times of the fifteenth century but what is now needed is a method by which property can be attached directly without the intervention of the defendant. This is accomplished during the seventeenth and eighteenth centuries. So important was this development that Yale says of it:

> "... the most significant theme of the seventeenth century Chancery procedure is the growth of the court's process and jurisdiction to place, as Lord Macclesfield, the Chief Justice, once put it, the 'hand of the court on the property', as well as on the person of the defendant. Such a development was a necessary preliminary to create in the court that mental climate which induced the Chancellor to think in terms of proprietary rights rather than personal obligations, and finally by the multiplication of equitable estates in property to draw in that kind of litigation which compelled a new definition and delimitation of the Chancellor's discretion."(17)

By the beginning of the nineteenth century the change has been brought about so completely that we find counsel saying:

> "The principle of the court is never to interfere with the personal liberty of the subject, where there are other means within its power of obtaining that which it seeks... Where the object has been to put a party in possession of property if the court can obtain that by its own proceedings, there is no authority for putting a person in prison. The court cannot proceed in both ways at the same time."(18)

This did not, however take place until the Chancellor had made a determined effort to render his traditional procedure more effective. Yale points to the case of Clark v. Waller[19] where the Lord Keeper "minded not only to shut up the defendant... but also to lay upon him as many irons as he could bear, for his wilful and manifest contempt".

This, of course, is not to suggest that the development of execution against property in itself created the concept of equitable rights in property. It does, however, open the way to such a concept. "The emphasis is on the rights in the property rather than on the conscience of the proprietor. This is a necessary consequence of the application of the process and one of the influences drawing equity away from the traditional basis of conscience into new legal surroundings - the beginnings of modern equity".[20]

The development of these equitable estates had the effect of profoundly changing the content of the maxim that equity acts "in personam". This fact does not appear to have been accepted by the older writers, Ames, for example, holding the maxim to be the "key to the mystery of equity"[21] and Maitland appears to have taken it as the basis for his theory that equitable rights are rights in personam.[22] On the other hand the modern approach is to confine the maxim to the process of court and not to deduce from it the nature of the rights.[23]

Thus a distinction is drawn between proprietary and personal rights. The former are fitted within the general framework of the law upon the theory of equitable estates. Just how the latter are to be reconciled with the common law is not obvious. If they are said to arise from any of the recognised sources of personal rights Chancery must, inevitably, openly encroach upon the jurisdiction of the common law. At first this problem is met by the simple expedience of ignoring it. The court continues to maintain that it is a court of equity properly so-called. Thus, for example, Lord Cowper in 1710 states the principle that the Court of Chancery had jurisdiction in cases of "fraud, trust and accident" with the explanation that equity could not interfere with the settled principles of the law to remedy general inconveniences, "But only when the observation of a rule is attended with some unusual and particular circumstances which creates a personal and particular inconvenience".[24] Thus too Ballow in 1737 confirms the principle as set out in Doctor and Student that equity exists to meet those cases where the general rule of law by reason of its general terms, causes injustice. He says:

> "Equity, therefore, as it stands for the whole of natural Justice is more excellent than any human Institution: neither are positive laws even in matters seemingly indifferent, any further binding, then they are agreeable with the law of God and nature. But the precepts of the natural law, enforced by the laws of man, are so far from losing anything of their former excellence that they receive an additional strength and sanction. Yet as the rules of the municipal law are finite, and the subject of it infinite, there will often fall out cases, which cannot be determined by them, for there can be no finite rule of an infinite matter, perfect. So that there will be a necessity of having recourse to the natural principles: that what was wanting to finite may be supplied out of that which is infinite."(25)

Holdsworth notes of Ballow's treatise that "... just as the Doctor and Student helped to carry over the principles of equity applied by the ecclesiastical Chancellors of the Middle Ages who were Canon lawyers: so Ballow's treatise helped to carry over the same principles into the period when equity was rapidly becoming a definite system of fixed principles and rules".[26]

Such statements, as we have seen, have been continually used since the inception of the court to justify its jurisdiction. This was the basis of the argument of Lord Ellesmere.[27] Now, however, the court is deliberately, and as a matter of policy, becoming a court of law. How can it justify its jurisdiction thus?

Firstly, it is maintained that the court's jurisdiction here does not conflict with that of the common law because it relates to an area of jurisdiction peculiarly its own. "The Common Law relating to fraud, mistake, accident and forgery was extremely meagre in the fifteenth, sixteenth and seventeenth centuries says Plucknett.[28] Holdsworth, writing of eighteenth century Chancery, says; "Though in very many cases the settled principles and rules of equity are apparent, some of these principles and rules are more flexible than they became later in the century, because they are more closely connected with the basis upon which they originally rested."[29] Thus Ballow writes "... although in matters of apparent equity, as fraud, of breach of trust, precedent is not necessary: yet in other cases it is dangerous to extend the authority of this court further than the practices of former times".[30] And Holdsworth again, "It is for this reason that we find that in these cases the Chancellors did in fact judge according to their consciences, after careful examination into all the facts and circumstances of the case before them".[31]

Secondly, the Chancellor makes no claim to be enforcing undertakings but, instead, emphasises that it is wrongful behaviour with which he is concerned. Thus all breaches of "confidence" become "frauds" or "constructive frauds". Here the Chancellor remains true to principle for it is quite clear that what he had considered as an "unconscionable act" he had always considered to be a type of "wrong". Now, however, the common law has come to distinguish between contract and tort and the word "fraud" has become associated with the latter. Therefore to associate the word "fraud" with an "unconscionable act" is misleading for it suggests that "fraud" is a type of wrong as opposed to the breach of a duty voluntarily undertaken. Thus the Chancellor maintains his jurisdiction here by a kind of a subterfuge for all "frauds" in equity are not torts or even tort-like. Some of them, of course, may be defined as "torts" and here the general principles of undue influence were evolved. Most breaches of "confidence" cannot however be so classified with the result that a definition of "fraud" in equity is virtually impossible. Thus Lord Haldane in Nocton v. Lord Ashburton [32] said "In Chancery the term 'fraud' came to be used to describe what fell short of deceit, but imported breach of duty to which equity had attached its sanction", and that "fraud" when used in this way,

meant "not moral fraud, but breach of the sort of obligation which is enforced by a Court of Conscience."[33] In other words the Chancellor maintains his jurisdiction in regard to matters which are not essentially delictual by maintaining his ancient approach to them via tort. As Chancery has now a virtual monopoly of those cases involving the administration of one person's affairs by another, this fact has very important consequences. It means that, in principle, the Chancellor will only grant relief where a person has committed an act of commission contrary to his undertaking which results in harm to his beneficiary.

Thirdly, the Chancellor purports to be merely "following" the law. Thus equity acknowledges the law and is said to supplement it - "the rules of equity necessarily followed and depended upon the law to which they were a supplement, or, on which they were a gloss..." The common law remains "the overruling jurisdiction of this realm". This is of course an ancient principle and results in the trust-concept. What is important here is that this trust-concept applies just as much to personal rights as to proprietary rights. The administrator is under no legal obligation to fulfil his undertaking but Chancery will ensure that he exercises both his de facto and his legal powers in the interests of his beneficiary and therefore he holds these powers in trust. He is, of course, not a trustee properly so-called but the distinction is not one of principle.

Fourthly, if a breach of conscience is now a "fraud" and most such "frauds" are in fact the wrongful use of a legal right, the question still remains "When is a person bound to exercise such a right in a particular way?" As long as the court's jurisdiction here remains wide and discretionary this question of course does not have to be answered but, as we shall see, during the eighteenth century the Chancellor feels himself more and more compelled to abandon such discretion. He is faced here with two alternatives; either general principles must be evolved or the obligations must be placed upon certain specified persons. The former course will result in direct conflict with the common law and therefore the latter is adopted. This is, as we have seen, also an ancient method of imposing liability, thus duties were placed upon the smith and the inn-keeper. It is a method which is only suited to a system of law devoid of general principles and it is in direct conflict with the application of any such general principle as "conscience". If A is under a duty to exercise his rights or powers in a particular way because it would be unconscionable to do otherwise and if it is then said that he is under this duty because he belongs to a particular class of persons, for example, a solicitor, we are at once suggesting that all similar acts committed by a person other than a solicitor are equally unconscionable and yet denying that they will give rise to liability. We shall see that this

has been one of the major problems arising from the concept of the fiduciary relationship.

The Trust

The Statute of Uses applied neither to uses of chattels, nor to uses raised out of leasehold or copyhold interests nor to active uses.[1] In the active use we see the advantages of this institution as an administrative device. Its exclusion from the Statute of Uses is usually put down to the fact that "it was necessary for the feoffees to retain the legal estate in order to perform their positive duties".[2] Thus Fifoot says, "If an active duty was imposed upon trustees, their retention of the legal estate was required to permit its performanc Soon after the Statute we find the courts enforcing such uses.[3]

It is frequently said that the "resurrection of equitable estates" resulted from the dicision in Jane Tyrell's Case[4] to the effect that "a use cannot be engendered upon a use" and the subsequent decision in the case of Sambach v. Dalston.[5] There it was decided that if land was conveyed to A to the use of B to the use of C the effect would be that the second use was void and therefore unaffected by the statute and, as the statute now caused the legal estate to be in B the Chancellor now enforced the use to C as a trust. Thus to Fifoot "(t)he restoration of the equitable interests was then effected by a typical display of professional casuistry".[6] In other words "the Chancellor in substance and in equity recognised the second use, though it was usually labelled as a 'trust'. Calling it a trust, in this view, is only a convenient way of distinguishing an interest not affected by the statute from one that was" or, as Lord Nottingham put it, the trust was "only a use at second hand".[7] Why did the Chancellor enforce the second use? Ames puts it thus; "The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the Chancellor at length compelled the faithless legal owner to perform his agreement".[8] He was able now to prevent "the scandalous dishonesty on the part of some trustees" because the abolition of feudal tenure in 1660 meant that "trusts were now to be used for administrative convenience and not to evade the revenue law".[9]

The difficulty however, is to understand why, if the trust was to be used as an administrative device, there was any need for all this tortured reasoning for, after all, the active use was not affected by the Statute of Uses. One would therefore think that if the enforcement of the "trust" was a method of

avoiding the statute, the trust as we know today would be a passive thing. One reason might lie in the rule that for a trust to be active it must actually charge the trustee with active duties - if it is silent it is a passive trust. Plucknett considers that the essential step taken by the Chancellor in the development of their trust was to interpret a trust placing no duty upon the trustee to reconvey the property so as to place this active duty upon him.[10] In other words we are dealing rather with the question of the interpretation of trust deeds than with the question of principle. Lord Nottingham took another view which is of particular interest to this thesis for, although it appears not to be generally accepted, it was nevertheless Lord Nottingham who was largely responsible for the development of the modern trust and consequently for sowing the seeds of the fiduciary doctrine.[11] His view is of particular interest to this thesis for in it we see a very clear statement of the trust concept, namely, that of a duty imposed upon a person in equity to exercise his legal rights to the benefit of another.[12] Lord Nottingham considered that the Statute of Uses only applied to those uses governed by a previous statute[13] which gave certain cestuis que use the right to convey the legal estate. This statute applied only to those uses where the feoffee was seised to the use of another. This occurred when the other had the liberty to enjoy the profits and therefore the "use" lay in the beneficiary. The Statute did not, however, effect trusts. In a trust this division of property into the use and seisin was not made for here the grantor had transferred both possession and use to the trustee to use the property to the benefit of the cestui que trust. Therefore the courts never in fact enforced the second use. What they did was to accept the fact that the Statute of Uses abolished all uses but, nevertheless, as the full use and benefit lay in the first feoffee to use, they were able to enforce a trust.[14]

Whatever the legal reasons were which enabled the courts to enforce the trust, the economic factors which led them to do so are clear. By the Statute of Wills of 1540 the power had been given to every tenant in fee simple to devise all land held by socage tenure and two-thirds of the land held by knight service. With the abolition of military tenures the last of the reasons which had brought about the Statute of Uses was removed. This reflected the waning power of real property which can also be seen in the tragic fact that it was then that feudal revenue was commuted for a duty upon beer. If the obstacles in the way of the enforcement of the trust were removed, what then were the factors which brought about its development.[15] Hanbury puts the question and answers it thus:

> "Equitable estates returned after 1660, and returned to stay. They were known no longer as 'uses' but as 'trusts'. Why was their return required? Not for the same purposes for which the use was orginally required. The use was in reality a lever for easing the shoulders of the land-owner from the dead weight of feudalism and all that feudalism involved, especially the impossibility of devising land. But after 1660 no freehold land held in fee was incapable of being devised, and the feudal incidence accompaning socage, which was to all intents and purposes the only free tenure left, were not burdensome. The reasons are not hard to find. The 'more lofty and important ends that the somewhat paltry and ephemeral ends served by the use' were, quite simply, the need for a device by which property could be administered."(16)

He lists those situations where such a device was, at this time, required; (a) the need for family settlements to emancipate women from the maxim "husband and wife are one in law, and the husband is that one", (b) the appearance of stocks and shares which brought about settlements of personal property with the capital in the hands of trustees with a duty to pay the income to the beneficiaries, and (c) the need for a device to fulfil the function now served by incorporation.[17)]

Why was it the use that was so developed to become the most important administrative device until the Companies Acts of the latter part of the nineteenth century? Firstly, the modern law of agency only developed in the nineteenth century with the result that, unless there was a proper partnership situation, there was in fact no other method of administrating assets.[18)] Of course companies had long existed in English Law but incorporation was not easily obtained and, with the financial crisis of the early eighteenth century, came a policy strongly antagonistic towards them.[19)] By vesting the property in the trustee the need for either agency or incorporation was obviated. In any event, as we have seen, the use had from early times fulfilled this function. Again, it was Chancery that furnished the most suitable machinery for controlling the conduct of administrative work and by the end of the seventeenth century its general jurisdiction here had been firmly established. This remained the most important function of the court until its final abolition and is the prime concern of modern equity. Finally, the trust provided great protection for the beneficiaries both in limiting their liability and protecting them from possible misapplication by the trustees of their funds.

Although the enforcement of the trust entails no fundamental change of principle, the problems that now faced the Chancellor are in fact very different in nature. He must develop rules for the enforcement of obligations which are purely personal. Generally speaking, rules must be evolved so as to force the trustee to carry out his duties; further rules must be

evolved as to what these duties are when the trust deed is silent; a standard of care must be placed upon the trustee and finally, a method must be found of ensuring that he acts in the interests of his beneficiary. It is the first of these that poses the major problem. As long as the purpose of the trust is to ensure the preservation of assets no great difficulties arise but if, however, more is expected of the trustee than this, the fact that the Chancellor's remedies are only in property - that he cannot award damages - means that he has no adequate way of enforcing such undertakings.

That it is the trustee who comes to play this vital role in English Law is a fact of great consequence as far as company law is concerned for it is largely upon the analogy of the trustee that the duties of directors come to be developed. In other words, they are developed on the analogy of a person whose obligations arise because property is vested in him; who is seen to have full legal rights in respect of that property but is bound in equity to exercise these rights to the benefit of his cestui que trust; whose obligation to do so is enforced by rendering ineffective acts done contrary to this duty ("constructive frauds") and against whom only proprietary remedies are granted.

THE DEVELOPMENT OF THE DOCTRINE OF FIDUCIARY RELATIONSHIPS

With the development of equity as a "legal" system it becomes necessary for the Chancellor to define those situations where he will hold a person to be bound in conscience to do or to refrain from doing something. As far as "confidence" is concerned it is quite clear that, from the very nature of things, the situations or circumstances which he defines as giving rise to such obligations will be "relationships". The most important such relationship is, of course, the trust. For centuries the word "trust" has been used in Chancery in a wide, non-technical sense to cover almost all situations of confidence. As we have seen the trust has become attached to the land and it is now defined in proprietary terms. Thus Ballow says "whosoever has the possession of goods or lands, either have absolute property or estate in them by sufficient title; or so far as this is wanting, is considered as a trustee for the true owner".[1] Thus too Lord Nottingham says "all trusts are either first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or cretated by act or construction of law... The law never implies, the courts never presume a trust but in the case of absolute necessity. The reason for this is sacred: for if the Chancery do once take the liberty to construe a trust by implication of law, or to presume a trust unnecessarily a way is open to the Lord Chancellor to construe or presume any man in England out of his estate."[2] The trustee is therefore said to owe his personal duties to his cestui que trust because he stands in a particular proprietary relationship to him. This established, the court begins to formulate these personal duties and during the eighteenth century the process gains momentum.[3]

Thus the first relationship of "confidence" was defined. It meant that where there was no such proprietary relationship the Chancellor could no longer speak of "trusts" and, as we shall see, these relationships of confidence, when defined, came to be called "fiduciary relationships". The definition of the trust was, however, only achieved by putting the cart before the horse. In fact a trustee does not act in the interests of his cestui que trust because of the proprietary relationship between them; rather it is that this relationship arises because the trustee has undertaken so to act. Only by returning to feudalism can this duty be considered as being attached to the property. In other words the definition ignores the fact that the trustee's duty to act in the interests of the cestui que trust is a personal obligation. If the court is to reject the principle of conscience, because

the trustee's duties are attached to a proprietary relationship and are not seen as arising from general principles as to the enforcement of undertakings, the trustee's duties must, in principle, be unique. There is no reason in law why they should be applied to any other administrator who is not a trustee - no matter how similar his undertaking. But what is even more important, this reasoning stands in the way of applying the rules evolved for one administrator by way of analogy to another for it ignores the very point of their similarity.

Generally speaking Chancery never goes as far as this for it never in fact rejects the principle of conscience. What it does instead is to adopt a middle course and to place certain defined relationships in a class upon the basis that they give rise to similar duties in conscience. It then enforces these duties by applying the same or analogous rules because the relationships fall within the class. It is a compromise solution and a most unsatisfactory one at that.

The definition of the other fiduciary relationships takes place hand in hand with the development of the fiduciary duties. These appear to find their origins in certain cases dealing with the "unconscionable taking of bargains" from young heirs. This, of course, does not mean that before this time - the latter part of the seventeenth century - such obligations were not enforced. They most certainly were. Now, however, the Chancellors feel compelled to look for authority and not to simply state that they are enforcing obligations arising out of "confidence".

The Cases of the Young Heirs

These cases, as may be expected, were not evolved from the application of any principle of law but were themselves, naturally enough, based directly on the principle of "conscience". They may, perhaps, best be understood by citing the facts of some of those which occurred before the turn of the seventeenth century for these established the rule to which the Chancellors first looked in order to develop the fiduciary doctrine. It should be pointed out, however, that these cases are very scantily reported, little more than the essential facts being stated.

In Bill v. Price [1] the defendant, who had for many years "practised" on young heirs by selling to them goods at "extravagant values", sold the goods at five times their value to the plaintiff, agreeing to accept payment on the death of the young man's father. The idea was that the plaintiff would

then resell the goods in order to obtain cash. The transaction was set aside. In Waller v. Dalt[2] the facts were similar to those just stated. The plaintiff was a young man in want of money who had purchased certain silks for the purpose of reselling them. He had given the defendant a note for £2,224 as against his inheritance whilst the silks in fact realised only £1,000. It was held that his liability to the defendant was in the sum of £1,000 and no more. Nott. v. Hill:[3] here there had been the sale of a revision by an heir at a sum far less than its true value. It was set aside as having been an "unrighteous bargain". Wiseman v. Beeke:[4] in this the "young" heir was "above thirty, near forty years old" when the bargain was made and what is more he was found to have been a man of "experience in the world". It was said that the action was brought by the plaintiff "understanding that Chancery began to relieve against such bargains..." James v. Oades:[5] a similar bargain to those already mentioned was declared to be against "conscience". In Lamplugh v. Smith[6] the heir had bought goods at an extravagant value and the transaction was set aside. He was held to be liable only for the true value of those goods which had come into his hands. The most extensively reported of these cases is that of Vere Essex, Earl of Ardglasse v. Henry Muschamp[7] where the Lord Chancellor is reported as saying:

> "... and many precedents in the Lord Ellesmere's, Lord Bacon's and Lord Coventry's times, and since, were produced whereby it appeared, that unconscionable bargains, which had been made with young heirs, had been set aside by decree of this Court, and it appeared in this case, that at the time of the bargain the Earl was a very young man and had forsaken his wife and her friends in Ireland, and lived here in London in riot and debauchery; and for supply of his expenses had made this bargain, without the advice of any friends or counsel of his own, but relied wholly on the defendant."

The defendant was described as "his companion in those debaucheries" and the Earl as "dissolute and necessitous".

Why does the Chancellor consider these bargains to be unconscionable? An examination of Vere Essex's Case gives a fair indication. Firstly, the benefit obtained by the defendant is out of all proportion to that which he gave. It must be noted that this is not in itself sufficient for the transaction to be set aside for the courts have taken the stand that inadequacy of consideration will not in itself be a sufficient reason for the court to interfere. Secondly, the heir is young. Although a major he is likely to be inexperienced and the Chancellor did, of course, not feel himself bound to apply any fixed rules as to minority. Thirdly, the heir "for the supply of his expenses made this

bargain" - he is invariably described as being "necessitous". Fourthly it is said that he "relied wholly on the defendant". In other words not only was he inexperienced but he also placed confidence in the defendant and relied on his judgment as to the bargain. It is pointed out that he never sought any other advice.

Not all these factors, however, appeared to have been present in the cases cited above. As to "youth", there appears to be the exception of Wiseman's Case and there too it is clear that there was no lack of experience. Nevertheless the case appears to be an exceptional one. In none of the cases does there appear to have been an enquiry into whether the heir was in fact inexperienced. Subsequently Lord Hardwicke said that inexperience was presumed in these cases.[8] All are said to be "necessitous", and it would seem that the courts have always in fact found this to be so - not that it would ever have been a very difficult fact to find. Nevertheless here too we find it said in later cases that necessity is also presumed but this seems hardly correct. Finally, the last element, that of "confidence" clearly was not present in all cases.

Subsequent cases go some way towards settling this question. In Sir John Barnardiston v. Lingwood[9] it is said by the Lord Chancellor, Lord Hardwicke,

> "But can this be a fair way of purchasing an estate, to furnish a young heir with money from hand to mouth, and barely enough to buy necessaries to the life-time of his ancestor... As to the hazard which the purchaser ran, I have said before that this court have also extended their relief in such cases, and with the greatest justice in the world, for the sake of the public, to prevent people gaining as it were, to the prejudice and damage of young improvident persons, and their families."

In Lord Chesterfield v. Janssen[10] Lord Hardwicke indicates that we are dealing with a "wrong" and not with a question of capacity. The facts of this case were as follows: A, aged 30, borrowed £5,000 from B upon the security of a bond conditioned for payment of £10,000 if A survived C, his grandmother (from whom he had "expectations"), but not otherwise. Soon after C's death A executed a new bond conditioned for payment of £10,000 to B which he gave to B on B's delivering up to him the first bond to be cancelled. A survived C for less than two years and his executors filed a bill claiming to be relieved on the second bond. It was held that A's act after C's death, had amounted to a confirmation of the original transaction, and the executors were not entitled to relief. In explaining the law Lord Hardwicke said:

> "... fraud may either be dolus malus, a clear and express fraud, or fraud may arise from circumstances, and the necessity of the persons

> at the time... But this court will relieve against presumptive fraud, so equity goes further than the rule of law for there fraud must be proved, and not presumed only.
>
> To take advantage of another man's necessity, is equally bad, as taking advantage of his weakness, and in such a situation, as incapable of making the right use of his reason, as in the other... In these cases too, fraud has been constantly presumed or inferred from circumstances, and conditions of the parties, weakness and necessity on the one side, and extortion and avarice on the other, and merely from the intrinsic circumstances of the bargain."(11)

This idea of the plaintiff having not been "free" or as is sometimes said, not being "sui juris" is, as we shall see, frequently to be found in these cases and the cases based upon them. What exactly it means is very difficult to say, for instance in the subsequent case of Proof v. Hinds[12] a case not concerning a young heir - we find counsel arguing that:

> "It can never be imagined that being sui juris he would have entered into a bond by which the defendant had it within his power to throw him into gaol, and keep him there all his life, whether he had the good fortune to recover what he was suing or not... Bonds taken from young heirs, marriage-brocage bonds, though given quite voluntarily, and often too cheerfully, are set aside in this court upon the reason that the party is not a free agent, and that the free operation of the mind, which is necessary to give validity to the very act is wanting."(13)

To return to Lord Chesterfield's Case, here we see the heir is thought not to be able to make a free decision and it is presumed that the defendant knew this from the fact that the plaintiff was prepared to make such a bargain. This is the argument used by counsel for the plaintiffs for he says that the defendants in these cases had the "advantage of the necessity of the person borrowing", that because of the "exorbitant advantage" he obtained he "must have known" that the heir was necessitous. He says that, although it is not "fraud" properly so-called, "though it be not so in the particular signification of the word, yet if it be unjust, in its nature exorbitant and extravagant, this court have considered it in the nature of fraud". These transactions are "strictly legal" but nevertheless because of the circumstances the court relieves.

In the same case, however, the Master of the Rolls, Sir John Strange, took a rather different line:

> "There are many circumstances on the part of the defendant that put his case in afavourable light. There was no intention of fraud in him, the scheme came from Mr. Spencer (the heir) not from him, the money was advanced on the borrowers own terms, after it had been refused by others, and not thought a good bargain according to the rules of calculation of chances."(14)

One would think that this latter point would, in itself, have been sufficient to decide the case in the favour of the defendant. The Master, however, goes on to say that:

> "But still I think there may be cases where this court will interpose, to prevent improvident persons from ruining themselves before expectancy takes into possession, though no case of fraud or imposition appears. Every serious and considerate person must see the sad necessity there is for the courts keeping a strict hand over agreements of this sort, but then they must still depend on their particular circumstances in determination of each case."(15)

Thus it would seem that the courts set aside transactions even where no "advantage" has been taken, which would imply that we are dealing here, at least at times, with a type of incapacity. But the Master's judgment is not altogether clear and it may be that he meant no more than that such transactions would be set aside although the young heir had willingly entered into them. Actually, in spite of what Lord Hardwicke had to say, this appears more often than not to have been the case. As Hanbury says, "persons with expectations from relatives are often those who require the smallest encouragement towards entering on a career of extravagance, and are kept from doing so only by lack of present means."[16]

On the other hand it is clear that the defendant is not permitted to prove that he received the "unconscionable bargain" as a voluntary gift, apparently on the reasoning that the heir in this position could not make the "right use of his reason". His only defence is that the bargain was in fact fair. This approach is maintained during the eighteenth and nineteenth centuries.[17] It is said that the fraud here does not mean deceit, but the unconscionable use of powers arising out of the attendant circumstances and conditions, and the presumption as to its existence is raised by the relative position of the parties.[18] The presumption cannot stand unless the defendant can prove it to be fair, just and reasonable - which means that the market price has been paid.[19] The only other defence open to the defendant is that the heir had independent advice. This is, however, very strictly interpreted and the mere fact that his father or other relative on whose death he was to take had been aware, or even took part in the transaction, is not sufficient to validate it.[20] Snell suggests that such circumstances would nevertheless be material in rebutting the presumption of "oppression and extortion".[21] On the other hand, where the heir sought no assitance, the creditor's task is, as Hanbury says, converted almost into an impossibility.[22]

However difficult it may be to follow much of the reasoning in these cases, the consequences of the rule are perfectly clear. A person cannot take an unreasonable bargain from a young heir in a position of necessity. It is submitted that if this rule is viewed from the Chancellor's traditional point of view, namely the conscience of the creditor, most of the difficulties fall away. It is not a question of ascertaining the exact state of mind or capacity of the young heir nor in finding that the creditor deliberately took advantage of the heir's unfortunate position. The Chancellor's traditional approach would be to hold that the older and more experienced person who is entering into the transaction deliberately, and not under the force of any circumstances, cannot in conscience take an unreasonable profit from a young person in such a situation. It is up to him to see to it that he does not. By focusing attention upon that person's behaviour the Chancellor is not, at least in theory, altering the common law for he is recognising the legal capacity of the heir. He is simply imposing a further duty in conscience upon the creditor arising from the particular circumstances of the case. It is for the creditor to show that he has discharged this duty which means in fact that he must either have seen to it that the young heir had independent advice or that he in fact entered into a perfectly fair transaction with him. To put it another way, one might say that, as a result of the circumstances, the creditor held his de facto power in trust - not in the sense that he was bound to exercise it to the benefit of the heir but in the sense that he was under a duty not to take advantage of it. The cause of much of the confusion is that the Chancellor now, turning his back upon his former wide jurisdiction, feels compelled to explain what he is doing in the terminology of the common law and this results in the introduction of all sorts of presumptions.

Finally, one point must be noted in connection with Vere Essex's case. There we see the suggestion that confidence reposed by one person in another will be viewed in exactly the same light by the Chancellor. The person in whom confidence is reposed thereby gains a position of power which he must not abuse. As far as the Chancellor is concerned there is no difference in principle between taking advantage of another's state of necessity and taking advantage of the confidence reposed in one by another.

The Development of the Doctrine between 1700 and 1827

The development of the fiduciary doctrine during the eighteenth century is a continuous one. It is only at the end of Lord Eldon's Chancellorship that the doctrine finally takes on its modern form. This development occurs along

two lines. Firstly, those cases concerning transactions between the parties to the fiduciary relationship and, secondly, those cases concerning transactions between the fiduciary and a third party and the fiduciary's liability for "profits".

(a) Transactions between the parties to the fiduciary relationship

Holdsworth[1] cites the case of Manners v. Banning (1709)[2] as the first case in which a presumption of undue influence was found arising from the relationship between the parties. Here the Abridgement reads:

> "Lord Chancellor: A Deed made by a child to a father doth generally lie under suspicion of a Trust and a Fraud, by reason of the Authority the Father hath over the child; but neither Law nor Equity saith it is void. And this court will support it, when done upon good Consideration. Lady Grace was the Darling of her Father and he prevailed upon her to Convey the Lands to him in order to settle them upon her in his prudent Manner, to which she complied. Now such Obedience cannot produce Effects to her prejudice."(3)

Here we have many of the factors which were present in the cases of the young heirs. The daughter would appear to have been young, the Chancellor speaks of her as a "child", and she is likely to feel compelled to do as her father says. But what was merely an additional factor in Vere Essex's Case is clearly the overriding consideration here, namely, the confidence reposed by a child in her parent. It is not clear from the report whether the Chancellor actually considered the application of any presumption but it is evident that where a child has entered into a transaction with her parent believing that parent to be acting in her interests or, at least, not acting contrary to them, he will view that transaction in the same light as he viewed the transactions of the young heirs.

In the case of Proof v. Hinds (1735)[4] the Chancellor found actual imposition or undue influence. The plaintifff, an extremely poor, illiterate person, requested a tradesman to assist him in making out his pedigree and in obtaining such proof as was necessary to establish his title to a certain estate. The defendant undertook to do this and in carrying out this mandate incurred certain expenses. These he requested the plaintiff to pay, saying that he could not continue unless this were done. By this time the plaintiff was absolutely destitute and clearly felt that his only hope lay in his being able to establish a claim to the estate. The defendant, well aware of this fact, then entered into a transaction with him in terms of which he granted the plaintiff time in which to pay on condition that he entered into a bond in the sum of £1,000 in favour of the plaintiff, which sum would fall due on the recovery of

part of the estate. During the course of his judgment the Chancellor said that "(i)t was in proof in the case, that at the time he gave his bond he was in the meanest circumstances, being reduced so low as to live upon what broken scraps of meat he could get from taverns and such places". We have already mentioned the argument advanced by the plaintiff's counsel which, it will be recalled, was to the effect that in entering into this transaction he had not acted voluntarily". The Lord Chancellor, Talbot pointing to the defendant's circumstances, said:

> "... the defendant's wife presses for the money laid out, whereupon the plaintiff declares, that for the services they have done, and he hoped they would continue, he would give a bond; upon which the wife replies, he might take what time he pleased for the payment of the bond... The present case... was not intended as a bounty but as an execution of an original contract for the services already done. Had an Attorney, pending suit, taken such a bond as this upon the same transaction, would the court set it aside? or would it suffer it to stand any further than as security for what was justly and legally due? The rule that a mischief is rather to be suffered than a general inconvenience, does not at all effect this case; for it would be much greater inconvenience to leave men under difficulties and distress open to all the oppression that other people may be pleased to make them undergo. This is the reason upon which the court relieves against bonds given by young heirs and marriage-brocage bonds, and will not suffer any advantage to be taken of the extravagance in want of judgment in the one case, and the strong bias to obtain what is desired in the other."(5)

It was held that the bond was to stand as security only for so much as had actually been laid out.

Counsel had maintained that the cases of the young heirs were authority and in doing so laid stress upon the state of mind of the plaintiff. Lord Talbot, however, shifted the focus to the defendant. His act was a "mischief" and an "oppression". He too found authority in the cases of the young heirs; there it was their position of "necessity" and their youthful "extravagance" whilst here it is the defendant's "necessity" and the fact that he had relied upon the defendant to assist him. He therefore stood in much the same position as a client to his attorney pending suit. Thus we see that abuse of influence includes the misuse of the "confidence" placed by one person in another to carry out an undertaking which would extricate him from his position of necessity. Although the Chancellor made no use of a presumption in this case he clearly indicated that the court might do so in certain similar circumstances i.e. that of the attorney and client pending suit.

Two years later the even more interesting case of Walmesly v. Booth 6) came before Lord Hardwicke. Here it was sought to set aside a bond given to an attorney by his client, a certain Japhet Crook for whom he had acted in

obtaining bail. It was quite clear that Crook was very much a man of the world but was at the time in a position of some stress - he was being charged with forgery. The hint of Talbot's in Proof's case was taken up by counsel for the plaintiff (heiress of Crook). "As this person stood in no other light than attorney to Crook, he cannot entitle himself to the bond". The report makes no mention of counsel having cited any authority for this proposition. When, however, Lord Hardwicke first heard the matter he was not sympathetic for the considered Japhet Crook "was more likely to impose than to be imposed upon."[7] The case was, however, reheard and Lord Hardwicke stated that he was convinced that his former decree, dismissing the bill, was wrong. He pointed to the fact that Crook was being prosecuted at the time and the defendant was acting in order to obtain bail for him. Added to this was the fact that an attorney is an officer of the court and a "strong alliance" must exist between him and his client for, once an action has commenced, that client cannot change his attorney without leave of the court. Therefore there is a "great obligation upon the attorney to take care of his client's interests". He found that Crook was at the time in a position of "distress" and "whilst (he) was in this deplorable condition" the bond was obtained. Thus the case could be compared to "the defrauding of young and improvident heirs where the court relieves upon general principles of mischief to the public, without requiring particular evidence of actual imposition upon them, as they are cases of general concern, they also give relief because the circumstances and situation of the young persons at the time of the agreement make them extremely liable to imposition".[8] He then went on to state the general principle.

> "What is the general rule the court goes upon? why, the person being in such circumstances that nobody might take advantage of him, and here the court will not allow A anymore than B to get an illegal benefit to himself... I think the case is stronger between attorneys and their clients, than any of the cases that it has been compared with by counsel.. (because of) the great power and influence that an attorney has over his client."(9)

He found that the bond bore no relation to the fees the defendant was entitled to charge and accordingly set it aside.

Thus in the cases of the young heirs we had advantage taken of a young and inexperienced person in a state of necessity, then in Proof's Case the defendant had taken advantage of the confidence placed in him by an ignorant and necessitous person and now we have advantage taken of the confidence of a person in necessity. Moreover, not only are the factors of youth and

ignorance no longer essential but we also see an increasing stress laid upon the undertaking which gave rise to the confidence. There is a "great obligation on the attorney to take care of his client's interests".

In the case of Young v. Peachy[10] (1741) a father had obtained an absolute conveyance from his daughter in order to achieve a particular purpose but subsequently made use of it for a totally different purpose.[11] The court held this to be a fraud but, by way of obiter, the Chancellor went on to say:

> "But the case is greatly strengthened when it comes to be considered that there is a recovery obtained by a father from his child, and when that is the case, it affords another strong circumstance, in order to relieve the plaintiff. In the case of Glissen and Ogden before Lord Chancellor King, that circumstance was strongly relied upon, but his Lordship refused to give relief... upon appeal, the Lords laid great weight upon the circumstance, that the conveyance was obtained by a father from his daughter in distress, and the decree of Lord King was reversed."(12)

His Lordship clearly approved of the decision of the House of Lords. Again there the element of "necessity" was stated but in Young's Case there appears to have been none and the view of Lord Hardwicke may be seen as a further stage in the development of the idea that the relationship itself, without such further requirements as necessity or inexperience, places the one party in a position of power and therefore renders such transactions voidable. We see this development taken a step further as regards the attorney-client relationship in the case of Saunderson v. Glass[13] (1742). A solicitor claimed that his client had made an absolute conveyance to him of £1,000 during her lifetime. The Chancellor found that the attorney had in fact "done acts of kindness privately for Lady Saunderson" but nevertheless held:

> "... but at the same time he was her attorney, and in that capacity was it not his duty to let her know the absurdity of the act she was doing? ... an attorney, whilst he is doing business for his client, or whilst cause is pending, appears to this court in quite different light than between two common persons; for if an attorney, pendente lite, prevails upon a client to agree to an exorbitant reward, the court will either set it aside entirely or reduce it to the standard of those fees to which he is properly entitled, and this was the rule that weighed with me in Walmesly v. Booth, and if the Court did not observe such a rule, it would expose clients very much to the artifices of attorneys especially femme coverts who are in Lady Saunderson's unfortunate circumstances."(14)

He then went on to say that this case was "directly conformable" with the reasoning of Talbot in Proof v. Hinds. In fact, however, the case is very different from either Proof's Case or Walmesly's Case for there the Chancellor

had spoken of unconscionable bargains made by attorneys with their clients when in a state of necessity and pendente lite. Lady Saunderson was not in a state of necessity in any true sense, she had made a gift of £1,000 to her attorney for the general administration which he had exercised over her affairs. Thus we see the relationship itself is almost, but perhaps not quite, the sole relevant factor. A client places confidence in his attorney to act in his, the client's, interests and the attorney must not abuse this confidence by making use of it to obtain an advantage for himself. This comes very close to enforcing the contract itself and this is particularly noticeable when one considers the Chancellor's statement that "... at the same time he was her attorney, and in that capacity was it not his duty to let her know the absurdity of the act she was doing?"

Some time between Proof's Case and the case of Cary v. Mansfield[15] (1749) the unreported case of Pierce v. Waring[16] was decided. Here a ward, on attaining majority, made a gift to his guardian of East India Stock in the value of £3,000. It was accepted that the gift had been made quite voluntarily for the kindness shown to him by his guardian who had cared for him after the death of his parents. Although there was no trace of imposition and although the ward had made no attempt to have the transaction set aside during his life time, the Chancellor set aside the transaction on the application of the representatives of his estate. In Cary's Case counsel stated that "The Lord Chancellor set it aside upon general principle... that it was a consideration for which he would allow nothing in this court; that it was a dangerous example, that he would not endure a gift to be obtained on these circumstances after the coming of age." Counsel went on to say that "If the court was to suffer a guardian to take such advantage of his pupil as in Pierce v. Waring, it would destroy the confidence (necessary in such a relationship)."[17]

Here there is no question of necessity or imposition of any kind, the rule is simply stated as being that a guardian cannot take. He may not accept a reward for his services, at least not immediately after their termination. It is thus clear that the type of influence arising from such a relationship is wholly immaterial - it is immaterial whether the benefit was obtained from the wrongful use of influence or not. The guardian is in a position of trust and, as such, a duty is placed upon him to see that he obtains no advantage from his ward as a result of such position.

The facts in the case of Whelpdale v. Cookson[18] (1747) were different from those in the abovementioned cases. A trustee for creditors had arranged for the sale by public auction of certain of the trust assets. At the sale a

person acting on his behalf purchased certain of them for him. A bill was filed by one of the creditors to set aside this sale and the Chancellor held that he "... would not allow it to stand good, although another person being the highest bidder bought it for him at a public sale, for he knew the dangerous consequence, nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it..." He then went on to say, however, that if the majority of the creditors agreed to allow it, he should not be "afraid of making the precedent".[19] What is of particular interest here is the fact that the Chancellor saw no connection between this case and the principles applied in the cases we have already considered. It is submitted that he is, in principle, correct in not doing so for the rule here is not one relating to the unconscionable use of a power or confidence but is rather a rule preventing a person administering the affairs of others from acting in his own interests when doing so - regardless of the fairness or unfairness of the transaction. We shall see that, with the development of the fiduciary doctrine, this rule ceases to be seen as based upon a principle of its own".[20]

In the case of Cary v. Mansfield[21] (1749) the development of the doctrine concerning relationships which give rise to influence is taken a step further. The defendant had been the steward or agent to the plaintiff's father. After the father's death, he was appointed receiver of the infant's estate under an order of court. On coming of age, the plaintiff executed a deed in the defendant's favour and this he subsequently sought to have set aside. The Master of the Rolls found that there had been no imposition, no misrepresentation or fraud. Nevertheless he held that:

> "But there is another proper head of equity for the consideration of this court, which will always hold a very strict hand over all deeds, purchases and conveyances obtained from young gentlemen soon after coming of age by persons presuming too much on the confidence reposed in them, and drawing them to executed deeds... Although no fraud, and the plaintiffnot imposed on by having a deed put into his hands of which he was not appraised, yet it was certainly very imprudent and dangerous to be suffered, that the person who is to take the benefit of this grant, and who had that relation to the plaintiff should not out of reasonable caution have advised the plaintiff to lay this deed before some common friend or third person."(22)

Thus confidence arising from a relationship where the one party acts for the benefit of the other is treated in exactly the same way as was the state of necessity of the young heirs. It was the defendant's duty to see to it that he did not take advantage of the confidence repbsed in him by the plaintiff and this should be done by seeing to it that the advice of a third party is

obtained. Of course, we still here have the element of youth but as we have seen this element is becoming less and less important and eventually falls away altogether in the case of certain relationships.

In the case of Griby v. Cox [23] (1750) it was alleged that a husband had purchased certain assets of his wife's separate estate by exerting undue influence over her. Lord Hardwicke, however, found that on the facts there had been no such proper influence but added, by way of obiter, that "(i)f there is any proof that the husband had any improper influence over the wife... by ill- or even extraordinary good usage, to induce her to do it, the Court might set it aside". This case has therefore been considered to lay down the rule, which still exists in English law, [24] that the husband and wife relationship is not a fiduciary one. [25] What is interesting here, however, is the fact that we again see that it is not wrongful influence that concerns the Chancellor but rather the use of any influence to obtain some benefit which would not have been obtained but for that influence. As has been said if one considers the influence as being held in trust the approach of the Chancellor becomes readily understandable. This point must be stressed because from now on we hear much talk of "rebuttable presumptions". This is the terminology of the common law and, usually, when applied in equity, leads to some very curious reasoning. Thus we find the Chancellor frequently saying that although he can find no imposition, the defendant has not proved that the plaintiff received independent advice and therefore as the relationship in which the parties stood gave rise to a presumption of undue influence, the transaction must be set aside.

We have seen how the fiduciary relationship between attorney and client was developed via an intermediate stage where, apart from the relationship itself, there existed the additional factors of ignorance and necessity. In Hylton v. Hylton [26] (1754) we find the same process taking place in the cestui que trust-trustee relationship. Here a gift of an annuity to a guardian or trustee soon after the coming of age of the ward was set aside. Counsel compared the case with that of a gift to an attorney pending suit. [27] In setting aside the gift the Chancellor said:

> "Where a man acts as a guardian, or trustee in the nature of a guardian, for an infant, the court is extremely watchful to prevent that person taking any advantage immediately upon his ward or cestui que trust coming of age, and at the time of settling account or delivering up the trust; because an undue advantage may be taken. It would give an opportunity either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take advantage, and therefore the principle of the court is of the same nature with relief in this court on the head of public utility, as bonds obtained from young

> heirs, and rewards given to an attorney pending a cause and marriage-brocage bonds. ...the court will not suffer it, though perhaps in a particular instance there may not be actual unfairness... Undoubtedly, if after the ward or cestui que trust comes of age, and after he is actually put into possession of the estate, he thinks fit, when sui juris and at liberty, to grant that or any other reasonable grant by way of reward for care and trouble, when done with eyes open, the court could never set that aside: but the court guards against doing it at the very time of accounting and delivering up the estate,... for the court will not suffer them to make that the terms of doing their duty."(28)

It is interesting to note that "public utility" is now ousting "conscience" as the guiding principle of the Chancellor. What is of more importance, however, is that although the Chancellor speaks of the trustee-cestui que trust relationship he is actually dealing with a case where the cestui que trust had only recently come of age. Nevertheless, this case comes to be cited as authority for the proposition that the relationship itself, regardless of the age of the cestui que trust, renders such contracts voidable.[29)]

As we have seen, with the development of Chancery as a court of law, the Court has come to define those situations which will give rise to duties requiring a person to do something and these situations are usually expressed in terms of factual relationships. On the other hand, this was not possible where equity gave redress for wrongful acts and here, throughout the eighteenth century, the court maintained a wide discretion. Although the definition of those factual situations giving rise to positive duties had the effect of rendering the court's jurisdiction somewhat less arbitrary, more than this was clearly required. A court of law must work upon general principles or it will be compelled to legislate. Lord Hardwicke made a determined bid to fill the gap left by the abandonment of the principle of "conscience" with the concept of "public policy" but this was doomed to failure. In truth this is hardly a principle at all and rather serves to underline that the court is in fact legislating.

The problem, therefore, with which the court is faced is that of grounding its jurisdiction in regard to these personal rights and duties upon general principles. Firstly, it must replace its wide discretion in regard to "wrongs" with rules defining those wrongs for which it will grant redress. Secondly, it must explain why it enforces positive duties in terms of a general principle. The former gives rise to the concept of "undue influence". The latter problem, however, is far more difficult to solve, especially if one bears in mind that the court has no jurisdiction to enforce contracts. For the purposes of this discussion these duties may be divided into two groups. Firstly, there are those

cases where the court places a duty upon certain persons to see to it that they do not take an advantage from certain other persons who the court considers might, in the circumstances, act, either knowingly or unknowingly, to their own prejudice. In the past the Chancellor might have considered it unconscionable for the one party to take such an advantage without first ensuring that the other had received every protection possible. In fact no question of tort arises here. If the advantage is taken without the necessary protection having been thrown around the person from whom the advantage is obtained, the transaction is voidable irrespective of the intention of the person receiving the advantage. Thus, for example, a guardian cannot accept a gift from a grateful ward without first ensuring that he had been independently advised. This class of case therefore covers persons who are considered for one reason or another to be in a weak position and includes those cases of "confidence" which, although they do not arise from an undertaking, the Chancellor considers, because of the youth, inexperience or ignorance of the person placing it, should be respected by he in whom it is placed. The second class of cases arises where a person places confidence in another who has undertaken to act in his interests. This class of case is, as we have seen, beginning to emerge from the abovementioned class. We have not as yet, however, met with a case devoid of at least some element of the first mentioned class i.e. without some element of weakness.

The former class of cases are clearly duties of "conscience" in the true sense of the word. Now that that principle has been abandoned it is very difficult to see how they can be included within one or more general principles without changing the common law rules was to capacity. This is avoided by holding that in these cases there is a "presumption" of "undue influence" which may be rebutted by proof of the fulfilment of these duties. Of course, this is merely a justification for enforcing these duties and can be seen from the fact that although a court may find no actual imposition it will nevertheless set the transaction aside unless these duties have been performed. The constant use of this presumption, however, has the rather unfortunate effect of rendering a definition of undue influence impossible. The moment it is defined as a type of wrongful act one is faced with a problem that it cannot be this that is presumed. When the second class of case emerges from the first class of case, and is for many years dealt with on the same principles, the natural tendency is to use this presumption to explain these duties. As absurd as it might be to consider that there can be a presumption of undue influence existing between the parties here this tendency, as we shall see, has been very strong. In the case of Bridgeman v. Green [30] (1757) we find the court attempting, in a very hesitant way, to

explain its general principle as to these types of wrong and the connection between this principle and the enforcement of these positive duties. Here Wilmot L.C. says:

> "Where the giver is a weak man, of facile easy temper, liable to be imposed upon, the court will look upon such a gift with a very jealous eye, and very strictly examine the conduct and behaviour of persons in whose favour it is made; if it see that any arts or stratagems or any undue means have been used by them to procure such a gift, if it sees the least speck of imposition at the bottom or that the donee is in such a situation of influence over him, or if there is the slightest scintilla of fraud, in such a case the court will and ought to interpose and by the exertion of such a jurisdiction they are so far from infringing the right of alienation, which is the inseparable incident to property that it acts upon the principles of securing the full, ample and uninfluenced enjoyment of it."(31)

It is interesting to see, however, that at this time the old principle of conscience has certainly not been completely ousted.

In Carpenter v. Heriot [32](1759) a bond made by a child on coming of age in favour of his father was set aside as having been obtained by parental influence. The rule was explained thus; "But then, it is said, suppose the bond without consideration and voluntary, this court will not set it aside... But if a man gives volutary bond for more than he is able to pay, the transaction speaks of weakness on the one side, and a sort of imposition on the other. And this court would have little equity to support a transaction so much against conscience."[33]

The case of Norton v. Relly [34] (1764) concerned the actual wrongful influence exercised by one person over another. Here a religious preacher induced an elderly lady to settle an annuity on him. In setting this aside Lord Thurlow said that this "is the first of the kind that ever came before this court" and that."(t)his court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree... it has a conscience to relieve". He found that the defendant had "intoxicated " her with his doctrines and "with his madness and enthusism" and that he had then taken advantage of this to obtain the benefit from her. There is no mention of any presumption nor of a special relationship. It is this type of case that now comes to be seen as typifying the wrong of "undue influence" although, as we shall see, undue influence has never been considered to include only those cases where one person has been able to dominate the other. It is impossible to leave the case without quoting the Chancellor's final remarks, "I cannot conclude without observing, that one counsel, with

some ingenuity, tried to shelter him under the denomination of an independent preacher: I have tried, in the decree I have made, to spoil his independency".

In Welles v. Middleton [35] (1784) we find the court setting aside a transaction between an attorney and his client on the grounds of the relationship in which they stood to one another. In other words no additional factors are required such as ignorance, inexperience, youth, necessity or that the transaction had taken place pendente lite. The head note of the case reads:

> A court of equity upon general principles of policy will set aside any gift made by a client to an attorney during the time when the attorney has in his hands the transaction of the client's affairs, without any proof of actual fraud.

The bill had been brought by the heirs at law and next-of-kin of a certain John Wilcox to set aside certain deeds as being obtained by the defendant from him by "fraud and imposition". These were, however, never proved, the court setting the transaction aside on the grounds of the relationship that existed between the parties. The Lord Chancellor stated the law as follows:

> "There are many instances where the court is obliged to act for the preservation of mankind. The presumptions arising must at least be refuted by the strongest evidence, but I am not satisfied at this moment it will bear any refutation. The case of Woodhouse v. Shipley, (36) was of this kind, and could not permit a marriage to be the foundation of such a contract. What is the case of expectant children anticipating gifts by sales? They go upon general ideas. So the cases of trustees and guardians, so of attorneys. The case of Pierce v. Waring for instance. The court would not have set aside the gift in that case, but because it was a pernicious thing that a man who had the relation of guardian, and the confidence that relation derives to him, should avail himself of the habits of intimacy and influence (the true honest and just influence as it is in itself) might have in the mind of an infant or child coming of age, to obtain from him a gift of that kind. In the case of attorneys, it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. And there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it was not so: but once extricate him, and it may be otherwise. The case of Proof v. Hinds is in this point: and though it was said that there were other considerations in that case, it was decided entirely on the general principle." (37)

The court is going considerably further than the authority it cites for Proof's Case was found on the facts and, even when Talbot suggested that the courts might go further than this, he never went so far as to say that they would set aside a transaction only on the grounds of the relationship. Pierce's Case was, of course, better authority but there the relationship is, as such, between persons of unequal experience (guardian and ward).

Fox v. Mackreth[38] (1788) must surely be the most interesting case of the eighteenth century in relation to the fiduciary doctrine. Here the trustee of an estate for the payment of debts had purchased certain property of the estate from the cestui que trust and, immediately thereafter, had re-sold it at a highly advanced price. Even while negotiating with his cestui que trust he had already begun negotiations for the resale of the property. When the matter was heard before the Master of the Rolls it was argued that the trustee was not accountable for the profit he had made as "... the case does not fall under any of the heads of fraud". The Master of the Rolls, however, held that it did, "... that it was a transaction as could not be meaintained but that it did fall within the cases of young men having estates in possession and in reversion, and dealing with a man of business, and of advantage taken of his distress, except that this case had the pre-eminence, as being a case where confidence had been so much abused." He therefore decided that the trustee must hold the profit in trust for his cestui que trust.

On appeal from this decision, the Chancellor, Lord Thurlow, stated that this was the first time such a case had come before Chancery. He considered that the point was one of exceptional complexity, and this especially in view of the fact that any ruling he might make would have considerable effect on the general transactions of business men. He said that, for example, if a purchaser of property knew that there was a valuable mine on the property he would not be under any duty to disclose this and therefore in the present case:

> "It is...essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but that it must arise from some obligation in the party to make discovery. The court will not correct a contract, merely because a man of nice honour would have not entered into it; it must fall within some definition of fraud. The rule must be drawn so as not to affect the general transactions of mankind... In the first place, I must find the value of the estate to be the sum of which it was sold to Page (the person who purchased from the trustee), for it would be in vain to argue that there was any confidence reposed in Mackreth, or fraud committed by him, if no loss accrued to Fox... (and if not that value) that does not make an end of the matter, unless the advantage was procured by some of those frauds which the court has taken notice of..."(39)

He then went on to say that:

> "...whenever a trustee gains intelligence as a trustee and a servant to the cestui que trust and conceals the circumstances he so gains knowledge of from the cestui que trust, he may have the hands of a court of justice laid upon him for fraud."(40)

By this Lord Thurlow clearly meant a trustee who was, at the time he purchased from his cestui que trust, purporting to make the purchase in the interests of his cestui que trust or, at least, not against them - in other words, he had not previously terminated the trustee-cestui que trust relationship or, at least, a relationship of "confidence" remained.

> "The question arising on this is whether the character of trustee shall vary Mackreth from a stranger; for it is not argued that in the case of a stranger treating in the same manner, the transaction must be cut down. If a trustee treat with a stranger as a trustee for himself ever so fairly, the vendee would be a trustee for the first cestui que trust, and the court will not consider whether the consideration was fair or not, which must be by reason of the confidence which the accident of their relation introduced, then the question is, whether, I can find, as a juryman, that Fox agreed to the proposal in confidence of Mackreth's knowledge and integrity. If a stranger had said to Fox, I will deal fairly with you, and afterwards misrepresented the value, I should hold that to be an abuse of a confidence which he was bound to observe. Was that the case here? I confess I am in doubt, I do not see that I have facts upon which to draw that inference. But if Mackreth had not the confidence of trustee, he might retain that of confidential friend. I am at a loss to find that. They seem to have dealt as men usually do, each endeavouring to represent the case as best for his own interests."(41)

The first question is therefore whether, at the time of the original purchase, the trustee-cestui que trust relationship existed. The Chancellor then went on to say that if this was found to be so then the question depended upon whether or not the trustee had paid the cestui que trust a true value of the property. If that was so the cestui que trust cannot claim any profit made by the trustee on his subsequent resale of the property. He pointed out here that it would be unreasonable to hold a trustee accountable for any profit he might make years later when the value of the property might have increased. He accordingly adjourned the case, saying that he would direct an enquiry to be made as to the "real value" of the estate. Cox, in his report of the case, notes that "His Lordship, however, did not direct any such enquiries, but after a lapse of considerable time affirmed the decree, saying, that he had considered the case very much and he could not see that his Honour's decree was wrong." The reporter of the subsequent proceedings in the House of Lords[42] gives Lord Thurlow the benefit of the doubt for he says "Lord Thurlow had considerable difficulty in making up his mind in this case." This report simply states that the House confirmed that Master's decree, no speeches being reported.

Thus the decision was based upon "abuse of confidence". The House of Lords' reporter says that this is "a general feature in all contracts between usurious money-lenders and distressed extravagant young men of fashion". This

is probably not wholly accurate but it is nevertheless clear that the Chancello looked to those cases for authority. There a person was forbidden in equity to exercise a de facto power to the detriment of the other party. This power did not arise out of the relationship itself and its "wrongful" use was therefore not a breach of the relationship. Thus, too, where an attorney took advantage of the fact that his client was in a state of distress and was dependent upon him to relieve him of this distress (the pendente lite situation) the attorney's wrongful act was not itself a breach of the relationship which was, of course, to act for him in a particular matter. Of course he could in truth be said to have "abused" this relationship but in no sense can it be said that, when ensuring that he does not do so, the court is enforcing his undertaking. This is, howeve not so where the attorney has a general duty to administer and it was not the situation in Fox's Case. Here we are dealing with the question of whether or not the defendant was, at the time, under a duty to act for the plaintiff. If he was, then the courts are seeking to enforce this duty.

One would think that, if the defendant had purported to be acting in the interests of his cestui que trust at the time he entered into the transaction with him and had said "it is in your interests to sell this property to me because I will be paying you a higher price than can be obtained for it", then, although he was not, as trustee, purporting to sell the property to himself, he was clearly acting fraudulently. What is more he would be acting in breach of his undertaking. On the other hand, if he had severed the relationship, if he had said "I wish to buy this property and therefore cannot act for you in connection with its sale" and had then proceeded to purchase the property from the cestui que trust, both parties acting in their own interests and both parties aware of this fact, then the question is whether he ought to have disclosed the fact that there was a purchaser willing to pay a higher price. If he had acquired this information whilst acting as trustee he was clearly under a duty to inform his cestui que trust of it and therefore it would be absurd to suggest that he could release himself from this duty by simply terminating the relationship.

As we have seen, however, this was not the approach of the Master of the Rolls. Although the Chancellor's reasoning is certainly far better than the Master's, he too sees the case as being analogous to the cases of the young heirs. Both consider that the trustee had "abused" his relationship by misusing the power he had acquired as a result of that relationship.

The case of Killick v. Flexney[43] (1792) concerned the sale of trust assets by the trustee to himself. The Lords Commissioners, before whom the case was heard, made no reference to Whelpdale's Case - indeed they appear to

have though that there was no authority on the point. Lord Commissioner Eyre said that "(t)he defendant has conducted himself grossly in selling out the funds, but if I am pressed to declare him a trustee for the plaintiff, of the lease and renewed lease, and tenant at will of the farm, I must pause a little. The defendant, as executor, not only had a right to sell the stock upon the farm, and assign the farm, and discontinue the cultivation of it on account of the infant, but it was his duty to do so; he has sold it to himself, and charged his own price, but shall he therefore be a trustee for the infant, for whom he could not, without breach of trust, have held it; or shall he not rather be bound by the sale and account for the true value to be settled by the Master?"[44] Lord Commissioner Wilson considered that "(t)he defendant, as executor, was not compelled to carry on the farm for the infant, but having carried it on, he cannot say that he did not carry it on as trustee".[45] Finally, the court came to the conclusion that "the defendant was to be considered a trustee for the infant." Thus it is clear that the court came to the conclusion that such a sale is either void or voidable but we are told no more. What is of particular interest here is the statement that the defendant had the "right" to sell the farm. This is the traditional approach of equity based on the reasoning that conscience will not permit a person to exercise his rights in a manner contrary to the "confidence" reposed in him.

In Newman v. Payne[46](1793) the general rule in regard to the attorney-client relationship was again stated. It is the relationship itself which gives rise to the power of influence and the court goes so far as to say that even if the client was, due to other circumstances, in a position which rendered him liable to be imposed upon, this fact would be irrelevant once the attorney and client relationship had been established. Here a gift from a client to his attorney of certain securities was set aside on the grounds that there are:

> "... peculiar restraints on attorneys, and they are not to deal with their clients upon exactly the same terms, upon which men at large may deal with each other. They are considered officers of the court ... I do not mean to press upon the difficulties in which Newman was involved, and the consequent influence, which a person transacting all his business (for it was a general management) and supplying him with money from time to time, must have gained over him... it is clearly held without any contradiction, that there can be no valid security for a gift between attorney and client in the course of business. Proof v. Hinds was not a case actually of an attorney, but of a person officiously interposing: but the opinion of Lord Hardwicke in Walmesly v. Booth is distinct, and is the more authority, as the bill was first dismissed, and though it was the case of Japhet Crook, who was more likely to impose than be imposed upon, yet he might be imposed on and Lord Hardwicke thought, that at all events it was impossible for the

court to suffer a bond by a client to an attorney in the course of their affairs and dealings... It is laid down in the whole of it upon the necessary restraint, under which the court must put those who, as officers of the court, are the persons, to whom the clients must apply, that no advantage be taken by persons in these situations".(47)

Thus such factors as ignorance, and necessity are actually rejected as being relevant and yet it is still "undue influence" that is the concern of the court. Nevertheless it is clear that the duty of the attorney to act in the interests of his client is becoming the most important factor.

In the same year the case of Massey v. Davies[48] (1784) came before the Vice-Chancellor. The defendant had been employed as an agent by partnership A and was a member of partnership B. In his capacity as agent he purchased timber from partnership B for partnership A. The action was brought by the latter for the profits he had made as a result of these transactions. It was held that he must account, the Vice-Chancellor saying:

"When a man undertakes to buy from me in the most beneficial manner, what my colliery shall want, can it be possible, that I can trust him to sell those articles to me himself? The clearest evidence is necessary to show consent... He has secretly gone into partnership, and bought from his partner and himself timber, which he has supplied to his employers, and he has made a profit, that is made in breach of his trust, and must be refunded from his pocket."(49)

There are in fact two principles involved here. Firstly, the defendant's failure to carry out his duty to do the best he could for his employers and secondly, the question whether such transactions are not voidable in any event because the agent sold to himself. The court, however, treats them as one, basing its decision upon the rule that an agent must account for profits made during the course of his agency. We shall see that the English courts have maintained this approach and they have done so because, if rescission is not asked for, this is the only other remedy available in Chancery in these circumstances.

In Whichote v. Lawrence[50] (1798) we have again the case of a trustee selling to himself. Lord Loughborough held:

"I do not recollect any case, in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. It would be difficult for such a case to occur; for unless advantage is made, the act of purchasing will never be questioned. The rule is laid down not very correctly in most cases, where you find it. It is stated as a proposition, that a trustee cannot buy from the cestuy que trust... the real sense of the proposition... (is) that he who undertakes to act for another in any matter, shall not in the same matter

act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest that total absence of temptation, that duty imposes upon him, that he shall gain no profit. The consequence is beyond doubt that, in whatev shape the profit redounds to him, whether by management, which is the common cause, or by superior good fortune, it is not fit, that benefit sha remain to him. It ought to be communicated to those, whose interests be under his care, offered him the means of gaining that advantage."(51)

This decision is, in many ways, unsatisfactory. To hold that a trustee may s to himself but must account for any profit made can only make sense if "profit" here in fact means damages. To say, as Lord Loughborough does, that where such a sale has taken place the trustee is accountable to his cestui que trust fo any profit he may ever make from that property is not only contrary to princip but is in fact absurd. What is of particular interest, however, is that the Chancellor gives a clear reason as to why such transactions are suspect, nam the trustees purporting to act both for his cestui que trust and for himself in a situation of conflicting interests. In the subsequent case of Campbell v. Walk (1800) it is held that such transactions are voidable, it being said that "... a trustee to seal cannot be the purchaser, but, however fair the transaction, it must be subject to an option of the cestui que trust, if he comes in a reasonabl time, to have a resale, unless the trustee, to prevent that, purchases under an application to court". Here, however, a different reason is given for the rule for it is said that "... the reason for the rule is that no man shall sell to himself: a case, in which it is impossible for the court to know, that he did no do all he ought to have done".(53)

It is said that in Lord Eldon's Chancellorship equity took on its modern form. This is particularly true of many of the principles of the fiduciary doctrine. In a series of celebrated judgments, Lord Eldon set out to formula these rules in terms of rational, legal principles. These judgments are of great interest for, not only did they establish many of the principles of the modern fiduciary doctrine - after 150 years they are still fairly frequently cited - but also we see in them many clear statements of the reasoning applied in their formulation.

In Gibson v. Jeyes[54](1801) the defendant, an attorney, had purchased an annuity from his client. Lord Eldon stated the general rule thus:

"I do not mean to contradict the cases of trustees buying from their cestu que trust: but the relation between the parties must be changed: that is, the confidence in the party, the trustee or attorney, must be withdrawn. That is the principle of the case of a trustee buying for himself... An attorney buying from his client can never support it; unless he can

> prove that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for the vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being suppressed, putting fraud and incapacity out of the question, which advantage with due diligence he would have prevented another person from getting, a contract under these circumstances shall not stand. The principle, so stated may bear hard in a particular case: but I must lay down a general principle, that will apply to all cases; and I know none short of that if an attorney of the vendor is to be admitted to a bargain for his own interest, which it is his duty to advise the client against himself... But from the general danger the court must hold, that if the attorney does mix himself with the character of the vendor he must show to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain. Therefore without imputing fraud, a general principle of public policy makes it impossible that this bargain can stand... It has been truly said, an attorney is not incapable of contracting with his client... A trustee may also deal with his cestui que trust, but the relation must in some way be dissolved: or, if not, the parties must be put so much at arms length, that they agree to take on the characters of purchaser and vendor; and you must examine whether all the duties of those characters have been performed."(55)

In the South African case of Armitage's Trustees v. Allison,[56] Dove-Wilson J.P. cited this passage with approval. In Preller & Others v. Jordaan,[57] however, Van den Heever J.A. said "Hierdie stelling skok my sin vir billikheid."[58] The difficulty is that his Lordship appears to say, on the one hand, that an attorney or trustee may enter into such a contract provided he dissolves the relationship and, on the other, that even if he does so he must nevertheless continue to do everything in his power for his client or cestui que trust. Why is this so? His Lordship then goes on to explain.

> "... An issue was pressed whether Fox had not received enough for the estate, though Mackreth had sold it for more; but the question was not upon the fact, whether the price paid to Fox was sufficient; but upon the principle, whether under the circumstances, if Mackreth had made more, he had disentangled himself from that situation, in which every benefit made by him was to result to the cestui que trust. The only fact was, whether he was disentangled from the situation. The moment it was decided that he was not, it did not signify, whether the estate was sold upon fair terms between him and Fox, for even a benefit arising by accident upon the principles of this Court should accrue to the plaintiff." (59)

If the relationship between a trustee and his cestui que trust is found to have not been dissolved then, of course, the trustee must account for all profits and the same rule would apply to the attorney. But the case in question is not this. It is the situation where the attorney does purport to dissolve the relationship and we shall see that Lord Eldon does not in fact apply the above-

stated rule.

> "With respect to the case of an attorney, I have no difficulty in saying, Jeyes might have dealt for his annuity: but he had two ways of proceeding... If she (the client) proposed to him to buy it, he would have done well to have said to her, that Gibson would give more than any one else ... (But) suppose, she had insisted, that he should be the person: it would be too much for the Court to proceed upon delicacies, such as these, and to say, he should not permit himself to contract with her. Therefore, I say, he might contract but then he should have said if he was to deal with her for this, she must go to another attorney to advise her as to the value: or, if she would not, then out of that state of circumstances this clear duty results from the rule of this Court, and throws upon him the whole onus of the case; that if he mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes into question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found. I answer that great rule of this Court, that he, who bargains in a matter of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence, a rule applying to trustee, attorneys or any one else."(60)

Thus we see that difficulty in understanding this rule only arises if one fails to take into account the fact that "confidence", although it includes the case of the "confidence" placed by one party in another to carry out his undertaking ("positive confidence"), also includes THE "confidence" arising out of such a contractual relationship ("negative confidence"). Thus when the attorney terminates the contractual relationship he must nevertheless see to it that he does not take advantage of that confidence arising out of the relationship. This latter type of confidence requires him either to see to it that the client receives independent advice or, if she will not, requires him to pay a fair price for under no circumstances will he be permitted to take advantage of it. This rather anomalous position has arisen from the fact that in the former type of confidence it matters not whether the client is weak, necessitous, inexperienced etc. for what we have here is in fact the breach of an undertaking. Such factors were, however, of the essence of the latter type of confidence for it was their presence that led the Chancellor to place duties on the person possessing such confidence not to abuse it. Because these factors are not required in the "contractual" confidence they have come to be abandoned altogether where such a relationship exists and the relationship itself is seen as giving rise to a position of de facto power. Thus in these "contractual" relationships, we appear to have the worst of both worlds. Undertakings are enforced on a delictual principle on the notion that their breach is an abuse of a factual power and a single principle is forged by holding this relationship, itself, gives rise to a further power - i.e."weakness"

on the part of the beneficiary is never required.

In the case of Ex parte Lacey[61] (1802) Lord Eldon considered the principles relating to the "positive-confidence" aspect of this concept.

> "The rule I take to be this, not that a trustee cannot buy from his cestui que trust, but that he shall not buy from himself. If a trustee will so deal with his cestui que trust, that the amount of the transaction shakes off the obligation, that attaches upon him as trustee, then he may buy... The rule is this. A trustee, who is entrusted to sell and manage for another, undertakes in the same moment, in which he becomes trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those, who have entrusted him. It does not preclude him from bargaining that he will no longer act as trustee. The cestui que trust may by a new contract dismiss him from that character: but even then that transaction, by which they dismiss him, must according to the rules of this court be watched with infinite and the most guarded jealousy, and for this reason, that the court supposes him to have acquired all the knowledge a trustee may acquire, which may be useful to him, but the communication of which to the cestui que trust the court can never be sure he has made, when entering into the new contract, by which he is discharged. I disfavour that interpretation of Lord Rosslyn's doctrine, that the trustee must make advantage. I say, whether he makes advantage, or not, if the connection does not appear to have been dissolved, it is the choice of the cestui que trust whether they will take back the property, or not, if the trustee has made no advantage. It is founded upon this, that though you may see in a particular case, that he has made no advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court, by which I mean, in the power of the parties, in ninety nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate and by the knowledge acquired in that character discovers a valuable coal mine under it, and locking that up in his own breast enters into a contract with the cestui que trust if he chooses to deny it, how can the court try that against that denial? The probability is, that a trustee, who has once conceived such a purpose, will never disclose it, and the cestui que trust will be effectually defrauded."(62)

Arguing thus, Lord Eldon went on to say that Whelpdale v. Cookson was therefore wrongly decided.

Here we have a clear statement of the "positive" aspect of "confidence". It is interesting to note that it is approached, even when it is recognised to arise from an undertaking, from a negative point of view; the person who undertakes to manage the affairs of another "undertakes in the same moment, ... not to manage for the benefit and advantage of himself..." It is because this duty has been approached via delict, Lord Eldon approaches it from the point of view of an undertaking not to do something.

Once again there is confusion as to whether or not advantage must be taken. We are first told that the "(a)mount of the transaction must shake off the obligation" but then the requirement of advantage as stated in Whichote's

Case is denied. The rule is again stated to be that if the relationship is not properly dissolved the trustee remains trustee and profits accordingly accrue to the cestui que trust. The reason for this is that, if the relationship is not properly terminated, profits accrue because it is more often than not impossible to know whether full disclosure has been made. As disclosure is required for the termination of the relationship, this explanation is obviously absurd. The example of the undisclosed coal mine only serves to emphasise this.

Although it is clearly impossible thus to analyse the judgment too vigorously, it does seem clear that, inconsistencies apart, Lord Eldon felt, as we have seen in Jeyes' Case, that where a person has a positive duty to act in the interests of another he cannot act in his own interests at all, regardless of whether or not in doing so he is actually taking advantage of the other. Thus the sale by a trustee to himself is void. Thus too, unless the relationship is properly severed, the trustee cannot purchase from the cestui que trust. Leaving aside the reasons given for this principle - which appear to deny that such a relationship can ever be terminated - this is obviously sound.

In Ex parte James[63] (1803) the question of disclosure is reconciled with the general principle. Here, Lord Eldon, stated that in transactions between a trustee and his cestui que trust the question was not whether a fair price had been paid"... but whether a person who had a confidential situation previously to the purchase, had at the time of the purchase shaken off that character by the consent of the cestui que trust freely given, after full information."[64] Thus he appears to have abandoned the suggestion which he had made in Gibson's Case to the effect that the court will frequently be unable to ascertain whether or not full disclosure has been made for here it is clearly stated that the validity of the transaction will depend upon such disclosure.

The case of Hatch v. Hatch[65] (1804) concerned a gift by a ward to her guardian after she had come of age. In setting the gift aside Lord Eldon said:

> "This case proves the wisdom of the court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand purporting to be a bounty for the execution of antecedant duty. There may not be a moral act, one that would do more credit to a young man beginning in the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui que trust, taking it into his fair, serious and well informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given: and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that enquiry is so easily baffled in a court of justice, that

> instead of a spontaneous act of a friend, uninfluenced, it may be the influence of a mind misled by undue kindness or forced by oppression, the difficulty of getting the property out of the hands of the guardian or trustee thus increased; and, therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee." (66)

Thus he here restates, in perhaps more absolute terms, the now long established rule in such cases. What is of particular interest is that it is said to be the same rule as that applying to attorneys and clients, trustees and cestui que trusts. The case of Coles v. Trecothick[67] (1804) concerned a purchase by a trustee from his cestui que trust. Here it is clear that there was no element of weakness in the position of the plaintiff. Nevertheless, plaintiff's counsel, Romilly, argued on the basis of the general rule as stated by Lord Eldon in Gibson's Case.

> "Admitting, that a trustee may buy from his cestui que trust, ... At least a trustee cannot purchase from his cestui que trust, unless he communicates all the information, of which he is in possession; unless he does as much for the cestui que trust as he would for himself."

The Chancellor, however, does not go so far as to say that, in such circumstances, the trustee should have done "as much for the cestui que trust as he would for himself." What is important here is a full disclosure.

> "Upon the question as to the purchase by a trustee from the cestui que trust I agree, the cestui que trust may deal with his trustee, so that the trustee may become the purchaser of the estate... a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving, that the cestui que trust intended, the trustee should buy, and there is no fraud, no concealment, no advantage taken, by the trustee of information, acquired by him in that character of trustee." (68)

The rule as stated here appears to be sound. It cannot, however, as so stated, be considered a general rule applied to all situations of "confidence" in the wide sense. Where there is in fact no question of weakness on the part of the cestui que trust the court conveniently abandons the further rules which it applies when it finds such weakness.

In Ex parte Bennet[69] (1805) a solicitor to a commission of bankruptcy himself purchased an asset of the estate. Lord Eldon set the transaction aside and gave the following reasons for his doing so.

> "The reason is, that it would not be safe, with reference to the administration of justice in the general affairs of trust, that a trustee should be permitted to purchase, for human infirmity will in very few instances permit a man to exert against himself that providence, which a vendor ought to exert, in order to sell to the best advantage, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price." (70)

This reasoning, too, is sound. Strangely enough, however, he went on to justify it further by pointing to the fact that a trustee is not even permitted to take a benefit for himself when he could not have obtained that benefit for his cestui que trust. It is difficult to see the relationship between these rules. This difficulty, it is submitted, will always arise when the court speaks as though it were enforcing the undertaking itself as, for instance, Lord Eldon does here. The general principle can be seen clearly in the statement by Sir William Grant in Randallv. Errington[71](1805) where, setting aside a transaction between a trustee and his cestui que trust, he said that "... a trustee may purchase from a cestui que trust under limitations, and with the restriction laid down by Lord Eldon in Coles v. Trecothick, provided it is distinctly and fully understood by the cestui que trust, that he is selling to the trustee, and the trustee takes no advantage of his situation, to produce a beneficial bargain to himself."(72)

In Morse v. Royal[73](1806) Erskine had an opportunity to express his views on the subject. He said there was a recognised class of cases where contracts were set aside as being contrary to public policy. These were gifts obtained by an attorney while engaged in the business of the "author of that gift", a deed by an heir when of age to his guardian, the purchase of revisions from young heirs when of age and the case of a trustee selling to himself. These contracts were set aside without any consideration of fraud "or looking beyond the relation of the parties". Regrettably, however, the present case did not fall within this class which was instead governed by the rule stated by Lord Eldon in Gibson's, Lacey's and Coles' Cases. He then went on to quote the rule as stated in Coles' Case to the effect that a trustee may buy provided there is a distinct and clear contract, it is proved that the cestui que trust had actually intended to sell to the trustee and that there had been no fraud or concealment. It will be recalled that in Coles' Case Lord Eldon did not apply the rules relating to those cases of confidence where the party was considered to be in a weaker position than the other. This Erskine appears to accept, albeit with some regret, to be the general rule as to the trustee-cestui que trust relationship. In other words, in modern terminology,

the relationship does not give rise to a presumption of undue influence. We shall see that throughout the nineteenth century this distinction is, however, certainly not generally accepted and is usually thought to have only been made during the latter part of that century. In fact from now on most cases dealing with this relationship are remarkably free from references to undue influence but, unfortunately, this is not so in the case of certain other relationships to which one would think the concept of undue influence would similarly have no application. One of the reasons for this is probably the tremendous influence that the case of Huguenin v. Basely[74] had over the subsequent development of the doctrine for it is clear that the courts at this time were beginning to appreciate the distinction. Thus in Lowther v. Lord Lowther[75] (1806) Erskine applied the rule in Coles' Case to the relation of agent and principal; "... an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear, that he furnished his employer with all knowledge, which he himself possessed."[76] This distinction is particularly clear also in the case of Sanderson v. Walker[77] (1807) where the trustee for sale of an infant cestui que trust had purchased the property. "The principle," said Lord Eldon, "has often been laid down, that a trustee for sale may be the purchaser in this sense; that he may contract with his cestui que trust, that with reference to the contract of purchase they shall no longer stand in the relative situation of trustee and cestui que trust, and the trustee, having through the medium of that sort of bargain evidently, distinctly and honestly proved that he had removed himself, from the character of trustee, his purchase may be sustained."[78] His Lordship then went on to hold, however, that as in this case the cestui que trust was an infant, this of course could not be done even although the purchase be made at an auction. Here he described the relationship between the parties purely in terms of the undertaking, "... a trustee to sell...(is) bound to exert all his skill, and apply all his knowledge with strict integrity for (the cestui que trust)" and therefore he may not use that skill and knowledge for his own advantage.

In 1807 the celebrated case of Huguenin v. Basely[79] came before Lord Eldon. The case is famous not so much for Lord Eldon's decision but for the eloquence of the plaintiff's counsel, Sir Samuel Romilly. Here a settlement by a widow upon a clergyman and his family was set aside. The defendant had, however, also taken on the management of the affairs of the plaintiff and, although the case was decided on the facts, the combination of these two relationships later led to a good deal of confusion of principle. In other words we have the position which we had in, say, Walmesly's Case

where one person acting on behalf of another is able to take advantage of that other when so acting, not because of the relationship itself, but because of the particular circumstances of the beneficiary. Lord Eldon found that:

> "... it was demonstration to Basely, that she placed confidence in him, as high as one individual ever placed in another... if a man does not choose to act upon the confidence... reposed in him, he ought to reject it, as soon as proposed."(80)

It would appear that the "confidence" here was the confidence she reposed in the defendant as the administrator of her affairs. Thus he said that the court would not set the instruments aside:

> "... if they are pure, voluntary, well understood, acts of her mind: but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind, providential, interference, to which she was looking, for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that, which has always been considered in this Court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, that if they are confirmed by extrinsic evidence, that they are not the pure, well understood, acts of her mind, this court will undo them."(81)

Thus we have it stated that the relationship of manager and principal can give rise to the same sort of influence as exists, for example, in the case of the guardian-ward relationship. The manager must protect his principal against such influence just as the guardian must protect his ward. The head note reads that the gift was "obtained by undue influence and abused confidence in the defendant, as agent undertaking the management of her affairs..." However reasonable the actual decision may have been, this proposition is absurd.

In Harris v. Tremenheere[82] (1808) an attorney purchased certain leases from his client on whose death an action was brought to have them set aside. In so doing Lord Eldon said:

> "The defendant is in this situation; being a person, who is to acquire the interest, and also the person who ought to advise the grantor, he imposed upon himself the duty of informing him fully of the value, and of acting in favour of his employer as adversely against himself, as he would against any other person, with whom, acting fairly for his employer, he was making the best bargain he possibly could. The Court expects that from him under such circumstances."(83)

He found that the price that had been paid was not "full consideration". On the facts of the case as reported it is difficult to know whether the client had

relied upon the attorney to inform him as to the value of the leases and therefore it is uncertain whether or not the court was giving redress for a breach of a duty undertaken. If this were not the case it is difficult to see how such a decision could be justified, for there was not the slightest hint that the defendant had exercised any "influence" over his client. Nevertheless, it would seem that this decision was based upon a presumption of such influence however unreasonable such a presumption might have been in the circumstances. This "influence" appears to have been of the same kind as that in Huguenin's Case and yet, the court did not set aside certain other leases which had been given as a gift by the client to "the lady which the defendant afterwards married". What the actual nature of this transaction was is also unclear for it is evident that the leases were in the defendant's hands by the time of the action. In any event they were held to be "a pure gift" because there was no suggestion that the defendant had misled his client in any way as to the value of them. Strangely enough, as unintelligible as all this is, the case was cited at some length a hundred years later by the Appeal Court as clear authority for the proposition that all recognised fiduciary relationships did not give rise to a presumption of undue influence.[84)]

In the case of Wood v. Downes[85)](1811) his Lordship stated that it had been laid down in Hylton's Case that no attorney can take anything for his own benefit from his client pending suit and that the rule was the same as to guardians who cannot take anything from their wards "pending the guardianship" or at the close of it, or "at any period, until his influence has ceased to exist". He then goes on to hold that the rule applies to attorneys generally but does not say why this should follow:

> "The case of Wells v. Middleton is an extremely strong case of this kind. It was submitted, that the transaction was liable to no objection as between man and man; but it was overturned upon this great principle the danger from the influence of attorneys or counsel over clients, while having care of their property; and, whatever, mischief may arise in particular cases, the law, with the view of preventing public mischief, says, they shall take no benefit, derived under such circumstances. It is not denied in any case, that, if the relation ceased, if the influence can be rationally supposed also to cease, a client may be generous to the attorney or counsel, as to any other person: but it must go so far." (86)

When can an attorney then take a gift or enter into a transaction to his own benefit with his client? In Montesquieu v. Sandys[87)](1811) an attorney had purchased a revisionary interest from his client which, though in the event advantageous to him, had been obtained without any question of fraud, the

proposal coming from the client. It was further held that no confidence was reposed by the client in his attorney as far as that transaction was concerned and that both had in fact been ignorant of the true value of it at the time of the transaction. The court refused to set the transaction aside but not on the basis that the defendant had discharged the onus placed upon him. Rather it was held that there was, in the circumstances, no presumption because its subject matter was:

> "... not a gift to an attorney, not a reward, taken by him, beyond the amount of his bill, for service done, not therefore within those cases, which have wisely established a principle that would reach the transaction, had it been admitted or proved, that the attorney took this conveyance, before his bill was delivered, as a reward for service done as an attorney:... an attorney shall not take from his client a gift or reward, while standing in that relation, the connection between them subsisting with the influence attending it; though the transaction may be as righteous as ever was carried out; that connection must as in the instance of guardians and ward be bona fide dissolved, before he take anything beyond his regular fees."(88)

This might mean that if the relationship has terminated altogether then there is no presumption but, as it was not suggested that the relationship had in fact been terminated but simply that the attorney was not acting for his client in connection with the revisionary interest, it is usually taken as authority for the proposition that an attorney may take a benefit provided he was under no duty to advise his client in regard to it - he was not acting in "hac re". How this rule ties up with the notion of "influence" is difficult to say. It is clearly simply an attempt to avoid the inequities of the general rule.

Although it can be seen that at this time the court had taken the stand that all depended upon the relationship that was established and had on numerous occasions stated which relationships these were, in Griffiths v. Robins[89] (1818) the Master of the Rolls held that where a gift had been made by an elderly lady aged 84, "blind or nearly so" to her niece and her husband in whom she "had entire trust and confidence", the onus was upon them to establish that the gift "was the result of her own free will".

The case of Goddard v. Carlisle[90] (1821) was heard before the Barons of the Exchequer. Here the plaintiff's father had died when he was "of very tender years" and the defendant had then acted in the general management of his affairs and had superintended his education. Furthermore, he has acted as his solicitor and sole adviser. The plaintiff had, on coming of age, given an annuity to the defendant's wife. In setting the gift aside Baron Richards gave, what seems to me, to be perhaps the clearest and most reasonable

statement of the law as regards to such transactions. Stressing that voluntary dispositions would not be set aside, no matter how foolishly they had been made, he went on to say:

> "... the whole question in this case turns entirely in my view of it on the relative situation of the parties... Now I do not mean to say that a solicitor may not, on any occasion, take a voluntary gift from a person for whom he may be engaged to transact law business; but where it can be shown that he was so connected with his client, as to have obtained any considerable influence over him, there it is that the court will always lean against the effect of the acts of his client in his favour, to the client's prejudice. On that ground, Courts of Equity interpose between infant and guardian, trustee and cestui que trust, and even father and infant son, where the parent should be wicked enough to exercise his influence unduly; but a solicitor is always peculiarly under the eye of the court, in respect of his conduct towards his client, of whatever his age may be. It is most important that professional men should be kept strictly aloof from all possible means, and even temptation of taking advantage of their power over their clients... For in the situation in which (the defendant) stood with regard to this young man, he was bound to have protected him against himself."(91)

Finally, we come to three cases concerning "confidential information". In Williams v. Williams[92](1817) a father had delivered to his son a stock of certain medicines and informed him of the "secret recipe" for making of them. This he had done with the view of admitting his son into partnership with him. The bill was brought for an order to restrain the son from vending the medicines and from communicating the secret. Lord Eldon held that the son had no right to vend the stock and granted an injunction restrain him from doing so. His Lordship appears to have been in some doubt as to what the law was as to the second prayer. He manages to avoid the problem, however, on the ground that the son had already communicated the secret and therefore there would be no purpose in granting the order. He nevertheless said:

> "But so far as the injunction goes to restrain the defendant from communicating the secret, upon general principles I do not think that the Court ought to struggle to protect this sort of secret in medicine. The Court is bound indeed to protect them in cases of patents, to the full extent of what was intended by the grant of the patent, because the patentee is a purchaser from the public, and bound to communicate his secret to the public at the expiration of the patent. Then, whether the principle can be extended to such a case as this - whether a contracting party is entitled to the protection of the Court in the exercise of its jurisdiction to decree specific performance of agreements, by restraining a party to the contract from divulging the secret he has promised to keep, that is a question which would require very great consideration."(93)

Thus to Lord Eldon the question was whether or not to grant an injunction to

enforce a contract.

In the subsequent case of Yovatt v. Winyard[94] (1820) the subject matter of the injunction sought was also a "secret recipe" for the making of a medicine. Here the defendant had been employed by the plaintiff and had "surreptitiously got access" to it. Counsel for the plaintiff sought to distinguish Williams' Case on this ground: "... though the Court might not protect a secret from disclosure by one to whom the proprietor had himself communicated it, yet it would when the person sought to be restrained had clandestinely possessed himself of it."[95] Lord Eldon granted the injunction on the ground that there had been "a breach of trust and confidence". He made no mention of a contract.

Green v. Folgham[96] (1823) again concerned a secret recipe for making a medicine. Here the secret had been communicated to the defendant for the benefit of his brothers and sisters. It was declared that he was to hold it in trust for them and was to account for the profits made by him by the sale of the medicine. It was not explained how information can form the subject matter of a trust.

Thus in the earliest cases on the subject we see three approaches, namely, contract, confidence and property. It will be seen that the uncertainty evidenced here is still to be found in English Law.

(b) Transactions with third parties and the rule as to "profits"

The modern rule requiring a fiduciary to account for all profits which he has made as a result of that situation is said to find its first authority in the case of Keech v. Sandford[1] (1726) - it is in fact frequently referred to as "the rule in Keech's Case". Hart has, however, pointed out that the rule is of even earlier origin. In this case a lessee of the profits of Romford Market had devised the lease to a trustee for an infant. The landlord subsequently refused the trustee's request for a renewal on behalf of the infant and the trustee thereupon took the renewed release of his own benefit. The Chancellor, Lord King, held that, although he could impute no blame to the trustee, he nevertheless must in the circumstances be deemed to hold the renewed lease in trust for the infant. His reasons for so holding were as follows:

> "I very well see, if a trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to cestuys que use; though I do not say there is fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who

> might not have the lease; but it is very proper that (the) rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustee have the lease, on refusal to renew to cestuy que use."(2)

Of this rule Hanbury says "The attitude of equity contains an element of prevention as well as of cure..."[3] Gareth Jones refers to this as being "... a prophylactic rather than a restitutionary principle... The Courts attempt to prevent any breach of loyality by imposing upon a fiduciary the most severe duty of loyalty; he must be safeguarded from any unhealthy temptation and deterred from the mere contemplation of profiting from his fiduciary position".[4]

Having considered the rule and the reasons for it, it is interesting to consider the two cases which Hart says indicate that the rule is of earlier origin than Keech's Case. The first case to which he refers is that of Holt v. Holt[5](1671). Here a testator had left £1,000 to his daughters. His estate comprised of a lease which was renewed by his executors in their own names. It was held that the daughters were entitled to the renewed lease so far as was necessary to secure their inheritance. The second case, however, is rather different from either Holt's or Keech's Cases. In Rushworth's Case[6](1676) the mortgagee of a lease renewed it in his own name. It was held that the mortgagor was entitled to the renewed lease on paying the mortgagee his charges. Here we are concerned with a rule concerning the pledging of incorporeals and unrelated to questions of administration. What is more, it is difficult to see how the reasoning for the rule advanced in Keech's Case could have any application.

After Keech's Case we have the following cases: Blewett v. Millet[7] (1774) where it was said:

> "Nothing is better established as a general proposition than where a trustee for an infant renews a lease in his own name, the renewed lease shall enure for the infants benefit. This is a doctrine founded on general policy to prevent frauds, and has long been an established rule in Courts of Equity."(8)

Pickering v. Vowles[9](1783); here a tenant for life of a lease under a marriage settlement allowed the lease to expire and obtained another for himself. It was decided that the renewed lease must be held upon the trust of the settlement. James v. Dean[10](1805). Here Lord Eldon said "... if the representative, having become tenant for life of that interest, had acquired a lease through the opportunity afforded him during that short period, my opinion was that she should be trustee".

Thus the rule, if we are indeed dealing with but one rule, gives certain persons a preferent right in equity to certain property or rights - preferent, that is, to some other defined person. In certain circumstances, unrelated to the administration of one person's affairs by another, it amounts to a prior claim to that right or property; in other cases concerning the administration of another's affairs it is applied to prevent possible breaches of duty on the part of the administrator. Even in the latter case it appears to fall rather far short of a general rule entitling the beneficiary to all profits made by the administrator in the course of his administration. Yet, of course, one can see immediately how such a general rule could be developed from it. Provided the courts are prepared to maintain this rather unreasonable and very cynical attitude, all that has to be done is to drop the requirement that there be a prior duty which the administrator was unable to fulfil and hold that he must account for all profits in order to keep him out of temptation's way. This is in fact, as we shall see, the modern justification for the general rule as to the fiduciary liability for "profits". That it is a most unsatisfactory basis for the rule is obvious.

To return to the rule as it existed in the eighteenth century; at that time, as has been seen, the rule did not appear to have been stated in terms wide enough to encompass all profits. Sealy in fact says that no such rule existed until the latter part of the nineteenth century.[11] He maintains that until that time only certain profits had to be accounted for. Keech's Case was authority for the rule applicable "to trustees, life-tenants, mortgagees in possession, and other persons with limited or partial interests in property (usually leaseholds) whereby in certain circumstances renewed or additional rights obtained by any such person are deemed to be an accretion to the original property, with the result that he is allowed no greater rights in regard to the accretion than he has or had in the property orginally held." He also, it would seem, considers it to be an example of the early application of the principle of profits to a particular case. Other profits for which a fiduciary was accountable were, firstly, profits made where he had taken the benefit of a contract of sale which he had undertaken to negotiate or to make on behalf of his beneficiary. An example of this he says is the case of Fox v. Mackreth.[12] Then there is the case where the fiduciary had undertaken to purchase on behalf of the beneficiary and profited by purchasing from himself; an example of this being the case of Massey v. Davies.[13] Thirdly, the rule that a fiduciary may not enforce at their nominal value against his beneficiary debts of securities which he has obtained at a discount during the currency of his undertaking or obligation, examples being Fox v. Mackreth and Ex parte James - neither of which

are however direct authority for this proposition. Fourthly, profits made by trading with trust funds, a rule which Sealy considers was established as late as 1784 by Lord Thurlow in Newton v. Bennett[14] Holdsworth, however, puts the date of this rule rather earlier.[15] Finally, the rule that a trustee is not entitled to remuneration.

That there was no general rule as to profits applying to all fiduciaries is probably correct. In any event as we have seen one can hardly speak of a developed doctrine of fiduciary relationships in the eighteenth century and certainly not in so far as it concerns the administration of one person's affairs by another, it being almost exclusively concerned with the notion of improper use of "influence". Whether it is true to say that no such general rule existed as far as trustees were concerned, is by no means certain. In the first place it was a relatively easy notion to introduce such a rule in the case of the trustee. Profits could simply be viewed as accretions to the trust property - this would be in line with the reasoning suggested by Sealy and clearly applied in many cases in the eighteenth century. This would, of course, have the effect of rendering it more difficult for the court to establish a rule in regard to other fiduciaries. This approach can be seen in Burgess v. Wheate[16] (1759) where Lord Mansfield certainly appears to accept that a trustee must account for all profits. He says:

> "But a trust in this court is the same as land and the trustee is considered merely an instrument of conveyance: therefore he is in no event to take any benefit and the trust must be co-extensive with the legal estate of the land, and where it is not declared, it results by necessary implications because the trustee is excluded, except where the trust is barred in the case of a purchaser for valuable consideration without notice. The trustee can transmit no benefit, his duty is to hold for the benefit of all who would have been entitled if the limitation had not been by way of trust."[17]

In Middleton v. Spicer[18] (1783) we see the same reasoning. Here the testamentary device of the settlor failed and it was accordingly held that the trust funds should go to the next-of-kin of the deceased. None, however, could be found and the question arose whether the trustees were to hold in trust for the Crown or to take beneficially. Lord Thurlow, on the authority of Burgess' Case, held that they were to hold to the benefit of the Crown, as "being clearly trustees (they) cannot by any possibility take any beneficial interest". This case is, of course, not entirely in point, but it does indicate the reasoning to be found in Chancery at this time as to profits made by a trustee. This approach via property is, however, not a very statisfactory

one. The fact that most profits accrue because of the undertaking to act in the beneficiary's interests cannot be ignored. When a trustee alleges that he holds certain property to his own benefit the question that arises is whether he ought to be holding it in trust for the cestui que trust - one cannot answer this question by saying that everything he obtains as trustee he holds in trust without deciding whether he obtained the property in the course of his administration and this in turn depends upon his obligations, his personal duties.

Then, finally, there are many statements to the effect that such a general duty to account for all profits did exist. Thus in his Principles of Equity,[19] (1778), Lord Kames writes "Equity prohibits a trustee from making any profit by his management directly, or indirectly." Thus too, in Ex parte Bennet[20] Lord Eldon says:

> "The principle is unalterably laid in the prior decisions, expecially in that where it was held, that, to protect the parity of transaction between trustee and cestui que trust, a trustee should not take for his own benefit even property, which the owner refused to sell the cestui que trust. That was a church lease. The trustee applied for a renewal, and the lessor declared, he would not renew for the benefit of the infant cestui que trust. The trustee then took it, and rightly in a point of moral honesty, for his own benefit, but this court said, it has so little power of obtaining a complete discovery in all cases, that the property should be thrown back to the lessor rather than the trustee should have it."(21)

. . .

By the end of Lord Eldon's Chancellorship most of the principles of the modern fiduciary doctrine had therefore been established. We have seen that the source of these principles is to be found in the medieval common law. This was a law almost exclusively concerned with proprietary rights. What was not property was tort, a law of torts primarily concerned with acts of direct physical violence to person or property. When this element was relaxed, the act of commission remained nevertheless an essential requirement. When undertakings began to receive the attention of the courts they were seen as rendering wrongful acts of commission done in violence of them.

The Chancellor introduced flexibility into a system which had become rigid with formalism. Bound to follow the common law, he achieved this by taking the fundamental moral principle of his time and grafting it onto the principles of that system. This resulted in the trust concept, the "unconscionable" act being the wrongful exercise of a legal right. It had the effect, too, of rendering unconcsionable a host of acts which had escaped the meshes of the common law and, in particular, of establishing the extensive field of liability falling

under the equitable head of "confidence".

In an age when property was the prime concern of litigation, equity granted specific performance and by means of this the Chancellor soon established an extensive jurisdiction. What is more, because of the flexibility of its procedure and, the Chancellor's willingness to extract the truth from the parties themselves, the court became primarily concerned with matters of administration.

During the seventeenth and eighteenth centuries equity began to turn its back upon its former wide discretionary jurisdiction and to establish itself as a court of law. By this time, however, the importance of property had begun to decline and contract, which was rapidly taking its place as the major concern of litigation, was securly in the hands of the common lawyers. Excluded from contract and unable to grant damages, the Chancellor was therefore compelled to formulate principles in property and tort and to use these, as best he could, to enforce the undertakings of administrators. This he did by maintaining the traditional approach. An undertaking was a fact which could give rise to a "confidence" which, in turn, rendered wrongful a subsequent act done contrary to it causing harm to the other party. The subjective element of wrongs was avoided by rendering all such acts wrongful per se or as giving rise to the presumption of a wrong.

This, again, required the statement of those relationships which gave rise to such equitable "wrongs". These, the so-called "fiduciary relationships", may therefore be said to be particular, stated relationships of "confidence". They accordingly include a wide range of relationships, an undertaking being seen as merely one circumstance giving rise to such a relationship.

The development of the fiduciary duties proceeded along three distinct lines. Firstly, the concept of "profits" was evolved by extending the notion of trust property. The first step in this direction was taken by that line of cases as represented by Keech v. Sandford. The rule in these cases was purely in order to prevent possible fraud. By the time of Lord Eldon, however, the beneficiary could claim "property" in the hands of the fiduciary which he had obtained from or ought to have obtained for the beneficary, provided a "prorietary" nexus between such "property" and property which equity recognised as belonging to the beneficiary could be established.

Secondly, the fiduciary was forbidden to act in a matter in which he had an interest conflicting with his duty. Thus the trustee to sell could not himself purchase.

Thirdly, a duty was placed upon the fiduciary, when transacting with

his beneficiary, to make disclosure of all relevant facts the knowledge of which he had acquired whilst acting as such. This rule was developed from those cases where the Chancellor had placed positive duties upon certain persons when transacting with others in a position of weakness to ensure that the weaker party was properly protected. These duties were enforced by presuming that any advantage obtained by the stronger party was obtained as the result of "undue influence" unless he could prove that he had carried out these duties. At first this presumption was thought to be the reason behind the duty of the fiduciary to disclose but later it came to be realised that this was anomalous.

Lord Eldon attempted to place all these duties upon a satisfactory basis. This he did by extending the notion of conflict of interest and duty to cover possible breaches of the fiduciary's undertaking and thus combining it with the reasoning in Keech's Case. Whereas formerly it was said that the fiduciary was in such a position where he had a personal interest in the particular matter, now it was said that he was accountable for all profits and under a duty to disclose in order to prevent him from placing his personal interests before those of his beneficiary i.e. breaching his undertaking. Thus it is said that he may not place himself in a position where his interest may conflict with his duty. In other words we are in fact dealing with yet another presumption. The fiduciary must account because he is presumed to have taken the property of his beneficiary and he must disclose because if he does not do so he is presumed to have deliberately taken advantage of the confidence reposed in him by his beneficiary. Thus we see that those duties which, one would think, must flow inevitably from the fact that the administrator has undertaken to act, are enforced by means of a presumption of a wrong. Lord Eldon did no more than change the name of that presumption.

THE DEVELOPMENT OF THE GENERAL RULE AS TO PROFITS

As we have seen, by the time of Lord Eldon there were many indications that the court was moving towards a general rule as to "profits" and that it was felt that authority was to be found for this in certain cases where persons had been deemed trustees of leases which they had renewed in their own names. It is, however, as Hart says, "now well established that this rule is not confined to the renewals of leases nor to trustees."[1] Although it is from these specific rules that the modern general rule to the effect that a fiduciary may not take a profit from his position was developed, they still remain today as separate heads of equity under which, as such a claim may be brought.

It will be recalled that Sealy classified this head as follows:

> "The rule applicable to trustees, life-tenants, mortgagees in possession, and other persons with limited or partial interests in property (usually leaseholds) whereby in certain circumstances renewed or additional rights obtained by any such person are deemed to be an accretion to the original property, with the result that he is allowed no greater rights in regard to the accretion than he has or had in the property originally held."(2)

The word "accretion" is used here in a special sense. For the moment it must be noted that it serves the useful purpose of pointing to the fact that we are dealing with "renewed or additional rights obtained in respect of property" ("property" is of course used here in the wide sense). This should not, however, be thought to provide the basis for the rule requiring such property to be held in trust. This has in fact been suggested. Thus it was said that the reason why a renewed lease became subject to the trust of a will disposing of the original lease "is that the one is merely an extension or continuation of the other".[3] Hart criticises this approach and states, clearly correctly, that the rule is simply based upon public policy.[4]

Today the rule is said to apply to trustees, executors, administrators, agents, mortgagees and mortgagors, tenants for life and remaindermen. It is not, however, agreed whether all these people are fiduciaries. Snell, for example, does not consider them all to be so.

> "The rule in Keech v. Sandford was extended in a modified form to persons who, though not in any definite fiduciary relationship to the other persons interested, have a partial interest in a lease."(5)

There is also said to be an additional rule that in the cases of trustees, executors, administrators, agents and tenants for life there is an irrebuttable

presumption that they cannot retain the benefit but in the cases of mortgagees (and mortgagors?) and partners there is only a rebuttable presumption of fact.[6]

In In re Biss Romer L.J. said:

> "On enquiry into the cases it appears to me, as a result, that a person renewing is only held to be a constructive trustee of the renewed lease if in respect of the old lease he occupied some special position and owed by virtue of that position, a duty towards the other person interested."(7)

Why does this duty arise? Hart[8] refers to the reasoning in Blewett v. Millet (1774) in order to answer this question.

> "The trustee's situation in respect of the estate gives him access to the landlord, and it would be dangerous to permit him to make use of the access for his own benefit."(9)

Although this is cited as the correct reason behind the rule applying to all these cases, it is submitted that the reasoning in Keech's Case is rather different. There it was also said that the rule existed to prevent trustees dishonestly renewing leases in their own names but that the necessity for the rule was the great difficulty a court would experience in ascertaining whether or not a trustee had in fact acted honestly.[10] It is not so much a case of his having access to the landlord and therefore being able to obtain the renewed lease ahead of the mortgagee by unfair means. What is more, it is obvious that the reasoning in Keech's Case cannot possibly explain why a mortgagee of a lease must hold the renewed lease to the benefit of the mortgagor for he is under no duty to renew it. In Keech's Case Lord King had said "I very well see, if a trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to cestuys que use..." It would be absurd to suggest that such reasoning could be applied to the mortgagor.

It is submitted that we may distinguish between those cases where the defendant was under a duty to renew for another and those cases where he was not. The reasoning advanced by Hart may apply to both cases but the reasoning advanced by Lord King can only apply to the former. This can be clearly seen in the case of Biss, Biss v. Biss.[11] Here the yearly tenant of a shop died intestate and his widow, obtaining Letters of Administration, continued, with her two children, to carry on his business. The landlord refused a renewal of the tenancy but later gave a lease to one of her children. The Court of Appeal held that the child could keep the lease upon the ground that any hope of renewal to the estate had been extinguished by the refusal of the widow's application, and the child thus neither deprived the estate of any

hope of renewal nor had been guilty of any breach of duty or abusive position. Thus it might be said that where there exists no prior duty there is no need to insist that the renewed lease always be held in trust. All that the court wished to ensure in such cases was that the lease be not acquired unfairly. If the defendant can show, as in Biss' Case, that he only applied for the lease after the landlord had refused its renewal, there can be no question of this.

On the other hand, this is not the case where there is a positive duty placed upon one person to renew the lease on behalf of another for the danger is that he may make no effort to acquire a renewal and then subsequently, after it has been refused, acquire it for himself. Thus we are dealing with a rule relating to administrators. In the case of a trustee of a particular asset such a rule is sufficient to ensure that he acts only in the interests of the cestui que trust in such circumstances. In the case of the administrator who is under a general duty to act in the interests of his beneficiary and, in particular, to acquire such assets as he considers will advance these interests, such a rule is not enough and it is submitted that it was with the development of such forms of administration that the general rule was evolved.

Hart appears, although he does not actually say so, to have considered that these old cases were in themselves authority for a general rule requiring a trustee to account for all profits made as the result of his position. Thus he quotes the following note in White and Tudor's Leading Cases in Equity as authority for his statement that the rule is confined neither to leases nor to trustees.

> "Whenever a person clothed with a fiduciary or quasi-fiduciary character or position gains some personal advantage by availing himself of such character or position, a constructive trust is raised by the courts of equity, such a person becomes a constructive trustee and the advantage gained must be held by him for the benefit of his cestui que trust."(12)

As we have seen, however, Sealy considers that this general rule only developed during the latter part of the nineteenth century. He maintains that before the Judicature Acts a fiduciary was only liable where he had taken for himself property actually entrusted to him or where his liability arose under one of the recognised heads.[13] There are, however, certainly an abundance of dicta to be found suggesting the contrary. In support of his contention Sealy referred to the case of Tyrrell v. Bank of London.[14] Here the House of Lords rejected the claim of a company requiring its solicitor to surrender a bribe as a "secret profit". Lord Chelmsford said:

> "But the Respondents contend, further, that... the agency of Tyrrell, being established, the circumstances show that he received his share in the rest of the land as a bribe to induce him, contrary to his duty, to prevail on the company to become the purchaser of the part of which they had bought, and therefore, that they are entitled to have the unsold part of the property conveyed to them. No authority has been adduced in support of such a proposition, and I do not think it can be maintained. In order to simplify the question, let it be supposed that... Read had offered him £5,000 to induce the Respondents to purchase, and they had been persuaded by Tyrell to buy at an excessive price. Of course, they might have rescinded the contract: but could they, in any manner, have obtained the £5,000 on the grounds that it belonged to them... The £5,000 itself, as a specific demand, they could in no manner have received."(15)

It is interesting to see the courts difficulty here is in understanding just how the company could claim to have any right to the bribe. What all the old cases had in common was not that the fiduciary should take no profit but that the other party had some sort of "right" or "interest" in the property which the fiduciary was bound to respect. The fiduciary relationship existed in respect of this interest which one might perhaps call a right in property running through another. In the case of the administrator under a duty to act generally in the interests of his beneficiary and to acquire such property as he, the administrator, considers will benefit those interests, such an approach cannot be adopted. What is required is for these rules to be extended so as to cover all profits made by a fiduciary although there exist no such "proprietary" connection. This means the rejection of the idea that the administrator should hold in trust property in which his beneficiary had an interest. Thus when in Henderson v. Huntington Copper Company[16] the court held that there was no need to identify the money as belonging in equity to the plaintiff, this meant that "claims based on ownership gave way to claims based on obligation" and the "defendant's conduct (now became) an 'equitable tort' or 'equitable fraud'". Thus we have not simply the formulation of a general rule developed from a number of specific rules but the formulation of a rule fundamentally different in nature; it only appears to be of the same nature because in both cases the fiduciary is deemed to hold the property in trust. This serves to blurr yet a further distinction for, as will be seen, the rule serves two functions: firstly, it provides a remedy, albeit not in damages, where the administrator has failed to do what he undertook to do and instead acted in his own interests; secondly, it provides a remedy for incidental profits made by the administrator during the course of his administration. The latter rule has given rise to considerable difficulty in English Law. It cannot be based upon the reasoning in Keech's Case for where profits are purely incidental there can be no question of the administrator having had a prior duty to acquire them for his beneficiary.

When, however, Keech's Case came to be explained by the "conflict of duty and interest" rule this reasoning came to be applied in the case of incidental profits. As will be seen, this is an entirely unacceptable basis for the rule. Either an administrator is liable for incidental profits or he is not, but he cannot be made liable for them upon the ground that in acquiring them he placed himself in a position where his duty conflicted with his interests.

THE MODERN FIDUCIARY DOCTRINE

In considering the modern fiduciary doctrine we will again treat separately the rule relating to transactions between the fiduciary and the beneficiary and the rule relating to "profits". The former rule may be said to cover the following situations:

(1) Where one party to such a relationship enters into a transaction with the other because he feels, for one reason or another, bound to do so. He may feel bound to do so because of the position of necessity in which he stands or the great respect, or even affection, in which he holds the fiduciary, or because of some personality weakness on his part. This we will call the situation of "domination". The term is, admittedly, by no means completely accurate but is very difficult to find one which will accurately describe all these rather dissimilar situations.

(2) Where the one party to such a relationship will enter into a transaction with the other without considering the effect of such a transaction upon his own affairs because he believes the other party would never enter into a transaction with him which would be to his detriment. He knows what he is doing but does not consider the consequences for he believes that the other party will always treat fairly with him. We may call this the "confidence-negative" situation. This situation includes the case of a gift made by a party believing that he can well afford to make it. The influence that the fiduciary is able to exert in such circumstances is considered to be just as much "undue influence" as the influence the fiduciary in case (1) above. Thus the Master of the Rolls in Tufton v. Sperni[1] said that although the case had been argued before the judge in the court of first instance as a case of:

> "...undue influence, as the phrase is perhaps most commonly understood. Tufton, that is to say, set out to prove that Sperni had, by virtue of his professional position and otherwise, acquired a complete control or domination, over Tufton, so that the latter ceased to be a free agent, and his mind became a mere vehicle for Sperni's schemes."

The Master, however, went on to say that the term "undue influence" is of wider application:

> "...undue influence as a matter of law includes both undue influence in the sense of domination of the party charged over the other, and also abuse of the duties of care and confidence which may be imposed on one to the other as a result of the particular relationship which emerges from the special circumstances of their association." (2)

(3) Where the one party will enter into such a transaction with the other because he believes the other is acting for him. He believes the purpose of the transaction is to advance his interests. This we may, perhaps, call the "confidence-positive" situation. This rather awkward term is used because these situations were treated, as we have seen, in Chancery as falling within the concept of "confidence". Very frequently these are situations where the common law recognised no legal duty on the part of the fiduciary to act in this manner. Nevertheless, we are not concerned here with the question of undue influence.

In any of the above three situations the relationship may in fact be that existing between one person administering the affairs of another. Thus a solicitor may compel an "unconscionable bargain" from his client pendente lite, the client feeling that he must agree to whatever the solicitor says if he is to avoid some greater harm. This is the sort of situation which arose in Booth's Case. Clearly such a transaction would fall within group (1). Such a relationship could also result in a transaction falling within group (2). Thus a client may have dealt with a particular attorney for a long time and developed great confidence in him and, he might therefore think that the attorney will only deal fairly with him - especially if the attorney knows more about his affairs than he does himself. Finally, of course, such a relationship falls naturally within the ambit of (3) above. Thus "undue influence" may arise from a relationship where there is no undertaking on the part of the fiduciary to act in the interests of the other party and it may also arise where such an undertaking exists.

Undue Influence

It is necessary to consider the fiduciary doctrine in relation to the presumption of undue influence in order to understand the modern doctrine as regards "positive confidence". We have seen that the latter class of case was treated by Chancery by extending the rules developed in connection with the concept of "influence". Thus not only do the principles bear a fundamental similarity but also the two situations have been so frequently confused as to render much of what has been said in connection with "positive-confidence" quite unintelligible. Firstly we will consider those fiduciary relationships where the fiduciary is not a person managing the affairs of another.

The relation of parent and child has, as we have seen, long been considered to give rise to such influence. Although this is the usual way in which the relationship is stated, it would appear that in fact it is the relationship between a parent and his child that exists during a short period after that child has come of age. Nor is the rule strictly confined to such relationships but extends to all persons in loco parentis. Lord Langdale in Archer v. Hudson (1844) stated the rule as follows:

> "Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age, but everybody will affirm in this Court, that if there be a pecuniary transaction between a parent and child just after the child attains the age of 21 years and prior to what may be called a complete 'emancipation', without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party who endeavours to maintain such a transaction to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This court does not interfere to prevent an act even of bounty between a parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgement, independent altogether of any sort of control."(1)

The rule has remained unchanged. Thus nearly one hundred years later in Lancashire Loans Limited v. Black[2] Lawrence L.J., quoting Farwell J. in Powell v. Powell, said:

> "A man of mature age and experience can make a gift to his father or mother because he stands free of all overriding influence except such as may spring from what I may call filial piety. But a young person (male or female) just of age requires the intervention of an independent mind and will acting on his own or her behalf and interest solely, in order to put him or her on an equality with the maturer donor who is capable of taking care of himself".

It is frequently stated that this is the rule which applies to all fiduciary relationships. Thus Sir John Romilly in Hoghton v. Hoghton, a case of a voluntary donation by a child to parent, said:

> "In many cases, the Court, from the relations existing between the parties to the transaction, infers the probability of such influence having been exerted. These are the case of guardian and ward, solicitor and client, spiritual instructor and pupil, medical adviser and patient and the like."(3)

It is the same rule that applies to the relation of guardian and ward. Thus Story says:

> "The Courts of Equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the higher sense of the terms the fullest deliberation on the part of the ward, and the most abundant good faith (uberrimae fides) on the part of the guardian. For in all such cases, the relation is still considered as having an undue influence upon the mind of the ward...(In these cases) two circumstances of great importance have generally occurred, first, that the grants and transactions have taken place immediately upon the wards attaining age, and secondly that the former influence of the guardian has been demonstrated to exist to an undue degree, or, in other words, the parties have not met on equal terms."(4)

What is meant by "influence" here? This is explained by Lord Hatherly in Turner v. Collins[5] as follows:

> "When talk of parental influence we do not think of terror and coercion, but kindness and affection, which may bias the child's mind, and induce the child to do that which may be highly imprudent, and which, if the child were protected, he would never do."(6)

This statement of the law is remarkably similar to that made 100 years previously by Lord Hardwicke in Gribsy v. Cox when discussing the influence which could be exerted by a husband over his wife. The child or ward is said to be not a "free agent" or to be not "free" or, again, not to be in a position to fully understand the act. But, although we are not dealing here with "wrongful" influence, neither have we a form of incapacity. It is repeatedly stated that a child may make a gift to its parent. Thus in Savery v. King[7] the Lord Chancellor said "The legal right of a person who has attained his age of 21 to execute deeds and deal with his property is indisputable."[8] We are, as has been seen, dealing with a duty placed upon the parent or guardian in conscience. Thus in M'Mackin v. Hibernian Bank[9] Barton J. said, "...the law protects young persons of an impressionable age when gratitude, affection, and respect for a parent are fresh and strong, not by curtailing their capacity to deal with others, but by binding the consciences of those dealing with them."[10] This was cited with approval in the more recent case of Lancashire Loans Limited v. Black.[11]

Like the relationships between parent and child, and guardian and ward, there is no duty upon the spiritual adviser to act in the interests of his pupil, at least as far as they concern this world. The law in regard to this relationship became settled during the course of the 19th century, although, perhaps not surprisingly, little is heard of it today. Stuart V-C in Nottidge v. Prince[12] stated the rule thus:

> "No person who stands in a relation of spiritual confidence to another, so as to acquire an habitual confidence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence without the danger of having the gift set aside. If it can be shown that a sufficient protection has been interposed against the exercise of the influence, there may be a case to sustain the gift."(13)

Here too there are frequent assertions that this is the rule that applies to all fiduciary relationships. Thus Stuart V-C went on to say:

> "But the principle prevails where there exists a relation which naturally creates influence over the mind. Therefore the doctrine extends to the relation of attorney and client, of guardian and ward, of parent and child."(14)

In Lyons v. Home[15] Gifford V-C said, quoting Lord Eldon in Hatch v. Hatch:

> "It is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust (for the parties to deal with one another)" (16)

And, again, Lord Penzance, in Parfit v. Lawless,[17] said that the same rules apply to this relationship as applied to parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, and guardian and ward.

The "undue influence" with which the courts are here concerned is, however, of a rather different nature to that of the parent-child and guardian-ward relationships, in that it is the influence of domination that is stressed. Thus Sir Samuel Romilly described the influence resulting from such a relationship as being capable of being used as "an engine to work upon the passions, excite superstitious fears or pious hopes, to inspire, as the subject best may be promoted, despair, or confidence..."[18] Stuart V-C in Nottidge's Case speaks of "a relation of spiritual confidence" and in Lyons' Case Gifford V-C speaks of the relationship giving rise to "dominion and influence". In Morley v. Loughnan[19] it was said that the "influence and domination" had resulted in "the defendant taking possession, so to speak of the whole life of the deceased."[20] In Allcard v. Skinner[21] Lord Lindley said "the undue influence which Courts of Equity endeavour to defeat is the influence of one person over another, not the influence of enthusiasm. But the influence of one mind over another is very subtle and of all influence religious influence is the most dangerous..."[22]

Although the rule is always stated in absolute terms, it will be found in fact that in every case in which the court has set aside such a transaction the "pupil" has either been an elderly, lonely and over enthusiastic lady or a man suffering from some form of mental disturbance. Although this may be rather a

harsh comment upon mankind, it does, nevertheless, render the rule more explicable. If this factor is ignored the rule could lead to rather absurd results. Hanbury voices the following criticism of it: "Why should the onus have been on the clergyman at all? Surely it would be a monstrous proposition that a parishioner could reclaim an Easter offering unless the priest could prove that he had given spontaneously?"[23]

What is presumed in these cases? In Turner v. Collins[24] Lord Hatherly said,

> "Influence is a thing which is assumed as between father and child, not that the influence is assumed to be unduly exercised, but the influence is assumed, and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction and the Court has to see that every proper protection was thrown around the child and that the child has deliberately and advisedly, and under protection, done that by which his father has obtained a benefit."(25)

This can be best understood by examining what the person, on whom the onus is placed, must prove in order to rebut the presumption.

In Huguenin v. Basely Lord Eldon said that it is not "whether the donor knew what he was doing, but how the intention was produced" and this appears to have, generally speaking, always been accepted as the essence of the rule. The onus upon such a person is to show that the other was "free", that he was "in such a position as...enable(d) him to form an entirely free and unfettered judgement, independent altogether of any sort of control."[26] Thus, "whilst the domination lasts it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice or in some other way."[27] It is the lack of "free" will that requires the intervention on the part of a third party. This is very clearly seen in Farwell J.'s statement of the rule in this regard in Powell v. Powell[28] (1900)

> "The donee must show (and the onus is on him) that the donor either was emancipated or was placed by the possession of independent advice in a position equivalent to emancipation...a young person (male or female)

> just of age requires the intervention of an independent mind and will acting on his or her behalf."(29)

Or, in the words of Stuart V-C, it must "be shown that sufficient protection has been interposed against the exercise of influence"[30]. In Parfits' Case Lord Penzance said "...the Courts of Equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers."[31] What is presumed therefore is not a "wrong"of any kind but a position of influence which results in a form of incapacity - an incapacity existing only in relation to the fiduciary. The duty is then placed upon the fiduciary to ensure that, in any transaction between them, he obtains no advantage as a result of that "relative incapacity".[31]

We turn now to consider those relationships which arise as the result of the one party having undertaken to do something for the other. Again it must be strassed that we are considering these relationships only in so far as they are held to give rise to "undue influence". Here we have the relations of trustee to cestui que trust, solicitor to client, agent to principal and medical adviser to patient.

The medical adviser-patient relationship has long been held to give rise to a presumption of undue influence. In Dent v. Bennett[32] Lord Cottenham said:

> "It has been argued, upon the authority of the civil law and of some reported cases, that medical attendants were, upon questions of this kind, within the class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. Undoubtedly they are..."(33)

In that case the court set aside a transaction between a surgeon and a man of 86 years of age which provided for the payment to the defendant of a large sum of money in return for his medical assistance for the remainder of his patient's life. In Billage v. Southey[34] a promissory note given by a very poor patient far in excess of the amount due to his medical adviser was set aside. In Williams v. Johnson[35] it was said that the relationship that existed there was "...one which afforded just such opportunity for the generation of those feelings of

confidence and gratitude, calculated to produce the influence (no doubt unconsciously operative), which creates a desire to confer benefits on the medical adviser and against which the patient requires protection and thus the onus was upon the medical adviser."[36]

We have seen that already in Lord Eldon's time there were cases dealing with the trustee-cestui que trust relationship which clearly indicate that the court did not consider that the relationship, as such, necessarily gave rise to a presumption of undue influence. The modern text books on the subject usually make no mention of such a presumption. We have already noted that in Smith v. Kay[37], Lord Chelmsford had in fact used the example of a trustee to demonstrate that a fiduciary relationship does not per se give rise to such influence. It would seem, however, that he did not go so far as to suggest that this relationship could never give rise to undue influence. The position has never been wholly free from doubt. Although the courts have never clarified the matter, it would seem, nevertheless, true to say that statements to the effect that the relationship does give rise to influence are mostly confined to the older writers and cases. Story, although he stresses the need to ascertain that "the cestui que trust intended that the trustee should buy, that there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee", nevertheless also speaks of "imposition".[38] Furthermore, he says "the same principles govern as in the cases of guardian and ward, with at least as much enlarged liberality of application, and upon grounds quite as comprehensive."[39] To Vinter the doctrine is always based upon the presumption of undue influence. As we have seen, there are plenty of dicta to the effect that the rule is of general application. Thus for example, Lord Brougham in Hunter v. Atkins[40] said: "For I take the rule to be this. There are certain relations known to law as attorney, guardian, trustee - if a person standing in these relations to client, ward, ward or cestui que trust takes a bargain, the proof lies upon him that he has dealt with the other party...exactly as a stranger would have done, taking no advantage of his influence or knowledge..."[41]. The only case

that I have been able to find in which the decision actually appears to rest upon this point is Prideau v. Lonsdale.[42] Here a young lady was induced by her executors to enter into a settlement in terms of which she and two trustees were to hold certain stock upon trust for herself for life and, after her death, upon such trust as she should by deed or will appoint and, in default of appointment, upon trust for the persons who would have been entitled to it as her next-of-kin. She subsequently married and on her death her husband, as her administrator, had the settlement set aside on the grounds that she had received no independent advice.

The attorney-client relationship is invariably held to give rise to such influence. "It is obvious," says Story, "that this relation must give rise to great confidence between the parties, and to very strong influences over the actions, and rights, and interests of the client. Here the influence was thought to be very like that met in the case of the parent-child and guardian-ward relation. To Story, the danger is that the attorney will take advantage of his client's "good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities."[43] We have seen, however, that Lord Eldon had said that where an attorney, instead of sending his client to a third party, dealt with him directly, he was bound to do as much for him as he would have done had he been acting for his client in a transaction with a third party. Although his Lordship probably meant no more by this than that such an attorney must pay a "fair price", the rule has, since then, been almost inevitably stated in these terms. In Holman v. Lyones[44] a client had engaged his attorney to sell certain of his property by auction. Not all the property was sold and he subsequently engaged the attorney to make out abstracts of title of portion of the unsold property. Sixteen months after the completion of this task, during which period the client had not employed him professionally, the attorney purchased certain of this property. Part of the purchase price being composed of an annuity. The client died three and a half years after the sale with the result that the attorney made a considerable profit. It was held that he knew that his client was of intemperate habits and that he

had neither made special enquiries as to his state of health nor endeavoured to obtain a higher annuity for him which, in view of his client's state of health, he would in all probability have procured. In setting the transaction aside Turner L.J. said:

> "...an attorney may deal with a client as a stranger where the circumstances are not such as to put him under a duty of advising the client."(45)

That this duty placed upon the attorney to continue to act in the interests of his client arises from the idea of undue influence and is not thought to be part and parcel of the attorney's mandate can be seen clearly from Lord Cranworth's statement of the rule in Savery v. King[46]:

> "So again, where a solicitor purchases or obtains a benefit from a client, a Court of Equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interests as he would have done in the case of the client dealing with a stranger."(47)

This formulation of a duty, arising from the position of "influence" the attorney is said to have over his client, in terms of a positive duty to act for his client, when coupled with the inevitable confusion arising from the enforcement of different duties in the name of one doctrine, has led the courts, at times, to hold that the positive duties arising from the attorneys undertaking to act in the interests of his client are enforced because of a presumption of undue influence. In Moody v. Cox and Hatt[48] the plaintiff contracted to purchase from certain trustees, one of whom was his solicitor, a portion of their trust property. The solicitor acted both for the trust and, through his managing clerk, for his client. He failed to disclose certain valuations to his client and sought to justify this upon the ground that his disclosure of them would have been a breach of his duty as a trustee. In setting the transaction aside Cozens Hardy M.R. stated, obviously correctly, that "The relief in a case of this kind does not depend upon undue

influence, and that is not the ground upon which I base my judgement."[49] Scrutten L.J. however, held:

> "Generally when you have made a legal contract and correctly expressed it in writing, and it is not obtained by any misstatement of fact, innocent or fraudulent, the contract stands, and the fact that one party or the other knows facts about which he says nothing which make the contract an unprofitable one to the other party, is of no legal importance. But there are certain relations and certain contracts in which a higher duty is imposed upon the parties, and they must not only tell the whole truth so far as it is material, and they must not only not misrepresent by words, but they must not misrepresent by silence if they know of something that is material. Some of these cases depend upon the relation between the parties, and, generally speaking are cases where the relation is such that you have confidence reposed by one party and influence exercised by the other. In that class of relation of parties you may get the duty, first of all, that the party who has influence must make a full disclosure of everything that he knows material to the contract; Secondly, that the party who has the influence must not make a contract with the party over whom he has the influence unless he can satisfy the court that that contract is an advantageous one to the other party."(50)

In any event, such confusion of principles apart, the rule is usually stated to be that where an attorney does not wish to find himself under a duty to act for his client, even although he had severed the relationship, he will have to establish "...first, the client must be fully informed; secondly, he must have competent independent advice; and, thirdly, the price which is given must be a fair one. The onus of proving all this lies upon the solicitor."[51]

Where he does not do this he might well find himself in the unfortunate position of the attorney in Demerara Bauxite Company Limited v. Hubbard and Others.[52] He had, previous to the transaction, been the solicitor of the person from whom he purchased land. Subsequently he resold the property at a considerably enhanced price. It was argued on his behalf that the price he had paid had been a fair one, that he had disclosed all material facts to the seller and, in any event, that he had neither acted as her solicitor in the matter nor had she in fact relied upon his advice. The court, however, held the

rule to be that, although the relationship of solicitor and client in a strict sense has been discontinued, the same principle applies so long as the confidence naturally arising from such a relationship is proved or may be presumed to continue. Thus even if a solicitor is no longer retained by his client, his duty in the contemplation of a court of equity may still be such as to throw upon him the onus of upholding the validity of a purchase from his client. The court, showing a splendid disregard for logic, then stated that the test as to whether such an onus rests upon a solicitor depends upon whether or not he owes his former client any duty in the contemplation of a court of equity.[53] In order to rebut such a presumption it must be shown that the solicitor had made a full disclosure of all information in his possession, that the transaction was a fair one in all the circumstances and that he had advised his client as diligently as if the client had been dealing with a stranger. Finally, it was stated that this principle is a wide application and should not be regarded as a technical rule of English Law.

It will be recalled, however, that in Montesquieu v. Sandys[54] the attorney avoided all this unpleasantness by seeing to it that his account was settled to date and that he was not acting for his client at the time. Thus it is said that none of these rules apply where the attorney is not "an attorney in hac re." It appears to be accepted that this, in itself, however, is not enough - although the courts have been very reluctant to state just what is. Thus we have seen that Turner J. in Holman v. Lyones[55] said this duty does not exist where the circumstances are not such as to place the duty upon him.

The position today remains as confused as ever. Thus in McMaster v. Byrne,[56] where the defendant had failed to disclose certain information to his former client, we find Lord Cohen speaking of the "position of ascendancy" which a solicitor may obtain over his client. There was in fact absolutely no question of such "ascendancy" ever having existed and the case was decided solely on the ground that the solicitor was under a duty to disclose information acquired by virtue of his employment.

This rule is said also to apply to the relationship of principal and agent. Like the trustee-cestui que trust relationship, however, modern text books are usually silent on this point. On the other hand, unlike that relationship, there are numerous cases in which the presumption has been applied. As the relationship here is obviously directly analogous to that of the director to his company we will consider these cases in a little more detail.

In Hunter v. Atkins[57] a retired admiral of about 90 years of age (described as "superannuated") made a gift to a person who had for long assisted him the administration of his affairs and who was described by the court as "a confidential agent". The plaintiffs alleged that at the time of the gift the admiral was "liable to fits of mental derangement" as the result of an injury he had received on the head from a cannon-ball. Although they went as far as to allege that he was at the time an "imbecile", the Chancellor knew the absurdity of the suggestion that a mere cannon-ball could so affect a British Admiral. He held that the admiral was in full possession of his faculties at the time and, furthermore, it was not essential for the defendant to prove that the admiral had received independent advice. He went on to say that:

> "The authorities mean nothing else than this, when they say, as in Gibson v. Jeyes, that attorney and client, trustee and cestui que trust may deal but that it must be at arms length, the parties putting themselves in a situation of purchasers and vendors, and performing (as the Court said, and I take leave to observe, not very felicitously or even correctly), all the duties of those characters."(58)

Here we appear to have a clear statement to the effect that such a relationship does not give rise to a presumption of undue influence. What is more, Lord Brougham clearly sees that, once all question of such influence is rejected, it is anomalous to suggest that, the parties having severed the relationship, the fiduciary should nevertheless be under a duty to act in the interests of his beneficiary.

In Tate v. Williamson[59] a young man, aged 23, being pressed for payment of his college debts, which amounted to approximately

£1,000, and being estranged from his father, sought the advice and assistance of his uncle. The uncle sent the defendant to assist him who suggested that he, the plaintiff, attempt to compromise these debts. This Tate, however, did not wish to do and he informed the defendant that he would sell the moiety of an estate to which he was entitled. It would appear that the defendant, there and then, offered to purchase it from him for £7,000 - payable in instalments. Before the agreement was signed, the defendant obtained a valuation by a surveyor estimating the value of the property at £20,000, which information he never disclosed to the plaintiff. In setting aside the transaction Lord Chelmsford L.C. said:

> "Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, a person so availing himself of his position will not be permitted to retain the advantage, although the transaction would not have been impeached if no such confidential relation had existed."(60)

The court held that as a fiduciary relationship existed between the parties the defendant should have disclosed this information and the transaction was set aside. It did not say that the defendant should have exercised that diligence on behalf of the plaintiff as he would have had the transaction been with the third party. The situation was correctly treated as one of "negative-confidence". Admittedly disclosure was required, but it was required not because the defendant was under a duty to act in the interests of the plaintiff. He was under a duty to disclose because the plaintiff had placed confidence in him to deal with him fairly.

In Coomber, Coomber v. Coomber[61] a son had managed a business as agent for his mother. She subsequently assigned the business to him as a gift. After her death a bill was brought to set aside this gift on the grounds of undue influence. Neville J. held that the onus was upon him to rebut the presumption that the gift had been induced by that relation in which he stood to his mother. He decided, however, that the

gift had been the result of the mother's affection for her son and therefore must be upheld. The Court of Appeal upheld this decision but on wider grounds. We have already mentioned that in this case Cozens Hardy M.R. held that it is not correct to say that any confidential relationship between donor and donee is sufficient to set up a presumption of undue influence and that it is incorrect to deduce this from the fact that the relation between attorney and client and parent and child gives rise to such a presumption. He went on to say:

> "When a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it; but to apply that to every fiduciary relation and to every relation of confidence is, I venture to think, not according to any authority and distinctly contrary to principle. So far as it being warranted by any authority, it seems to me to be plainly negatived by what Lord Eldon said in Harris v. Tremenheere as it is possible to imagine...(T)here is no evidence of misrepresentation or of circumvention, or of any improper conduct leading Mrs. Coomber to make this gift; it was a spontaneous gift of her own generosity. It was not made after weighing the value of the consideration, it was simply an out and out gift by this lady in favour of her son having been carefully and properly advised by the solicitor as to the effect of what she was doing."(62)

In that he distinguishes the relationships of attorney and client and parent and child it would appear at first sight that Cozens Hardy M.R. considers that certain fiduciary relationships give rise to a presumption of undue influence and others do not. On the other hand he cites the case of Harris v. Tremenheere as authority for the proposition that all relationships do not give rise to such a presumption and that case dealt with the attorney-client relationship. It is difficult to say whether Harris' Case can be cited as authority for this proposition for, on the one hand, we have a "pure gift" left standing and, on the other, we have a sale at an "undervalue" set aside because the attorney ought to have advised his client as to the value - although there was absolutely no evidence that the client ever instructed him to do so or relied upon his valuation or, even, that the attorney knew that the lease was worth more than the price he paid for it. Although Fletcher Moulton L.J. seems to suggest that there might

have been another fiduciary relationship here, namely, that between mother and son, he nevertheless was well aware that the fact that the transaction was a donation was very relevant.

> "In my opinion there was absolutely nothing in the fiduciary relations of mother and son with regards to this house (where the business was run) which in any way affected the transaction. It is possible that there might have been a transaction between the son and mother, with regard to a purchase of this leasehold property, in which the son would have had to show that he had given her full information in every possible way as to the value. But in this case the gift was not based on value in any way at all. ... She meant it to go to her son whatever the value was, and that wish of hers is not shown to be brought about in any way by any - I will not say improper conduct of the son, but any - conduct which put any responsibility upon him in the matter."(63)

He then went on to say that it is incorrect to think that all fiduciary relations give rise to a presumption of undue influence - "The nature of the fiduciary relation must be such that it justifies the interference". Here the court was clearly primarily concerned with the fact that the son was the manager of his mother's business. It might have come to a different decision if it had considered that a fiduciary relation, as such, existed between the son and the mother.

In Inche Noriah v. Shaik Allie Bin Omar[64] a malay woman, who was described as being of great age and wholly illiterate, executed a deed of gift of landed property in favour of her nephew who had managed all her affairs. Before executing the deed she received independent advice from a lawyer who, however, was unaware that the gift constituted practically all her property and, although acting in good faith, had not pointed out to her that she could, equally effectively, have benefited her nephew by bequeathing the property to him. The gift was set aside. The case, it was held, fell to be decided upon the well established principles of Chancery. The question was whether or not it fell within those class of cases where the relationship between the parties was such as to give rise to a presumption of undue influence. Quoting Wright J. in Morley v. Loughnan, Lord Hailsham L.C. said that "(t)he burden lies on the recipient

to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstance". It was necessary for the donee to prove that the gift was "the result of the free exercise of independent will" and the independent advice here had not been sufficient to do this.[65]

The fiduciary relationship that had existed here was that of one person managing the affairs, as agent, of another. There was no suggestion that a fiduciary relationship giving rise to a presumption of undue influence exists between aunt and nephew. However reasonable it may have been for the court to set the transaction aside, it is submitted that the grounds upon which it did so are wholly untenable.

Tufton v. Sperni[66] is the most recent case on the subject. The plaintiff, who suffered from epilepsy, was described as being "credulous and unbusinesslike" - facts well known to the defendant who was "wide awake" and indeed very businesslike. The transaction, which was set aside, concerned the sale of certain premises by the plaintiff to the defendant at a price considerably below their market value. It has already been pointed out that in this case it was held that "undue influence" as a matter of law includes both undue influence in the sense of domination and also "abuse of the duties of care and confidence" which may be imposed upon one person as the result of the particular relationship in which he stands to another. It was upon the latter ground that the case was decided. This relationship of "confidence" arose from the fact that, prior to the transaction, the defendant had acted as the plaintiff's adviser in regard to certain other properties.

Stating that the harshness of the transaction itself gave rise to no remedy, the Master of the Rolls said that he could not upset the finding of the judge in the court of the first instance who had found that Sperni had not "...acquired a complete or domination over Tufton, so that the latter ceased to be a free agent, and his mind became a mere vehicle for Sperni's schemes." Nevertheless the transaction could be set aside if it was found that Sperni stood in such a relation to Tufton that he

owed to him a duty of "care and candor" and was therefore bound to make a full disclosure to him of all the material facts. In support of this contention the Master cited Lord Eldon in Huguenin's Case where he said that if the deed had been the result of the plaintiff's

> "...notion, that this is the true effect of that friendly assistance, that kind, providential, interference, to which she was looking for, for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that, which has always been considered in this court as undue influence,...this court will undo them."(67)

As has been seen Huguenin's Case is a difficult one. It is nevertheless clear that it was decided on the facts. The Master then cited Wright J. in Morley v. Loughnan[68] where he said that

> "There is no doubt about the law, which is illustrated by numerous cases collected in White and Tudor's work upon the leading case of Huguenin v. Baseley and continuing down to the case of Allcard v. Skinner, that the law is, that where large voluntary gifts are made and accepted inter vivos, the recipient may be called upon to show that the donor had capacity and knowledge of what he was doing. In this case that capacity and knowledge are not disputed. Proof may then be given against the recipient to show that the donor's intention to give was produced by undue influence, and then the courts of course set it aside, unless the transaction as a whole was a benefit to the donor. Or the donor may show that a confidential relationship existed between the donor and the recipient, and then the law on the grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by these relations..."(69)

He then cited Lord Lindley's statement to the effect that these relationships could be divided into two classes, namely those where one party has been able to impose upon the other as a result of his relationship and those where he was under a duty to advise the other. He then cited Lord Eldon in Huguenin's Case to the effect that the question was not whether the plaintiff knew what she was doing but rather as to how that intention was produced. He thus came to the conclusion that:

> "In other words, the relation must be one which makes it the duty of one party to take care of the other."(70)

Finally, he cited Lord Chelmsford in Tate v. Williamson[71] as authority for the fact that it was not necessary to show that the persons stood in one of the recognised relationships such as guardian, trustee, solicitor etc. but that all that need be shown is that they stood in such a relationship as "...that while it continued confidence was 'necessarily reposed'". Thus he concluded,

> "In my judgement, the question is not one of domination but of influence, well short, no doubt of domination, based on and arising out of a particular association and advisory capacity."(72)

He found this to be so and set the transaction aside. It would seem from the remarks of Jenkins L.J. that the court considered that such relationships, although they might not be "clothed in the recognised garb" of the well known relationships, are nevertheless fiduciary relationships. As has already been pointed out, this decision was followed in the subsequent case of Antony v. Weerasekera[73]

Hanbury makes an interesting suggestion in regard to the presumption which is said to arise in the case of those managing the affairs of another. He says that the rule "...does not apply to agents unless they are managers of the property of, let us say, an imbecile or childish principal."[74] Although it is difficult to find any direct authority on such a statement, it would seem in principle to be correct. Originally such a factor was required and, as we have seen, it was only by the extension of the concept of "confidence" to enforce "positive-confidence" that this element came to be abandoned during the latter part of the 18th century. It is submitted that this rule is of wider application and applies to all such cases where undue influence is presumed from the existence of a relationship which arises as the result of one person having undertaken to act for another. In other words, this is to suggest that where the beneficiary in such a relationship is of full capacity and suffers from no weakness in any sense of the word, no such

presumption does, or at least should, exist. Such weakness may not be the result of any physical defect on the part of the beneficiary but may arise due to his position of necessity. Necessity would be relevant as far as a fiduciary relationship was concerned where the one party was able to take advantage of the others necessity because of the relationship existing between them.

It will be seen that most cases support such a contention. Thus in Goddard v. Carlisle[75] the donor had just come of age and was considered to be inexperienced. On the other hand in Hunter v. Atkins,[76] also a case of an attorney, it was found that the donor suffered from no physical defects and therefore the presumption was not applied. In Tate v. Williamson[77] we have again the case of youth and inexperience whilst in Inche's Case[78] we have ignorance and great age. Finally, in Tufton's Case[79] we have epilepsy and credulity.

We also find that sometimes the court is careful not to state the rule in absolute terms. Thus in Edwards v. Meyrick[80] Wigram V-C said:

> "it is not insisted in argument that a solicitor is under an actual incapacity to purchase from his client. There is not in that case the positive incapacity which exists between a trustee and his cestui que trust, but the rule the court imposes is that in as much as the parties stand in a relation which gives or may give the solicitor an advantage over the client, the onus lies on the solicitor to prove the transaction was fair."(81)

Sometimes, admittedly, the courts do appear to have decisively rejected the "other factor". Thus in Rhodes v. Bate[82] Sir George Turner stated that the age or capacity of the person conferring the benefit and the nature of the benefit are of little importance in cases where a relationship is established. They are only of importance where there is no such relationship. In this case the defendant had acted for the plaintiff to a rather limited extent as a solicitor or agent which had in fact nothing to do with the transaction which the court was asked to set aside. Nevertheless the presumption applied.

> "...I take it to be a well established principle of this court that persons standing in a confidential relationship towards others cannot...hold benefits which these others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."(83)

The transaction was set aside on the grounds of undue influence arising from the relationship of attorney and client. Although Turner L.J. stated the rules in such absolute terms and the case is often cited as authority for this, the facts of the case suggest that there were other considerations. Here the plaintiff was a woman of over fifty years of age. She resided at the home of the second defendant, the Reverend Codrington, to whom, it was said, "she was much attached" and who had "a very great influence over her." She paid the whole of her estate (except for £20) in payment of his debts to his attorney who was also her attorney and who was also said to have exercised influence over her. In fact it was said by Stuart V-C that:

> "Upon a fair consideration of the evidence it seems plain that the defendant Bate took advantage of the influence which...Codrington and he himself had over her."(84)

It would seem that whenever the rule is applied in absolute terms injustice results. Thus in the case of Walker v. Smith (85) (1861) a client had made a gift to his solicitor while the relation existed between them. Sir John Romilly, in holding that the gift must be set aside in an action brought after his, the donor's, death said:

> "Now if the point here were the extent of influence exercised by the recipient of the bounty over the donor, I should be of the opinion that there was none; though the relationship of solicitor and client existed, I do not see in the evidence any more than a strong regard, friendship and esteem for the recipient of the bounty, but in my opinion, Mr. Smith has not fulfilled the obligation which lies upon him of showing that the gift was really bona fide made to him. I am of the opinion that, in all these cases, you must not take into account the

> evidence of the recipient himself; the gift must be established by a separate and independent evidence, and if there were separate and independent evidence here, I should uphold the gift."(86)

We might add that what has been said above applies also to the relationship between doctor and patient. The situation which most writers and judges seem to have in mind when considering the rule is that of the sick or injured patient ready to agree to anything if the doctor will only cure him. Here, of course, we do have the additional factor. The situation would be analogous to that of the client pendente lite, the person of weak understanding etc. It is submitted that, once again, when one looks at the cases it will be seen that this factor is invariably present.[87]

THE FIDUCIARY DUTIES ARISING FROM THE FACT THAT ONE PERSON HAS UNDERTAKEN TO ACT IN THE INTEREST OF ANOTHER

This is the "positive-confidence" situation. It arises from Sealy's second category of fiduciary relationship of which he says:

> "(t)his type of fiduciary situation arises in the words of Asquith L.J. in Reading v. R.(1) 'whenever the plaintiff entrusts to the defendant a job to be performed'. Any person will find himself in such a situation if he has undertaken or is under an obligation (not necessarily contractual) to act on another's behalf or for another's benefit, or is deemed in equity to have done so."(2)

It matters not whether the undertaking is enforceable at law for equity, it is said, is not concerned to enforce the undertaking but is concerned to see that if the fiduciary acts at all, he acts honestly and in accordance with his undertaking.

As we have seen, the rules governing such persons had, by the beginning of the 19th century been brought together under one principle, namely, that the fiduciary must not place himself in a position where his interest conflict with his duty. With the complete acceptance of the general rule as to profits this too was seen to arise from that general principle. Thus in Bray v. Ford[3] Lord Herschell, in holding that the governor of a college who had also acted as its solicitor was not justified in charging the college for his professional services, said

> "It is an inflexible rule of the Court of Equity that a person in a fiduciary position, such as the respondent, is not, unless otherwise expressly provided, entitled to make a profit, he is not allowed to put himself in a position where his interests and duty conflict."(4)

The result of this approach has led to the reformulation of the principle when applied to those cases where the fiduciary transacts on behalf of his beneficiary with himself. Now it is said that the rule is that such transactions are voidable even although the fiduciary did not breach his duty (paid a fair price) because he must not place himself in a position where his interests "may possibly conflict" with his duty. In other words "conflict of interest and duty" is now equated with actual breach

of the undertaking.

This approach is adopted in most of the leading text books relating to fiduciary duties. Thus Hanbury says that the general rule is "A trustee must not place himself in a position where his interests may conflict with his duty." Under this heading he deals with the rule as to profits and the rule as to "purchase of trust property".[5] Snell states that the general rule is "With certain exceptions, neither directly nor indirectly may a trustee make a profit from his trust." "This rule," he says "is part of the wide general principle that in order to protect a trustee against the "fallibility of human nature" he may not put himself in a position where his duty and his interest may conflict, or where he may be able to take advantage of knowledge of the property (e.g. as to valuable minerals under the land) acquired while trustee. Under this general rule he deals with (a) speculations, (b) renumerative employment, (c) purchase of the trust estate and (d) purchases from cestui que trust. The rules here, he goes on to point out, are applicable to agents, solicitors, company directors, servants, guardians, partners, promoters of companies, managing owners of ships, receivers, borough treasurers and members of committee of inspection in bankruptcy.[6] Halsbury also considers that both transactions between the parties and 'profits' are governed by the conflicts rule.[7] To Lewin the conflict rule is the basic rule.[8] So to it is with Gower who says "As fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests. Good faith must not only be done but must manifestly be seen to be done, and the law will not allow a fiduciary to place himself in a situation in which his judgement is likely to be biased and then escape liability by denying that in fact it was biased." Under this rule he deals with (a) contracts with the company, (b) other secret profits, (c) abuse of confidence and (d) competition.[9] Stoljar, writing on agency, cites Lord Langdale's statement of the general rule in Gillet v. Peppercorne:[10]

> "(But) if a person employed as an agent, on account of his skill and knowledge, is to have in the very same transaction, an interest directly opposite to that of his employer it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continual disappointment, if not the continual practice of fraud."(11)

Under this heading he deals with the agent selling to himself, transactions between principal and agent and bribes and secret profits.[12] Fridman adopts the same approach. He says these duties may "...be lumped together under one general principle; namely, that the agent must not let his own personal interests conflict with the obligations he owes to his principal. This general idea is manifest in various ways."[13]

The Concept of Conflict of Interest and Duty

The rule that a fiduciary must not place himself in a position where his interests conflict with his duty appears, at first sight, to be perfectly straight forward. Unfortunately it is not. This is so because the principle has been used as the rationale of rules relating to the fiduciary's duties in four quite distinct situations.

Firstly, there is the case where the fiduciary purports to act on behalf of his beneficiary in a particular matter in which he has an interest conflicting with that interest of his fiduciary which he has undertaken to advance. The most obvious example of such a situation is where the fiduciary purports to enter into a transaction on behalf of his beneficiary with himself, for example the agent to sell, purchases. Here it is clear that he may breach his duty by transacting on terms less advantageous than he could have obtained had he transacted on behalf of his beneficiary with a third party. It is also evident, however, that such a transaction might be on terms far more advantageous, as far as his beneficiary is concerned, than could have been obtained had the fiduciary transacted with a third party. Nevertheless, whether or not the terms of the transaction were more or less advantageous, it might be said that the fiduciary has entered into a transaction in which his interests

conflicted with his duty. This would also be true of the situation where he enters into a transaction on behalf of his beneficiary with a third person but has an interest in the transaction which conflicts with his duty, for example an agent sells to a company or partnership in which he has an interest. Here again he may put his interest above those of his beneficiary and thus breach his duty or, on the other hand, he may have acted throughout solely in his beneficiary's interests. Thus as far as we are concerned, this situation is identical to that where he transacts on behalf of his beneficiary with himself. For the moment we will ignore the question of actual breach of duty and discuss the rule on the assumption that the fiduciary has acted in the best interests of his beneficiary but has nevertheless placed himself in such a situation where his interests conflict with his duty. *or may possibly with his duty*

The objections to a fiduciary transacting with himself are many. If he is acting on behalf of a person with full legal capacity it might be said that usually, if he is acting bona fide, there will be no reason why he should ever find it necessary to enter into such a transaction. He can always transact directly with his benefidicary. What is more, express provisions apart, his beneficiary gave him authority to transact with third persons and not with himself. This reasoning, however, will not apply where the beneficiary does not have full capacity, for example the ward. Here it might be argued that if the fiduciary is prepared to enter into such a transaction on terms more advantageous than he could have obtained elsewhere, there should be no objection to the transaction. On the other hand, it could be said that, as the fiduciary is under a duty to obtain the best possible terms for his beneficiary, he, therefore, apart from donation, can never enter into such a transaction without breaching his duty for he must always make some decision in his own interests and against those of his beneficiary. Such an argument might, however, be thought to be rather unrealistic. Why then are such transactions voidable? Although this question was much debated by the Civilians, English lawyers appear never to have doubted, since the latter part of the 18th century at least, that these transactions should be voidable and that this

rule is to prevent possible fraud. For the same reasons transactions entered into by the fiduciary with a third party in which the fiduciary has an interest are set aside. Thus the rule is said to be "puritan in its inflexibility" for he may not "even put himself in the way of temptation." It is frequently said that the rule exists because of the difficulty that a court will experience in many such cases of ascertaining whether or not the beneficiary in fact acted bona fide. It would, however, be unreasonable to suggest that a court would have any particular difficulty in ascertaining whether the terms of the transaction were fair - and in any event it is said that such transactions are set aside "no matter how fair the price".

It is submitted that there are probably two reasons for the rule. Firstly, the fact that the duty of a person acting in the interests of another may extend beyond merely entering into the most advantageous transaction possible at any particular time. Thus for example it may be that he should not sell at all or should only sell at some later stage. In such a case it certainly would be most difficult for a court to ascertain whether or not the fiduciary had breached his duty for it would have to decide if he had actually thought at the time of the transaction that it was not an advantageous time - as far as his beneficiary was concerned - to transact. Secondly, and this is probably the most important reason for the rule, a person should not be permitted to make a decision on behalf of another in such a situation for no matter how honestly he may act, the fact is that he could hardly but be biased and, furthermore, there would always be a doubt as to the propriety of the transaction.

We now turn to the second situation covered by the rule. So far we have only considered the situation where there was in fact a conflict of interest and duty. It is clear, however, that a fiduciary may act on behalf of his beneficiary in a matter in which he has an interest but which interest does not conflict with his duty. Let us take an example. A, considering that a certain property will appreciate rapidly in value instructs B to purchase it for him and resell it at a later date. He informs B that the maximum price he can afford is R10,000. B, who fully agrees with A's judgement, is unable to purchase

the property for less than R15,000. Without informing A, he puts up the balance of the purchase price himself and subsequently resells the property for R32,000, taking a proportionate share of the profit. Here his interest certainly did not conflict with his duty. Nevertheless, as we have seen, the "conflict of interest and duty" rule was extended so as to apply to cases where the fiduciary actually breached his duty, it being said that in such a case his interest did in fact conflict with his duty. This in turn led to the rule relating to the situation where the fiduciary acted on behalf of his beneficiary in a matter in which he had an interest conflicting with that duty, to be re-stated. Thus in Aberdeen Railway Company v. Blackie,[1] a case of a director purchasing on behalf of his company from a firm in which he was a partner, Lord Cranworth said

> "...agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect."(2)

In other words such situations are covered by the rule even although the fiduciary did in fact act bona fides, because it is said his interests could have conflicted with his duty. The rule as so stated means that a fiduciary may neither breach his duty nor place himself in a position where he could possibly breach that duty.

Does the transaction in the example above fall within the rule? Obviously B's interests could possibly conflict with his duty, for example if, having purchased, A wishes to sell immediately and B does not.

It has been submitted that this approach is untenable. A man either breaches his duty or he does not. He cannot be held accountable where it is thought that he might conceivably do so. It has been said that "The trustee is always in a position of some temptation by the very fact of managing the funds of another" and to this it might be added that anybody, whether he be an administrator or not, who is under a legal duty of any

kind, might always breach that duty but surely he cannot be accountable unless he in fact does so. Difficult one

This is not to suggest that B in the above example should be entitled to his profit. He undertook to act for A and has, without obtaining A's consent, turned the matter into a joint-venture. If he is to be held accountable, this surely is the only basis upon which it can be done.

Thirdly, a fiduciary may act in his own interests instead of acting in the interests of his beneficiary. Here he has breached his duty by acting contrary to it. As we have seen, this is said to be a case where the fiduciary has permitted his interests to conflict with his duty.

Fourthly, a man may breach his duty by acting contrary to it even although, in so doing, he does not act for himself where he should have acted for his beneficiary. Thus for example he may disclose information given to him in confidence by his beneficiary. Here too it is said that his interests conflicted with his duty though it is difficult to see how this can ever be the case where the information is disclosed purely for the benefit of a third party.

Fifthly, also included within the rule, are incidental profits made during the course of the fiduciary's administration of his beneficiary's affairs. Here it is simply nonsense to speak of there ever being a "conflict of interest and duty". The profits arise for the very reason that the fiduciary has acted in the interests of his beneficiary. If he is to be held accountable for these the action should be based solely upon the fact that they are profits made during the course of such administration.

(2) The avoidance of contracts between Fiduciary and Beneficiary

The general rule applying to fiduciaries of this class in regard to contracts entered into between him and his beneficiary is stated by Sealy thus:

> "...the beneficiary will not be held bound by any contract which has been entered into either by or through the fiduciary where the latter's position was such as to

> prejudice, or be likely to prejudice, the honest and full discharge of his undertaking."(1)

It is usual to say that this situation involves a "conflict" between the beneficiary's"interest" and the fiduciary's "duty". It must, however, be borne in mind that frequently such a fiduciary is under no legal duty to act at all.

This formulation of the rule is far too wide. A beneficiary may only avoid contracts between himself and the fiduciary. Contracts entered into on his behalf with a third are only voidable if that third party has knowledge of the fiduciary's breach of duty. What is more, it is only in regard to transactions entered into on behalf of his beneficiary with himself, that we can speak of the fiduciary being in a position which is "likely to prejudice" his duty. When he enters into a transaction with his beneficiary the validity of the transaction depends upon whether he actually breached his duty - i.e. whether he made full disclosure.

(a) Transactions entered into by the Fiduciary on behalf of his Beneficiary with himself

"The rule I take to be this," said Lord Eldon, "not that a trustee cannot buy from his cestui que trust, but that he cannot buy from himself."[2] Until the recent case of Holder v. Holder (1968) this proposition has remained completely unchallenged. Lindley L.J. in Farrar v. Farrar Limited[3] said that such sales were in fact "no sales at all". Hanbury says that they are "entirely forbidden".[4] The rule, of course, does not apply only to trustees but to all fiduciaries.[5] Such transactions are, however, not void, as was suggested in Re Boles and British Land Company's Contract,[6] but voidable at the instance of the beneficiary provided that he comes within a reasonable time to have it set aside.[7] Just what is a a "reasonable time" is difficult to say. In York Building Company v. MacKenzie[8] a purchase by a "common agent" (who appears to have been the Scottish equivalent of our Deputy Sheriff) at a public sale which he had arranged was set aside by the House of Lords eleven years after the sale.

The beneficiary has an absolute right to have the conveyance set aside and it matters not how honestly the fiduciary had acted and how fair the transaction may have been.[9] It is usually said in this regard that purchases from co-trustees are also voidable.[10] Whether this is in fact a fiduciary rule or depends rather upon the rule relating to trustees requiring them to act jointly is, however, doubtful. It is submitted that it is the outcome of the latter rule. A fiduciary cannot, of course, circumvent this rule by selling to a third party and then repurchasing for himself[11] but he may purchase from a third party provided the original sale was bona fide, i.e. there was no understanding between him and the purchaser as to its repurchase.[12] It has also been held that he cannot repurchase the property so long as the original contract of sale remains executory.[13] The fact that the fiduciary was unaware of the rule is of course irrelevant and this is so whether he sold to himself or repurchased from a third party.

The rule has been applied at times with great severity. Thus in the case of Wright v. Morgan[14] a sale was set aside in the following circumstances. A testator had provided in his will that one of his sons should have the option to purchase his property, an independent valuation of it having been obtained. The son, however, ceded this right to his brother. Both brothers were trustees under the will and an action was brought to have this cession set aside. The court rejected the plea that what had in fact been "sold" was not the property but a right to it. Viscount Dunedin saying:

> "But, as it was, the option transferred to Douglas only gave Douglas the right to ask from the trustees a contract of sale, and that contract of sale was ex rei necessitate, a contract between the trustee and himself as a trustee, and that is what the law will not allow."(15)

It was then argued that there was no conflict of duty and interest for the property would be sold to him on the conditions of sale as set out in the will and at the price determined by independent valuers. This too was rejected. And yet, although the transaction was set aside, it was never in doubt that the

brother who had ceded the right could, of course, have exercised it at any time himself, and that, should he have then wished, he "might have transferred to a trustee just as well to any one else." On the other hand, it is well established that a fiduciary may purchase where he had obtained an option to purchase before becoming a fiduciary. Thus in Kelly v. Enderton[16] a principal gave his agent an option to purchase certain property and also agreed to pay him a commission on the sale of it. The agent sold the property to a clerk in his office. It was held that the principal could not recover the property in the face of the undisputed fact that he had given his agent an option to purchase. In Re Mulholland's Will Trust[17] it was said that "the principale does not apply where the trustee purchases under a contractual right preceding the fiduciary relationship."

The rule was considered in great detail in the recent case of Holder v. Holder.[18] The case is of considerable interest for it appears to evidence a very definite change of policy on the part of the courts as regards the application of this rule. The defendant, an executor in an estate, purported to renounce his executorship with the object of buying certain farms in the estate. Before doing so, however, he had signed a cheque, endorsed certain insurance policies and, together with the other executors, had instructed a firm of solicitors to act for the estate. These actions were referred to in the court of appeal as being merely "technical" acts of intermeddling. It had, however, been conceded at the trial that the renunciation was, because of these acts, invalid and the Appeal Court felt compelled to accept this. Having taken no further part in the affairs of the estate, he then purchased these farms at an auction. It was accepted that he had taken no part whatsoever in the fixing of the reserve price nor in instructing the valuer who fixed it. The price he had paid was described as "a good one and probably higher than any one not a sitting tenant would have given" - he was in fact the tenant of the farms.

The trial court applied the rule and set the sale aside. The appeal court took a very different view. Danckwerts L.J. looked to the reason behind the rule. He said:

> "The principle that a trustee cannot purchase part of the trust estate goes back to the statement of it by Lord Eldon L.C. in 1802 in Ex parte Lacey. Lord Eldon stated the principle in the most severe form. The reason given by Lord Eldon, that it is impossible to ascertain what knowledge the trustee may have seems less persuasive in the light of Bowen L.J.'s famous dictum that 'the state of a man's mind is as much a fact as the state of his digestion,' and the almost daily experience of any judge engaged in ascertaining the knowledge and intentions of a party to proceedings."(19)

Then, referring to Snell "Principles of Equity,"[20] he continued,

> "It is said that it makes no difference even though the sale may be fair and honest and may be made at a public auction, but the court may sanction such a purchase and, if the court can do that there can be no more than a practice that the court should not allow a trustee to bid. In my view it is a matter for the discretion of the judge."(21)

Dankwerts, however, found that the sale should stand because the plaintiff had acquiesced to it. Harman L.J. said:

> "The judge decided in favour of the plaintiff because the third defendant was at the time of the sale in a fiduciary position and, like any other trustee, could not purchase the trust property. I feel the force of this argument but doubt its validity in the very special circumstances of this case. The reason for the rule is that a man may not be both a vendor and a purchaser; but the third defendant was never in that position. He took no part in instructing the valuer who fixed the reserves or in the preparation of the auction. Everyone in the family knew that he was not a seller but a buyer...(he had not) interfered in any way with the administration of the estate...he acquired not special knowledge as executor."(22)

He continued,

> "Another reason lying behind the rule is that there must never be conflict of duty and interest, but in fact there was none here in the case of the...defendant, who made no secret throughout that he intended to buy."(23)

He then referred to the rule as stated by Lord Eldon in Ex parte Lacy and Ex parte James and said,

> "These are no doubt strong words, but it is to be observed that Lord Eldon was dealing with cases where the purchaser was at the time of the sale acting for the vendors. In this case the...defendant was not so acting... Of course, I feel the force of the judges reasoning that if the.... defendant remained an executor he is within the rule, but in a case where the reasons behind the rule do not exist I do not feel bound to apply it..."(24)

He therefore held the rule did not apply to the defendant but added that if he were wrong in this then, in any event, the transaction could not be set aside by the plaintiff for he had acquiesced to it. The case was therefore decided upon that basis, and with this there can be no quarrel. It is submitted, however, that the views expressed by the judges upon the rule itself are not above criticism.

Danckwerts L.J. considered the reason for the rule, namely, that "it is impossible to ascertain what knowledge the trustee may have," is no longer tenable.[25] It would seem, however, that when Lord Eldon said this he was referring to the case of a trustee purchasing from his cestui que trust and not from himself. His Lordship's reasoning here admittedly contains a non sequitor, but that is irrelevant here. Both Danckwerts L.J. and Harman L.J. appear to have failed to distinguish between the two situations. The former appears to have considered that it is sufficient for a trustee to pay the best price that could be obtained at the time. This must certainly be the position where the trustee severs his relationship with his cestui que trust and purchases as a stranger, but it surely cannot be enough where this relationship remains. He has positive duties to decide how and when the property should be sold. The dangers inherent in this reasoning can be seen from the fact that the court never did ascertain whether, if the trustee had acted, a better price could have not been obtained and this may well have been the case for here the trustee was the only person with an intimate knowledge of the property and, it would seem, that he was the only trustee with a sound knowledge of farming.

Harman L.J.'s judgement goes much further than this. He clearly considers that a trustee can purchase so long as he neither acts nor pretends to act for the estate. This reasoning,

it is submitted can never be accepted for a trustee has a positive duty to fulfil and to suggest that he can avoid this whenever he wishes to purchase the trust estate can only be accepted if the law requiring trustees to act jointly is abandoned.

(b) Transactions between the Fiduciary and his Beneficiary

In Sanderson v. Walker Lord Eldon[26] (1807) stated that a trustee could buy from his cestui que trust provided he was able to prove:

> "...that he had removed himself from the character of trustee; and this can do by showing that he has concealed no facts, that he has given an adequate price, that he has not in any way abused his fiduciary position and that the beneficiary has had independent advice."

Although this statement of the law is frequently cited as authority today it clearly contains elements of undue influence. The modern rule appears to have only two aspects. The fiduciary must transact openly, make full disclosure and, probably, pay a fair price.[27] Modern authorities tend to approve rather of Lord Eldon's formulation of the rule in Coles v. Trecothick[28] where he went no further than to say that it must be established that the cestui que trust intended to sell to the trustee, no fraud and full disclosure.[29] We have, however, seen that there still exists a certain amount of confusion between this situation and undue influence. Here the judgment of Scrutten L.J. in the case of Moody v. Cox and Hatt[30] was cited. In that same case, however, Cozens Hardy M.R. said:

> "There may be cases in which undue influence is proved as a fact, but the principle to decide this case upon, in my view, is this. An attorney selling to a client or buying from a client is bound to disclose everything that is material, or may be material to the judgement of his client before the transaction is completed. The duty to disclose is quite consistent with the absence of undue influence."(31)

This being so, statements to the effect that there are two further requirements, namely, independent advice or, if that is not proved, evidence that the fiduciary acted to the benefit

of his beneficiary just as he would have done had the transaction been with a third party, would fall away.

There is sometimes a further rule stated, or perhaps a refinement of the rule, to the effect that

> "...even the fact that a trustee has ceased to hold that office will not necessarily render him a fit purchaser, for he will not be allowed to purchase if he continues to act as a trustee up to the point of the sale, getting during that period all the information that may be useful to him, then suddenly purporting to discharge himself of the character of trustee and purchasing the property."(32)

There is, however, no authority for the fact that the speed in which the trustee alters his position has, unless done fraudulently, any effect upon the transaction.

The fiduciary's duty to make a full disclosure is uneffected by the fact that he may owe a duty to a third party not to disclose the relevant facts. Thus in Moody v. Cox and Hatt[33] it was held that the fact that the solicitor was not dealing with his own property but as trustee for another did not absolve him of this duty. Snell says that these obligations continue after the termination of the relationship itself.[34] He cites, however, here the case of Demerara Bauxite Company Limited v. Hubbard[35] but, as we have seen, the court appears to have in mind the doctrine of undue influence.

What must be disclosed? Story, not very helpfully, says that the fiduciary must disclose whatever he is bound in conscience to disclose. But then he also says this duty arises from the relation of ancestor and heir, and considers that the duty to disclose rests upon the presumption of undue influence. It is in order to prevent advantage being taken of "the unlimited confidence, affection, or sense of duty, which the relation naturally creates."[36] Sealy, distinguishing the doctrine of undue influence, considers that the fiduciary's duty is to "make available any special information which he had acquired in his capacity as fiduciary - e.g. valuations obtained on the beneficiary's behalf or special knowledge of the subject matter gained through familiarity with it while engaged as fiduciary."[37] Sealy's discussion here is not, however, easy to follow. He

points out, obviously correctly, that disclosure in the case of a "secret profit" is relevant for "quite different reasons." This must be so for there the fiduciary is in fact obtaining consent to take for himself what he would otherwise have had to account to his principal for. Thus he is required to disclose "all material facts" as it will clearly not be sufficient for him merely to state that he has "an interest" or will make "a profit". Sealy then goes on to say that in company law confusion has been multiplied by a failure to distinguish the specific and different duties of disclosure imposed by statute, charter or articles upon a company's officers and the consequence has been that disclosure has tended to be treated "as a formal requirement for the validity of a contract to be strictly and fully complied with." He then, however, states, generally, that "it has been assumed in the discussion that the fiduciary's interest is as an opposite principal party, but this need not be so" and he then cites as authority for this proposition the case of Transvaal Lands Company v. New Belgium (Transvaal) Land & Development Company.[38] This was a case in which a director had voted upon a transaction with another company in which he held shares as trustee for a third party. Here we are dealing with disclosure of interests in transactions carried out on behalf of the beneficiary. In other words the case deals with precisely that sort of disclosure which one would have thought Sealy was seeking to distinguish from the disclosure required of a fiduciary when transacting with his beneficiary. The position in company law is, indeed, as we shall see, extremely confused. It is submitted that this has, however, arisen not only as the result of applying the rules relating to profits (and frequently also decisions relating to the effect of particular rules contained in company's articles) but also by confusing the rules relating to the case where the fiduciary purports to act both for his company and for himself. Furthermore, this confusion is not confined to company law and is strongly evident in Sealy's discussion of the subject. Thus under the rubric "The avoidance of contracts" he states that the position of a fiduciary who undertakes to act for another "as regards contracts in which he is himself interested" is that:

> "...the beneficiary will not be held bound by any contract which has been entered into either by or through the fiduciary, where the latter's position was such as to prejudice, or be likely to prejudice, the honest and full discharge of his undertaking... Contracts which infringe the rule may be rescinded at the beneficiary's option. As with other voidable contracts, restitutio in integrum must be possible, but, in contrast with transactions voidable for innocent misrepresentation, even executed contracts may be set aside. In rejecting the issues of bona fides, reasonableness and fairness, Lord Cranworth (Sealy had cited Cranworth's famous statement of the rule) was following the lead clearly given by Lord Thurlow in the earliest leading case of Fox v. Mackreth: it is sufficient that the beneficiary objects. But there is one well established exception to the rule as Lord Cranworth stated it: an adequate disclosure by the beneficiary of his interest may render the parties free to make a binding contract."(39)

This is of course the universally accepted approach of English writers on the subject. It is based upon the idea that there is but one rule. It does, however, it is respectfully submitted, completely confuse two entirely different situations. Where the fiduciary transacts on behalf of his beneficiary with himself the transaction is voidable. This is so regardless of whether or not a fair price has been paid. Where the fiduciary transacts on behalf of his beneficiary with a third party in a matter in which he has an interest the transaction is only voidable if the third party had notice of his, the fiduciary's, breach of duty. There is no authority whatsoever to suggest that the beneficiary may void such a contract as against a third party who had no knowledge of the fiduciary's breach. But, even if the beneficiary is unable to avoid the contract, the fiduciary will be liable to account for any profits. His liability for these profits arises from the fact that they came to him as the result of his administration. If he wishes to enter into such a transaction he should obtain the consent of his beneficiary and if a profit will accrue to him as the result of it, he must inform his beneficiary of that fact and obtain his consent to take that profit for himself. None of this is, however, relevant here. We are considering only that case where the fiduciary transacts directly with his beneficiary. To hold that one rule applies to

all these situations can only lead to anomalies.

Where the fiduciary deals directly with his beneficiary the transaction is not voidable "no matter how fair the price". It is voidable only if the fiduciary transacted secretly (i.e. purchased through a third party without disclosing this fact) or if he failed to make disclosure of facts concerning the transaction which he had acquired as the result of his position as fiduciary. Furthermore, there is no authority for the proposition that such a transaction is ever voidable where the fiduciary has paid a fair price. What is more, in such a case one cannot speak of the fiduciary having "an interest" in the transaction. The relationship is severed, at least as far as the particular transaction is concerned, and the fiduciary acts only for himself. On the other hand, in those cases where the fiduciary acts on behalf of his beneficiary in a matter in which he has an interest, disclosure of information acquired in his capacity as fiduciary will very frequently not be sufficient disclosure nor, in fact, will it always even be relevant. What he must disclose is his interest and, if he wishes to take a profit, he must inform his beneficiary of it and obtain consent to take it for himself.

Why must disclosure be made? The answer to this question should, in principle, determine what must be disclosed. Of course, in the earlier cases the reason given was that it must be made in order to avoid undue influence. Sealy, rejecting this, says that the true reason for the rule is that "this information should become common property before the parties (can) stand on equal bargaining terms."[40] It is submitted, however, that this too is based upon the concept of undue influence. Where such influence exists the rule is that the parties must be placed in a position of "equal bargaining terms." His explanation may, therefore, well be technically correct as far as Equity is concerned but it obscures the fact that the true reason for such disclosure must surely lie in the fiduciary's duty to act in the interests of his beneficiary. Thus all information that he obtains during his administration should, because of this duty, be disclosed to his beneficiary and he cannot be permitted to avoid this by simply terminating that relationship. It would be unreasonable to suggest that on termination of the relationship

he must merely account for money or property in his possession and not also inform his beneficiary of all information that he has obtained regarding his affairs. The reason for the duty would therefore at the same time explain its limits. Here again we see Equity enforcing an undertaking via the concept of an equitable wrong. The wrong being the taking of an advantage at the expense of the beneficiary by the use of information so obtained.

Finally, it should be noted that text books on contract frequently refer to disclosure here as being "misrepresentation" - "silence constitutes misrepresentation where there is a fiduciary relationship". Thus for instance we find Chitty writing:

> "The general rule is that mere silence does not constitute misrepresentation, and tacit acquiescence in anothers self-deception gives rise to no legal liability, provided it has not previously been caused by a positive misrepresentation. But there are exceptions to this rule, namely, where the contract is within the class of contracts uberrimae fidei, where there is a fiduciary relationship between the parties, and where failure to disclose some fact distorts a positive representation. In each of these cases there may be a duty to speak, and a breach of this duty will entitle the representative to avoid the contract."(41)

Sealy argues, obviously correctly, that the duty to disclose here is sui generis. The beneficiary's remedy is in equity giving no right to repudiate or to claim damages at law. Whether it is sensible to maintain this distinction, as Sealy clearly thinks it is,[42] is, however, doubtful. The situation appears to be the unfortunate result of the development of English Law by two courts acting upon different principles. On the other hand it is submitted that to suggest, as Newman[43] does, that the equitable principles of disclosure should be extended to all transactions regardless of whether or not there exists a fiduciary relationship, is completely untenable. His argument is based upon the assumption that the fiduciary's duty to disclose is no less than a duty to disclose all material facts concerning a particular transaction which are within his knowledge. He therefore sees no reason why such a duty should not always be imposed upon persons

entering into transactions with another. It is submitted, however, that the fiduciary is under no such duty. What he must disclose are those facts which he ascertained when acting for his beneficiary concerning his beneficiary's affairs. The duty to disclose arises out of and is limited by his duty to administer.

Liability to Account for Profits

The term "profits" have a very wide meaning in Equity. It includes both pecuniary advantages obtained by the fiduciary at the expense of his beneficiary as the result of a breach of his duty and all incidental profits accruing to him as the result of his position. He is usually said to be liable for the latter because equity will not permit him to "place himself in such a position that his interests may conflict with his duty." In Bray v. Ford Lord Herschell[1] stated the rule and the reasons for it thus:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is a danger, in such circumstances, of a person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing."(2)

Thus equity here is said to contain "an element of prevention as well as cure."[3] In the light of this it is surprising to find that fiduciaries have been held liable for profits even although it has been accepted that they could not possibly have made those profits for their beneficiary. Keech v. Sandford[4] is usually cited as authority for this but a far clearer statement of the rule in this regard is to be found in Regal (Hastings) Limited v. Gulliver[5] where Lord Russell of Killowen said:

> "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."(6)

In thus formulating the rule the Court was not, however, suggesting that the principle underlying it was anything other than that a fiduciary is not to be permitted to allow his interest to conflict with his duty. Thus Viscount Sankey said that the general rule of equity here is "that no one who had 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."[7] Thus it would seem that the taking of a profit, as such, by a fiduciary places him in this position. He cannot take a profit for this will, or may, result in a conflict of interest and duty. The fiduciary is accountable for all profits. The fiduciary, by the mere fact of taking the profit has placed himself in a position where his interest conflicts with his duty (a "constructive fraud") and therefore he is accountable for those profits as a constructive trustee.

In Barnes v. Addy[8] Lord Selborne L.C. said:

> "It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There is no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."(9)

The rule, however, as stated above appears to be formulated to produce such inequitable results. It means that in order to prevent possible breaches of duty, equity insists that even those profits made where there is no breach of duty must be surrendered

up to the beneficiary. Why should not the fiduciary simply be liable for profits where a conflict did occur or may have occurred?

On the other hand, however, it might be thought that the anomoly here is not that the fiduciary is accountable for all profits but that the rule should be said to be based on the principle of conflict of interest and duty. Why should not a person who is managing the affairs of another account to him for all profits made during the course of that management? If this reasoning is sound then the fiduciary's accountability for profits has nothing to do with the question of whether or not he, in obtaining that profit, failed to act in the interests of his beneficiary.[10] The fact is that such an approach is based on a distinction which does not exist in equity. There a person is liabile to account for what "belongs in equity" to the plaintiff and this occurs where the property was considered to be that of the plaintiff before the defendant purported to appropriate it to himself, where the defendant used the plaintiff's property to make the profit and where the defendant took the profit for himself in breach of a duty to obtain it for the plaintiff. In other words, as we have repeatedly stressed, liability arises either in property or as the result of an equitable "wrong". Thus we cannot draw a distinction between an action seeking redress for damages resulting in what the fiduciary failed to do and an action for profits. If a fiduciary takes something without committing a breach of trust which did not, prior to his taking it belong, at least in equity, to his beneficiary, how then can he be held accountable for it? There are only two possible ways open to the Chancellor. Either a further type of equitable wrong is formulated such as the conflict of interest and duty principle and it is then presumed that whenever the fiduciary takes a profit he has breached this duty or it is said that the knowledge or opportunity or both were the property of his beneficiary and therefore the property into which they have been converted belong to him. The former results in the anomoly discussed above and the latter in an extension of the concept of property beyond all reasonable limits - even for equity.

Before considering the above problems further it is necessary to consider how the rule has been applied. In doing so I have attempted to distinguish between various situations in which a fiduciary has been held accountable for profits. Most of these distinctions have been used frequently before but some, however, are my own. Although none of them are really satisfactory they do assist in illustrating the application of the principle and the wide area which it covers.

(a) Remuneration

The principle that a trustee must act gratuitously is very ancient, the cases here going back at least as far as the 17th century. The origins of the rule appear to be rather different from those of the similar rule applying in Roman Law to the mandatory for it would seem that the idea was that to allow remuneration would be to permit the trustee to exploit his beneficiaries by bringing undue pressure upon them.[11] Today the rule is of rather different content for the beneficiaries may, of course, always agree to the fiduciary receiving remuneration where it was not originally provided for in terms of the original trust deed or undertaking, although such agreements are said to be "regarded with jealousy by the courts". The modern rule is rather that, no matter how wide his powers, a fiduciary may neither decide upon his own remuneration nor appoint himself to a position of remunerative employment nor appoint any one else to such a position in whose remuneration he has an interest - for example a trustee who is a solicitor cannot appoint his firm to do work for the trust on a remunerative basis. It is usually said that this rule applies to all fiduciaries but this would appear to be incorrect - for example a solicitor is always entitled to his fees. It has however been applied to directors.

Thus whilst the rule originally was unrelated to "profits" the modern rule is clearly but an application of this principle. In fact the well-known statement of the rule as to profits by Herschell C.J. in Bray v. Ford[12] concerned the question as to whether or not a governor of a college who was also a solicitor was justified in charging that college for his professional services. A fairly recent case upon the rule is that of

In re The French Protestant Hospital,[13] Here the governors of the hospital, which had received a charter in 1718, were forbidden to receive remuneration in terms of its by-laws. They attempted to alter this provision and the question arose whether they had the power to do so. Danckwerts J. held that they could not. His reasons for so holding were these:

> "It is plain that these persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property. It is quite plain that it would be entirely illegal if they were simply to put the property, or the proceeds of the property of the corporation, into their pockets and make use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees.... But while it is entirely proper for a settlor or testator to insert in his settlement or will a provision enabling the trustees of a trust constituted by him to obtain payment for their services, it seems to me a very different matter for persons who are already in the position of trustees, and therefore, so far as they exercise their powers at all, bound to exercise them in a fiduciary manner on behalf of the charitable trusts for which they act, themselves to empower the directors to be at the one time directors and persons who are making a profit."(14)

(b) A Fiduciary may not use property to his benefit which he holds for and to the use of another.

It would appear that the old rule as to trustees was that they were under no obligation to keep trust funds separate from their own and were allowed to use them to trade, provided the trustee was solvent at the commencement of the venture. Sealy considers that the modern rule was not established before the time of Lord Thurlow[15]. Holdsworth puts the change at an earlier date[16] but Sealy considers that this does not take into account the authorities which were relied upon in Newton v. Bennett.[17] In any event, the modern rule is clear. If a fiduciary uses property or funds which are those of his beneficiary, either in law or in equity, in any way other than for the benefit of that beneficiary he will be liable for all losses and will be accountable for all gains made. The idea of what is "owned" in equity is given a

very extensive meaning. Thus in Shallcross v. Oldham[18] the master of the ship was authorised to use the vessel to the best advantage. Unable to procure remunerative cargo, and not wanting to risk the owner's money, he purchased a cargo of coals on his own account, unloading it at another port but charging himself with proper freight. It was held that the master had to account for his whole profit. It was true that he had no intention to defraud but the profit was made by the use of the owner's property, Page Wood V-C reasoning as follows:

> "The great question...is whether the defendant had a right to employ the property entrusted to his charge for his own benefit. The case of a van used by a servant to carry his own goods was put in argument; but that does not appear to me to shake the principle that, when a chattel is entrusted to an agent to be used for the owner's benefit, all the profits which the agent may make by using that chattel belonged to the owner. The nearest case which was suggested is perhaps that of a trustee in possession of a mill and machinery; I think it clear that, if the trustee invested his own capital in working it, he would be bound to account to his cestui que trust for all the profits made by the use of the mill."(19)

The rule thus covers both the case where the fiduciary acts mala fides and the case where he acts bona fides. It covers both the case where he acts in his own interests, when he should have acted in the interests of his beneficiary, and the case where he acted solely in the interest of his beneficiary.

(c) A fiduciary is accountable for all profits made as a result of taking for himself an advantage which it was his duty to take for his beneficiary

Under this head would fall all those cases where the agent to purchase purchases on his own behalf and then resells at a profit to his principal and where the agent to sell, purchases and later resells at a profit. If in doing so the agent transacts with himself, then the principal may, of course, sometimes be able to void the sale but where this is not possible his only remedy will be an action for profits. Included here too would be cases of secret commissions, discounts, rebates and rewards which result in the beneficiary receiving less than he would have

received had the fiduciary not taken them and had, instead, bargained for better terms for his beneficiary. Cases of this sort would be those of Fawcett v. Whitehouse[20] and Andrews v. Ramsay.[21] In the former case a partner negotiating the terms of a lease on behalf of his partnership "clandestinely" stipulated for and received a secret reward of £12,000. In the latter case an agent to purchase received a secret commission from the seller. Here too would fall many cases of bribes. Thus, for example, in Salford Corporation v. Lever[22] the plaintiff company appointed an agent to advise them concerning tenders made to it for the supply of coal. One of the suppliers paid to him one shilling a ton on all contracts which he had recommended to the company, the supplier recouping himself by increasing the price by one shilling a ton. Mala fides is, however, not essential and, what is more, the fiduciary is accountable even where it was impossible to take the advantage for his beneficiary. We have seen the early application of this rule in Keech v. Sandford.[23] Thus too in De Bussche v. Alt[24] an agent purchased a boat which he had been instructed to sell and later resold it at a profit. In fact he had purchased it himself because he had not been able to sell it on the terms stipulated by his principal, namely $90,000 in cash. Although he had resold the boat at a higher price, he had done so by granting extensive credit. Nevertheless he was held accountable. So too a fiduciary is accountable even although his beneficiary instructed him not to seek to make the profit for him. Thus in Bentley v. Craven[25] a partner in a firm who also acted as its agent to purchase sugar for it, sold various quantities of sugar to the firm at the market prices of the day but at a considerable profit. He was held accountable for this profit even although he had been instructed not to speculate on behalf of the partnership. The leading modern authority on the subject, Regal (Hastings) Limited v. Gulliver,[26] relates to directors and will be considered in more detail later. For the moment it is sufficient to note that there a company had no money to apply for certain shares and its directors, purchasing these shares for their own account, made a substantial profit. Although the directors had purchased the shares in order to make possible a scheme to advance the interest of the company,

and although it was impossible for the company to have purchased the shares, they were nevertheless held accountable for this profit.

(d) A fiduciary is accountable for all profits made as the result of taking an opportunity arising during the course of his administration, even although he was under no obligation to take it for his beneficiary

Here again, as in the above cases, it is immaterial whether the fiduciary acted mala fides or bona fides. Included here would be those cases of discounts, commissions, rebates, rewards and bribes which do not result in the fiduciary fulfilling his undertaking on terms less favourable to his beneficiary. Thus the fiduciary is accountable for discounts even although they are the practice in a particular trade. Here too the case of Attorney General v. Goddard[27] would probably fall. There a police sergeant was held accountable for bribes which he had received.

Even where it is established that the beneficiary suffered no harm as a result of the fact that his fiduciary had obtained the profit, it is usually said that such a profit must nevertheless be accounted for because it may have had the tendency to cause such harm. An example of such a case is that of Williams v. Barton.[28] Here the facts were as follows. The defendant was one of two trustees under a will. He was also employed as a clerk by a firm of stock brokers on the terms that his salary should consist of half the commission earned by the firm on business introduced by him. On his recommendation, the firm was employed to value the testator's securities, the firm's charges being paid out of the testator's estate. Although he had taken no part in the making of the valuations or in fixing the fees to be charged, he was nevertheless held accountable to his co-trustees for that part of the commission paid to him by his firm. Here Russel J. said:

> "It is a well established and salutary rule of equity that a trustee may not make a profit out of his trust. ...On the same principle a trustee has no right to charge for his time and trouble. It was argued on

behalf of the defendant that the case was altogether outside that rule of equity because the sums received by the defendant were merely parts of a salary paid to him by his employers under the contract of service and were not of a character for which he was liable to account....The situation is an unusual one, and the contract of service represents the following peculiar features. The remuneration has no relation to the services which the defendant has to render to his employers....The amount of his remuneration depends (subject to his employers' acceptance of orders) upon his own efforts, but upon efforts not in any relation to the work which he is engaged to do. Any increase of his remuneration rests with him.

From this it seems to me evident that the case falls within the mischief which is sought to be prevented by the rule. The case is clearly one where his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the Stockbrokers to act for the estate, as the recipient of half the fees to be earned ...on work introduced by him, his obvious interest is to choose or recommend them for the job.

In the event that has happened. They have been chosen, and chosen because the defendant was a trustee, with the result that half of what the estate pays must necessarily pass....(H)e has increased his remuneration by virtue of his trusteeship. In my opinion, this increase of remuneration is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee."(28a)

Then, finally, there are cases where it is very doubtful whether such a "conflict of interest and duty" could be said to have existed at all. Here we have the very important modern authority of Phipps v. Boardman.[29] This is a case which merits a fairly detailed consideration for in it we see all the difficulties of principle met with by equity in regard to this duty. A certain C.W. Phipps had by his will established a trust, the trustees of which were the testator's widow (who had become senile), his married daughter and an accluntant, one Fox. The trust held a substantial minority holding in a private company engaged in the textile industry. Considering the accounts of that company to be unsatisfactory and its directors to be unfriendly to the Phipps family, Fox consulted Boardman, the family solicitor who had also advised the trustees from time to

time. It was decided that Boardman and one of the beneficiaries of the trust, Tom Phipps, who was engaged in the textile industry himself, should attend the annual general meeting of that company with the idea of getting Tom appointed a director and they were given proxies by the trustees for that purpose. This attempt, however, failed and Boardman then suggested that Tom should try to buy a controlling interest in the company. The latter felt that this operation was too big for him and at his request Boardman agreed to come in with him. This scheme received the blessing of Fox. Boardman then wrote to the other active trustee, the deceased's daughter, explaining what they proposed to do. She consented to this but does not appear to have thought that they intended acting outside the trust. In fact the trust had neither the power in law nor the financial means to purchase the shares. What is more, Fox, who in fact managed the trust, did not wish it to become further involved.

Boardman then entered into prolonged negotiations with the directors of the company, purporting at least some of the time to be representing the trust, during the course of which he obtained considerable information as to its affairs. Finally a price for the shares was agreed upon and he and Tom purchased the balance of the shares. The deal in fact was a most profitable one and resulted in not only a great increase in the value of the shares held by the trust but also in a profit of some £75,000 to Boardman and Tom Phipps. John Phipps, a beneficiary under the trust, who had been consulted but not fully informed about the negotiations, brought an action to compel them to account to the trust for this profit. Whilst Boardman had been described by the trial judge as man of ability, energy, clarity of mind and persistence, John Phipps was found to have been slow on the uptake, particularly when dealing with financial matters, and a person not easy to negotiate with as he had "a one-track mind".

The trial judge, Wilberforce J., held that they were liable to account. His reasoning for doing so was summed up in the following passage from the judgement in the Court of Appeal of Pearson L.J.

> "...the defendants were acting with the authority of the trustees and were making ample and effective use of their position as representing the trustees and wielding the power of the trustees, who were substantial minority shareholders, to extract from the directors of the company a great deal of information as to the assets and resources of the company; and... this information enabled the defendants to appreciate the true potential value of the company's shares and to decide that a purchase of the shares held by the director's group at the price offered would be a very promising venture. The defendants made their very large profit, not only by their own skill and assistance and risk-taking, but also by making use of their position as agents for the trustees."(30)

His decision was upheld by the Appeal Court and the defendants thereupon appealed to the House of Lords. There the appeal was dismissed, Viscount Dilhorne and Lord Upjohn dissenting.

The various views expressed in the House of Lords are best understood by first considering the dissenting judgements of Viscount Dilhorne and Lord Upjohn. The former said that equity, may, "where there has been some impropriety of conduct on the part of a person in a fiduciary relationship as, for instance, a trustee purchasing trust property, require that person to account." He then considered Regal (Hastings) Limited v. Gulliver and distinguished it on the basis that in the present case the appellants did not make a profit out of buying shares which it was intended that the trust should acquire. He nevertheless considered that certain passages from the judgement in that case were relevant. Firstly, he cited Viscount Sankey as to the general rule:

> "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."(31)

He then went on to refer to a passage in the judgement of Lord Russell of Killowen, a passage which we have already noted, where he said that the liability of a fiduciary to account for profits was not dependent on fraud or mala fides or upon the question of whether the profit would or should otherwise have

gone to the beneficiary, or whether the fiduciary was under a duty to obtain it for the beneficiary or indeed whether he, in doing so had acted solely in the interests of his beneficiary. The liability, he said, arises from "the mere fact of a profit having in the stated circumstances, been made". He then referred to Lord Macmillan's judgement where he, stating the rule in much the same terms as Lord Russell had, went on to say:

> "The issue thus becomes one of fact. The plaintiff company has to establish two things: (i) 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 the utilisation of their opportunities and special knowledge as directors; and (ii) what they did resulted in a profit to themselves."(32)

Finally, he quoted passages from the judgements of Lord Wright and Lord Porter where they stated the rule in much the same terms.[33]

It has been suggested that the rule so stated is based upon the proposition that the mere fact that a fiduciary makes a profit means that he is in a position where his interests do or may conflict with his duty. This can be clearly seen in a passage from Lord Wright's judgement where he said:

> "...both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out 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."(34)

Nevertheless, Viscount Dilhorne appears to have taken the opposite view. He did say that, in his opinion, "it could not,...be said that the shares were acquired 'only by use of' their 'fiduciary position,' or 'in the course of' their 'agency' or by reason and only by reason of the fact that they were agents of the trust for certain limited purposes."[35] To him, however, whether the profit was so related was dependent upon whether anything had "occurred during this period which gave rise or could have given rise to a conflict of interest."[36] The fact that the appellants

were fiduciaries, and he accepted this, did not necessarily mean that they were accountable for the profit.

> "It does not, however, necessarily follow that they are liable to account for the profit they made. If they had entered into engagements in which they had or could have had a personal interest conflicting with the interests of those they were bound to protect, clearly they would be liable to do so. On the facts of this case there was not, in my opinion, any conflict or possibility of a conflict between the personal interests of the appellants and those of the trust."(37)

He then goes on to ask whether the information they had obtained was the "property" of the trust. He considered that:

> "While it may be that some information and knowledge can properly be regarded as property, I do not think that the information...obtained by Mr. Boardman as to the affairs of the company is to be regarded as property of the trust in the same way as shares held by the trust were its property. Nor do I think that saying that they represented the trust without authority amounted to use of the trust holding."(38)

He then went on to distinguish the case of Aas v. Benham.[39] This case was referred to as authority for the proposition that the information was the property of the trust and as it was considered by all the judges in Phipp's Case it is necessary to consider it briefly. There the defendant, a partner in a partnership of ship-brokers also carried on business as a ship builder and in doing so used knowledge acquired in the partnership business. A claim against him to account to the partnership for the profits of his business as ship builder failed. Here Lindley L.J. said:

> "As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any profits which he may have derived from such information, but there is no principle or authority which entitles a firm to the benefits derived by the partner from the use of information for purposes which

> are wholly without the scope of the firm's business.... It is not the source of the information but the use to which it is applied, which is important in such matters.
>
> To hold that a partner can never derive any personal benefit from information which he obtains from a partner would be manifestly absurd."(40)

Thus Lindley said no more than that a partner must account for profits made by the use of information acquired as such for purposes within the scope of the partnership business. Bowen L.J., agreeing with this contention, however, introduced a strong element of "property". Referring to a dicta of Cotton L.J. in Dean v. MacDowell,(41) he said:

> "I think that when Cotton L.J. said that a partnership was entitled to the profits which arose out of information obtained by one of the partners as a partner, he was speaking of information to which the partnership was entitled in the sense in which they are entitled to property. I think you can only read the sentence in which the expression occurs in that way. It is as follows: 'again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property'...He is speaking of information which a partnership is entitled to in such a sense that it is information which is the property, or is to be included in the property of the partnership - that is to say, information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest. But you cannot bring the information obtained in this case within that definition!"(42)

Viscount Dilhorne then held that the information here was not affected by the principle as stated by Lindley L.J. as it could not be used in relation to the trust and, applying the test of Bowen L.J. it was not the property of the trust for the trustees neither could nor desired to purchase the shares.

Finally he went on to consider the view expressed by Russell L.J. in the Court of Appeal to Phipp's Case where he said that:

> "The substantial trust holding was an asset of which one aspect was its potential use as a means of acquiring knowledge of the company's affairs, or of negotiating allocations of the company's assets, or of inducing other shareholders to part with their shares. That aspect was

part of the trust assets."(43)

In other words to Russell L.J. it was not the information itself which was the property of the trust but the potential use to which the trust could be put. Viscount Dilhorne did not agree.

> "I do not take the view that Mr. Fox and Mrs. Noble by assenting to the appellants' proposal and facilitating the obtaining of information by them parted with an asset of the trust. I am for these reasons unable to agree with Russell L.J."(44)

Thus although agreeing with the finding of the trial court that the defendants had never obtained the consent of the trustees to take this profit for themselves, Viscount Dilhorne was of the opinion that as it had been made in a situation where there was no conflict of interest and duty and as neither the information acquired nor the use of the trust asset was "property" of the trust, such consent was never required for the profit here did not fall within the rule.

Lord Upjohn was similarly of the view that there had been no conflict of interest and duty. He considered that in Regal's Case there had been such a conflict for "(t)he scheme had been that Regal would make the profit, in fact its directors did." In Keech's Case the lease was trust property and it has always been held that a trustee can only renew such a lease for the benefit of his cestui que trust. Neither of these cases were, however, in point here. He then went on to consider the statement of the rule as found in Regal's Case and held that:

> "...in my view, their Lordships were not attempting to lay down any new view on the law applicable and indeed could not do so for the law was already so well settled. The whole law is laid down in the fundamental principle exemplified by Lord Cranworth's statement...But is applicable, like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different cases that the observations of judges and even in your Lordships' House in cases where this principle is being applied must be regarded as applicable only to the particular facts of a particular case in question and not regarded as a new and slightly different formulation of the legal principle so well stated."(45)

The fact that a person was a fiduciary, he said, did not mean that he was therefore necessarily liable for any profit he had made. He is accountable where he has placed himself in such a position that his interest conflicts with his duty and, even then, only to the extent that these profits were made "within the scope and ambit of his duty."(46)

To him "information is not property at all" nor could Russell L.J.'s contention be accepted. He points out that if the information or potential use was in fact a trust asset the trustees could never, even when acting together, part with it. He considered that the only possible situation where the appellants' interests could have conflicted with their duty arose where, having learnt so much about the company and realising that in proper hands the shares were a good buy, they should then have suggested to the trustees that they ought to purchase the shares on behalf of the trust. As, however, they were unwilling to do so and, furthermore, as the point had never been placed in issue, he did not think it could be now taken into account by the House of Lords. He accordingly considered that the appeal should be upheld.(47)

Lords Cohen, Hodson and Guest were of the contrary opinion. The lastmentioned was of the opinion that:

> "If Boardman was acting on behalf of the trust, then all the information he obtained...became trust property. The weapon which he used to obtain this information was the trust holding. And I see no reason why information and knowledge cannot be trust property."(48)

He therefore appears to accept that the appellants had used the "property" of the trust both in that they had used information obtained whilst acting for it and that they had "used" it in the sense as suggested by Russell L.J. He then went on to cite the judgements in Regal's Case in support of this. It will, however, be recalled that these judgements appear to be based on the fact that a fiduciary is accountable for all profits because, in taking a profit, he places himself in a position of conflict of duty and interest. On Lord Guest's approach this reasoning would be unnecessary for a trustee is liable for all profits made as the result of his use of trust property without more ado. He

went on to say that the case of Aas v. Benham[49] was no authority for the proposition that the information here was not trust property for that case was a case of partnership where the scope of the partners to bind the partnership can be closely defined in relation to the partnership deed.

Lord Hodson considered that the rule had been "succinctly stated by Lord Cranworth" in the Aberdeen Railway Case. He then went on to say, however, that they had acquired information on behalf of the trustees by using the strong minority shareholding of the trust. This information furnished them with "knowledge of a most extensive and valuable character." He then went on to say:

> "...I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called 'know-how' in the commercial sense is property which may be very valuable as an asset I agree with the learned judge and with the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust. It was obtained by Mr. Boardman by reason of the opportunity which he was given as solicitor acting for the trustees in the negotiations with the chairman of the company...the end result was that out of the special position in which they were standing in the course of the negotiations the appellants got the opportunity to make a profit and the knowledge that it was there to be made."[50]

He similarly argued that the case of Aas v. Benham was not relevant here as partners work within a defined area of business and this is not so in the case of general trusteeship or fiduciary position. Nevertheless what was said in that case by Bowen L.J. and what had been said by Cotton L.J. in Dean v. MacDowell was relevant in that it explained that information could be property. Furthermore, he said, citing Keech's Case and Regal's Case, that it was irrelevant whether or not the opportunity could in fact have been used for the beneficiary. He considered that it was not necessary to decide whether the "potential use" of the trust as suggested by Russell L.J. "is properly to be regarded as part of the trust assets." He then, without distinguishing the question, went on to say that there had been a possible "conflict of interest

and duty" for the trustees may have requested Boardman's advice on the desirability of an application to court in order that they might avail themselves of the information obtained. However remote this was the possibility existed and therefore the case fell within the rule as stated by Lord Cranworth. He considered that although the conflict of interest and duty here had never been pleaded:

> "The question whether or not there was a fiduciary relationship at the time must be a question of law and the question of conflict of interest directly emerges from the facts pleaded, otherwise no question of entitlement to a profit would fall to be considered."(51)

Lord Cohen held that the fact that the appellants obtained information from the company while standing in such a position meant that they were bound to give that information to the trustees but did not mean that they had to exclude it from their own minds. The mere use of any knowledge or opportunity which came to them in the course of their duties does not necessarily render them accountable. Nor did his Lordship consider that information was "property" in the strict sense of the word. Nevertheless he held that the appellants were accountable for this profit. If the company had been a public one the position might have been different but in this case it was a private company and the information could only have been obtained by so acting for the trust. He disagreed with the contention of counsel that all depended on the question whether the information could have been used for the trust. This, although "an attractive argument", failed to give undue weight to

> "...the fact that the appellants obtained both the information which satisfied them that the purchase of the shares would be a good investment and the opportunity of acquiring them as a result of acting for certain purposes on behalf of the trustees."(52)

This, he considered, was enough to dispose of the case. He went on, however, to say that in his opinion an agent is liable to account for profits he makes out of trust property if there is a possibility of conflict between his interest and his duty to his principal. The information and the opportunity which they

had used in order to acquire the shares they had obtained as a result of the fact that they had represented themselves as agents for the trust and therefore, although strictly speaking not property, could not be used for their own benefit if there was any possibility that the trustees might wish to acquire the shares for the trust. Although Boardman was not bound to advise the trustees on this point, he was the person to whom they would turn to for advice.[53]

(e) A Fiduciary is accountable for all profits made as the result of his use of his position as such

In Regal's Case Lord Russell of Killowen said that the directors had acquired the shares "by reason, and only by reason of the fact that they were directors of Regal, and in the course of that office". The former proposition here is enough to render the fiduciary accountable. Here the profits are acquired not as the result of opportunities arising during the course of the fiduciary's administration of the others affairs but from the very fact that he holds that office and, if he had taken the opportunity in his personal capacity and not as his capacity as fiduciary he would not be accountable to his beneficiary for it. An example of such a case is that of Reading v. Attorney General.[54] Here the facts were as follow s. Reading was a sergeant in the British army. He "had received large sums of money for his help in smuggling illicit goods into and through Cairo. Wearing his full uniform, he used to ride through that city in a lorry which carried the goods, and his uniformed presence enabled it to pass the civil police without inspection. The military authorities seized the money he obtained for these services. With more audacity than realism, he petitioned the Crown for its return. The House of Lords rejected the petition shortly and unanimously. Sergeant Reading had abused the position of authority to which the Crown had appointed him. He had obtained his bribe through the use of the Royal uniform and 'the opportunities and facilities attached to it', (per Asquith L.J.) and must account for it to the Crown."[55] Here Denning J. in the court of first instance said:

> "In my judgment, it is a principle of law that if a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he engages, or the position which he occupies, are the real cause of his obtaining the money, as distinct from being the mere opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to the master."

(f) A fiduciary cannot make any profit from the beneficiary in any matter relating to the beneficiary's affairs, although he was under no obligation in respect of that particular matter to act in the interests of the beneficiary.

Thus if a fiduciary happens to acquire at a discount debts or securities enforceable against his beneficiary, he cannot claim to enforce them at their nominal value but must give his beneficiary benefit of the discount. He may be under no duty to acquire the securities, but having done so, he may not claim or, rather, hold the profit.

It is nevertheless clear that in such circumstances the fiduciary may in fact be acting in bad faith. For example in the case of Regier v. Campbell-Stuart.[56] Here the facts were as follows. The defendant having agreed, as agent for the plaintiff, to give her particulars of any house suitable for purchase by her of which he might hear, bought a house for £2,000 through a nominee (who never had any interest in it) and subsequently entered into a purported contract to purchase the house from that nominee for £4,500. He then resold it to the plaintiff for £5,000 concealing from her the nature of the previous transactions and representing that he had paid £4,500 for it. Here Farwell J. said:

> "When the relationship of principal and agent exists, the agent may terminate that relationship by himself selling to his principal property which belongs to him so long as the principal knows that the property does in fact belong to the agent and that the agent is intending to sell his own property. But that must, in my judgement, be limited to this extent, that it is the duty of every agent to act honestly and faithfully towards his principal, and, if he conceals most material facts from his principal by means of a fraud

> obtains an advantage for himself purporting to sell or by selling property which is his own, then the duty which lies upon him is not put an end to by such a contract, and he remains liable to account for any secret profit which he has made as the result of the transactions between himself and the principal."(57)

It is important to note that in the abovementioned case the agent was never an agent properly so called in that he never had authority to purchase the house for the plaintiff.

Disclosure of "Profits" Common law

It is accepted that a fiduciary may hold profits for himself where he has obtained the consent of his beneficiary to do so. Sealy considers that the stress placed upon disclosure in most profit cases has its origin in cases dealing with rescission. He says that in cases unconnected with rescission disclosure will be relevant only as evidence that the fiduciary's act has been previously authorised, or subsequently ratified or condoned.(58) It is respectfully submitted that one cannot speak of "ratification" here for in many cases the beneficiary will not be ratifying any act which the fiduciary purported to perform on his behalf. Nor does the word "authorisation" appear to be apt. As equity treats the taking of a profit in certain cases, but not all, as a type of "wrong" perhaps one can speak of "condonation". Nevertheless it would seem that where a fiduciary is accountable for a profit which he has actually made and the beneficiary then agrees that he may retain the profit for himself, this must surely be donation. If it was agreed beforehand that the fiduciary could, in the event of his making a profit, take it for himself then, it is submitted, this is an agreement either limiting the scope of the fiduciary's undertaking or an agreement to share in the profits arising from a particular undertaking.

Remedies

Here we must distinguish between two situations. Up until now we have dealt with "profits" as including all advantages which the fiduciary obtains, including those cases where he has

appropriated the assets of another - that is assets which belonged to him in equity. Thus the case of the trustee who helped himself to the trust assets was included. When we come to the remedies that are available to the beneficiary it would seem clear that (except, perhaps, in the case of directors) a distinction exists between such "profits" and all other profits.

(1) Property which is held by the fiduciary for the equitable owner..

Where a person has control of property which is considered in equity to be the property of the beneficiary, - (provided he does not hold the property as debtor for "(n)o trust can, of course, exist where there is a debtor-creditor relationship: in equity, restitution stopped where repayment began")[1], his beneficiary's claim is that of trustee in respect of the trust assets. He has what amounts of a right in rem in respect of the property not only against the fiduciary but also against third parties except the bona fide purchaser for value. This right may be maintained even where the "property" is not in its original form.

He will also have a personal right, against the fiduciary to an account. He has the same right against a subsequent holder of the property where that person received the property with notice, actual or constructive, of the existence of the separate beneficial interest of the beneficiary or of the fiduciary's want of authority to so deal with the property. Furthermore a third party will be liable, even although he never received the property, if he assisted the trustee in his breach of trust - the trustee de son tort.

(2) Other Profits

When we come to profits accruing to fiduciaries other than profits in the sense of trust funds which they have misappropriated, the position is far more complex. This is due to two factors: firstly, the wide use to which the word "profit" is used and, secondly, the want of definition of the term "constructive trust".

As we have seen, Chancery has no power traditionally to award damages and in order to circumvent this difficulty it

would, where it considered the plaintiff had an equitable right to certain property, declare the defendant to be a constructive trustee of that property. Here, says Sealy,[2] "(t)here is not a trust already existing which it can enforce, or on the basis of which it can direct the defendant to account,...the plaintiff is not claiming that the money or property is his, but that it ought to be his. His claim is not based on ownership in equity but on obligation in equity: he pleads that the defendant, although legally and beneficially the owner, ought not retain the property but should be ordered to make it over." Thus he quotes Sir William Grant M.R. in Beckford vs. Wade[3]:

> "Upon what grounds is a Court of Equity ever called upon to direct one man to convey a real estate to another, except upon the ground of a trust, either actual or constructive."

Thus Sealy points out that the constructive trust is purely a "remedial device". This, of course, is undoubtedly correct. The difficulty, however, lies in the fact that it is always open season for new definitions of the term "constructive trust". We see this in Gareth Jones'[4] criticism of the case of Lister vs. Stubbs[5] where the court held that the recipient of a bribe need only account for it to his principal. He finds it difficult to justify this decision and considers that where the dishonest fiduciary has been "unjustly enriched at his principal's expense" he "should hold the enrichment as constructive trustee for his principal."[6] When one considers that Lister vs. Stubbs is, to Sealy, the prime example of the working of the "constructive trust", it is at once apparent that there is some difference of definition involved here. The differences in fact run deeper than merely definition but we will deal with this aspect first.

The two leading cases here are Metropolitan Bank vs. Heiron[7] and Lister vs. Stubbs.[8] In Heiron's Case an action was brought in 1879 against a former director of a company in order to recover the sum of £250.0.0. on the ground that the defendant had received it from a debtor of the company's as a bribe to induce him to use his influence to obtain favourable terms of compromise for the debtor with the bank. This had all taken place in 1872. The defendant accordingly pleaded the Statute of Limitations. It was

held that this defence was good. The Statute did not run against a cestui que trust where the trustee had, in breach of his trust, misapplied or misappropriated trust funds. The question therefore was whether the bribe was held in trust by the defendant for the company. The court unanimously held that it was not and therefore held that the defendant's plea was good. Their reason for so holding was that, in the words of James J. that here"...liability is a debt only differing from ordinary debts in the fact that it is merely equitable, and in dealing with equitable debts of such a nature Courts of Equity have always followed by analogy, the provisions of the Statute of Limitations."[9] The Master of the Rolls said that "(n)either in law nor in equity could this sum of £250 be treated as the money of the company, until the court, in the action by the company, had decreed it to belong to them on the ground that it had been received fraudulently as against them by the defendant." Cotton L.J. said:

> "In favour of the appeal it is argued that no time runs against a breach of trust; that argument was founded on an insufficient definition of what is meant by a breach of trust. Where a trustee has a fund in his possession and wastes it either by neglect of duty or by doing an act not justified, and the cestui que trust comes to recover his money, no time will bar his suit, for it is a claim by the cestui que trust against the trustee for money or property which was in the possession of the trustee, and must be considered as in the possession of the trustee for the benefit of the cestui que trust until the trustee duly discharges himself. To such a suit there is no bar by statute. But the present case is not such a case. Here the money sought to be recovered was in no sense the money of the company, unless it was made so by a decree founded on the Act...It is a suit founded on breach of duty or fraud by a person who is in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a cestui que trust seeking to recover money which was his own before any act wrongfully done by the trustee."(10)

In Lister's Case the plaintiff company employed the defendant to buy for them certain material which they used in their business. The defendant took from one of the firms of which he so bought large sums by way of a secret commission, a portion of which he invested. The plaintiffs brought an action against the defendant to recover the money so paid to him, claiming to be entitled to

follow such money into the investments, and they moved for an injunction to restrain the defendant from dealing with the investments or for an order directing him to bring the monies and the investments to court. It was held that the relation between the defendant and the plaintiffs was that of debtor and creditor, and not that of trustee and cestui que trust and that the plaintiffs accordingly were not entitled to that order.

Thus it is quite clear that where the court considers that the money or property held by the defendant is not that of the plaintiff but simply owed it to the plaintiff then, until the court finds in favour of the plaintiff, the defendant does not hold that money or property as trustee. Once the decree is made he, of course, becomes "a constructive trustee". Sealy, however, appears to equate the term "constructive trust" only with such a trust decreed by the court.[11] This he says is the method of recovery where a fiduciary acts in the interests of his beneficiary but does not hold property of the beneficiary. Included here he places such cases as Keech vs. Sandford. We have already dealt with this class of profit situation. It would seem that this type of case has always been treated as giving rise to a "constructive trust" but that such fiduciaries have been considered to have held the "profit" in trust by operation of law from the moment of their acquisition of the trust property. These cases are treated in the text books as examples of "constructive trusts" which are usually defined as trusts which are raised by construction of equity "without reference to any presumed intention of the parties".[12] The fact that "profits" as in Keech's Case are usually classed together with such profits as in Lister's Case in that they are all profits arising out of the fiduciaries position appears, nevertheless, not to mean that they hold as identical types of constructive trustees. Thus Keeton says:

> "The question whether an agent is a trustee for his principal has provoked considerable discussion. It is certainly clear that an agent cannot make a profit out of his position as agent, and if he does, he is accountable for the profit to his employer as a constructive trustee of it. On the other hand, until such judgement or decree has been obtained the money cannot be regarded

as that of the principal."(13)

Constructive trusts, of course, cover a wider field than simply profits arising or gained by fiduciaries as a result of their position. There appear to be the following cases:

(1) Conveyance procured by fraud, duress, undue influence or mistake. Here Scott[14] states that the wrong doer holds the property as constructive trustee and that "the fact, however, that the transferor has an equitable interest in the property and that the transferee is a constructive trustee is recognised in the cases which allow the transferor to reach the property in the hands of a third person to whom the fraudulent person has transferred it, where he is not a bona fide purchaser". Sealy, however, appears to think that this is not possible for he says "in such cases, the plaintiff has either effectively ceased to be or never has been beneficially entitled to the property."[15]

(2) Acquisition of an interest in land under an oral agreement; here there appears to never have been any doubt that the constructive trustee holds as constructive trustee from the moment the property comes into his possession.

(3) Acquisition of property by a fiduciary; this of course is the case which we are now considering. Here Scott also says the defendant holds as constructive trustee apparently from the moment of his acquisition of the profit. This in fact, however, appears to be the position rather in American Law than in English Law where we have, as we have seen, the above distinction. Scott, discussing English Law, points to the case of Keech vs. Sandford which appears to bear his proposition out but, as we have seen, this appears to be only one class of profit cases. Scott goes on to say that this rule is applicable "where he receives a bonus or commission in violation of his duty as a fiduciary and cease to retain it".[16] This appears to be an overstatement as far as English Law is concerned.

(4) Following property into its product. (This is a class given by Scott.)

(5) Acquisition of property from a fiduciary; this occurs where the fiduciary wrongfully transfers property held by him as a fiduciary. The transferee, unless he is in the position of a purchaser for value and without notice, holds the property upon a constructive trust for the beneficiary. Here it would seem that he is constructive trustee from the moment of his acquisition of the property.

COMPETITION AND CONFIDENTIAL INFORMATION

Competition

The leading case here, and, apart from companies, it would seem the only case in which a decision has actually been given, is In re Thompson.[1] Here it was decided that where the trustees of a will were directed to carry on the business of the testator, who had been a yacht broker, it would be a breach of trust for one of the trustees to set up on his own account as a yacht broker in competition. Clauson J. in reaching this decision relied heavily upon the rule as stated by Lord Cranworth in the Aberdeen Railway Case. He said that he was translating it so as to apply to the facts of the case before him. He held the principle to be this:

> "The rule of universal application is that an executor and trustee having duties to discharge of a fiduciary nature towards the beneficiaries under the will - in this particular case the duty was to carry on the business of the testator to the best advantage of the beneficiaries - he shall not be allowed to enter into any engagement in which he has or can have, a personal interest conflicting, or which may conflict, with the interests of those whom he is bound to protect."(2)

He considered that the question was therefore whether the trustee in so setting up a competing business had placed himself in such a position. He held that the trustee had done so because, owing to the "spe cial nature" of a yacht agents business,

> "...he would have been obtaining for himself chances of earning a commission which, but for such competition, might be obtained for the beneficiaries under the will."(3)

Confidential Information

We have seen that in the early cases dealing with the "misuse" of confidential information the fiduciary's liability was based upon three quite distinct grounds. In some cases it was said that "confidential information" was "property" belonging to the beneficiary in equity. On the other occasions it was held that although such information was not property, its use by the fiduciary amounted to a breach of "confidence". Finally, it was sometimes said that his liability arose ex contractu.[1] This

problem which has never been satisfactorily settled, was well stated by Turner V-C in Morrison v. Moat.[2]

> "That the court has exercised jurisdiction in cases of this nature does not, I think admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in a manner as it enforces against a party to whom a benefit has been given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever ground the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."(3)

It is evident that there are two principal reasons for this uncertainty; on the one hand the fact that Chancery was almost exclusively concerned with property and, on the other, the doctrine of consideration. Although "property" notions remain strong, today the tendency is to move away from "property" and to base liability upon contract.[4] Here, we might mention, for no other reason than that its facts are very similar to those of a case which we will consider in connection with directors, the case of Robb v. Green.[5] In this case the defendant, who had been employed by the plaintiff as manager of his business, had "surreptitiously" copied from his employer's order-book a list of names and addresses of his customers. He did so with the intention of using this information so as to solicit orders from them after he had left the plaintiff's service, and, subsequently; this was exactly what he did. It was held that his contract of service contained an implied term that he would observe good faith towards his master during the existence of the confidential relation between them and that the defendant's conduct was a breach of that contract. The plaintiff was accordingly held entitled to an injunction restraining him from using the information and charges.

But there are occasions where in English Law such liability cannot be based upon contract and here resort is made to the doctrine of "Confidence". A good example of this is the recent case of Coco v. A.N. Clark (Engineers) Ltd.[6] The plaintiff, one Marco Paolo Coco, had designed an engine for a motor assisted

bicycle and negotiated with the defendants for its manufacture. The negotiations, however, broke down and the defendants informed the plaintiff that they would produce their own design. Mr. Coco was, nevertheless, of the opinion that the "moped", which they subsequently produced, was not entirely their own design. He claimed that the defendants had taken advantage of the confidential information which he had given to them in the course of the negotiations. As no contract could be found to have existed concerning this information, Megarry J. had to consider whether or not there existed an obligation in "confidence". He posed three questions: whether the information was "confidential", whether an obligation of confidence attached to its communication and whether the use made by the defendants was unauthorised.

His Lordship said that however confidential the circumstances of communication may be, there can be no breach of confidence in revealing to others something which is already common knowledge. Novelty may not be essential in all cases; some product of the human brain being sufficient to confer a confidential nature upon the information. He pointed to the difficulty that will exist where part of the information is confidential and part is not and felt that in such a case it would be going too far to say that in no circumstances would the defendant use the confidential information at all. An injunction would mean that the defendant must keep out of the market altogether until that part of the information which was confidential became common knowledge and therefore should not be granted if damages would be a fair compensation.

Megarry J. considered that the earlier cases gave no guidance as to what circumstance will attach an obligation of confidence to the communication. He saw that:

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, thus this should suffice to impose upon him the equitable obligation of confidence."(7)

As to the third question - whether the use made by the defendants was authorised - his lordship thought that some detri-

ment to the plaintiff should be shown if equitable remedies were to be revoked, though he accepted that there might be cases where this would not apply.

Rejecting all "proprietary" notions as wholly untenable and as arising merely because of the peculiar limitations placed upon the Chancellor's jurisdiction, it is submitted that the introduction of the "reasonable man" serves merely to ascertain whether or not there was an implied agreement - although the English courts avoid coming to this conclusion in order not to contradict the doctrine of consideration. Of course the question cannot end there. If there is an agreement, the court must still decide whether its enforcement will not be contrary to public policy as an unjustified restraint upon trade. As we are not dealing here with patents and frequently not even with information which could conceivably be patented (e.g. a list of customers), the nature of the information should be relevant only in so far as it bears upon the question as to whether there is an implied contract and as to whether the contract is enforceable. It probably will also be taken into account by the court when deciding as to what remedy should be granted.

PART 3

THE FIDUCIARY RELATIONSHIP IN ROMAN DUTCH LAW

THE FIDUCIARY RELATIONSHIP IN ROMAN DUTCH LAW

The terms "fiduciary" and "fiduciary relationship" are, of course, extensively used in our law. The question here is whether they are used in the application of the English fiduciary doctrine or merely to describe certain relationships known to Roman Dutch Law. They appear to be used in two distinct situations; firstly, in connection with the doctrine of undue influence and, secondly, to describe persons administering the affairs of others, the relations between such persons and their beneficiaries and certain rights and duties flowing from these relations.

The Fiduciary Relationship and Undue Influence.

The question as to whether or not the delict of "undue influence" is part of Roman Dutch Law has been much debated and falls outside the scope of this thesis. Nevertheless, the decision in Preller v. Jordaan,[1] coupled with the fact that the presumption of undue influence has played such a decisive role in the development of the English fiduciary doctrine, requires comment. The fact that the Appellate Division held that a type of delict is known to our law which is in content similar to the wrong of undue influence and which may be described as such, does not, of course, mean that the fiduciary rule as to its presumption is also part of our law. In fact it would seem that our courts have definitely rejected this. Thus in Spies N.O. v. Smith en Andere[2] Steyn J.A. held that the relationship of metus reventialis does not give rise to a presumption of a substitution of the will of the person in authority. In Miller v. Miller[3] the question was raised as to whether a contract between an attorney and client, of itself, raised a presumption of undue influence. Although it was not necessary for Corbett J. to decide the point, he gave a very strong dicta to the effect that no such presumption existed.

> "... counsel argued, it is not incumbent upon a party relying upon undue influence to do more than allege undue influence and this relationshp. I am by no means convinced that this submission is sound."(4)

He went on to point out that this is a rule of English Law and that no support can be found for it in Preller's Case. Furthermore, he pointed to the dicta in Spies' Case against the existence of such a presumption.

> "... there are several remarks in the late Appellate Division of Spies N.O. v. Smith en Andere... which indicate that a confidential relation-

ship between persons, such as might give rise to metus reventialis, though relevant, does not create any presumption of undue influence."(5)

As Joubert[6] points out:

"It is important to note that the Appellate Division justified its acceptance of undue influence as a ground for restitutio in integrum by reference to authorities of the Roman Dutch law and did not seek to justify its decision on the ground that there was a wholly foreign doctrine which had become part of our law by judicial acceptance. The doctrine was accepted because, it was argued, our own authorities can be read so as to include this ground. It would therefore be wrong in approach to consider our law and English Law regarding undue influence as one of the same thing and to apply the further and subsidiary rules of the English Law."(7)

This would mean that those cases in which it was stated that transactions between persons standing in a fiduciary relationship to one another would be set aside unless it was proved that the one party had received independent advice, can no longer be considered good authority. Actually, apart from a dictum of de Villiers C.J. in Yates v. Estate Yates,[8] the only clear authority for this proposition is to be found in Armitage's Trustees v. Allison.[9] In that case a sale by an attorney to certain clients of his was set aside on the ground that they had not received independent advice, although the attorney had made full disclosure to them of all relevant facts and had bona fide believed that they could advisedly enter into the transaction. Apart from the abovementioned dicta of de Villiers C.J., the court relied solely upon English authority, namely, Savery v. King,[10] Holman v. Lyones,[11] Wood v. Downes,[12] Upington v. Bullen,[13] Gibson v. Jeyes,[14] Montesquieu v. Sandys,[15] Rhodes v. Bate,[16] Tate v. Williamson,[17] Mitchell v. Homfray[18] and Wright v. Carter.[19] The reasoning of the court can be seen from the two following extracts.

"... we are of the opinion that the defendant made a full disclosure of the material facts attaching to the proposed investment; but, in the absence of competent independent advice, much more than this would be necessary to convince the court that the transaction was perfectly fair. In the words of Lord Eldon, the defendant must show that no industry he was bound to exert would have got a better bargain and that he gave the trustees all reasonable advice against himself which he would have given against a third person."(20)

"... we think the law applicable to the present case may be fairly taken as that laid down by Stirling and Cozens Hardy L.JJ. in Wright v. Carter. It is true that Vaughan-Williams L.J. stated that he was not prepared to lay down that in every case of purchase competent independent advice, as distinguished from advice of the purchaser's solicitor, was necessary; but the example of the kind of case he gives in which he thought that it might not be necessary, only emphasises its vital

> importance in a case like the present one. He says 'it may be that a particular transaction of purchase appears to be so manifestly fair that independent advice is not necessary.'"(21)

This is the traditional approach of Chancery. If a person is in a position of power over another he must either see to it that the transaction is in that others interest or he must ensure that such person is in no way influenced by him.

What our courts have rejected is the presumption of the existence of such a "power". As we have seen, however, there is a further presumption in English Law, namely, where a person is found to have in fact been in a position of power over another it is presumed that he wrongfully exercised this power. The difficulty here is that the concept of undue influence or, for that matter, the substitution of one will for another, involves two elements. Firstly, a species of incapacity and, secondly, wrongful advantage taken of it. The fact that in Preller's Case undue influence was held to be a species of delict would indicate that our courts will also reject the second presumption and require the plaintiff to prove that the defendant had wrongfully used his "power" It must be admitted, however, that there is something rather anomalous in such an approach. If the plaintiff was so incapacitated why should his remedy depen upon the state of mind of the defendant? If, however, the "incapacity" of the plaintiff is emphasised, as was done in Spies' Case, then two approaches are open to the courts. Either all questions of delict be rejected and the matter be treated as one of incapacity or a duty be placed upon the person who is in the position of "power" either to pay a fair price or to ensure that he takes no advantage of the others weakness. If the latter course is adopted the "fiduciar relationship" may yet be held to be part of our law in regard to undue influence.

The Fiduciary Relation and the Administration of the Affairs of Others

It is, of course, in connection with the administration of one person's affairs by another that the term "fiduciary" is most frequently used in our law. Used, that is, in the sense as explained by Clayden C.J. in Refco Ltd. v. Amicor Investments:(1)

> "It is, I think, of the essence of such a relationship that one party is in a position which he should in some way act for another."(2)

This is clearly the sense in which Murray uses the term in the extract quoted above from his note in the Annual Survey of South African Law. Thus de Villiers and Mackintosh write:

> "In passing, it may be noted that by virtue of the fact that they are entrusted with the creation of legal rights and legal obligations for others, representatives (in the sense of 'persons acting for others in legal relations') have been treated by the law as a separate genus, the members of which are subject to strict rules of impartiality and good faith. The genus is styled 'fiduciary relationships'".(4)

The term "fiduciary" has been used so frequently in our cases in this sense that no purpose can be served in citing authority. The manner in which it is used can be clearly seen in the following extract from the judgment of Innes C.J. in Robinson v. Randfontein Estates Gold Mining Company.[5]

> "Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the others expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in The Aberdeen Company v. Blackie Bros. the doctrine is to be found in the civil law(D.18.1.34.7.)(6)

This is, of course, nothing other than that class of fiduciary relationships and the rules applying to it categorised by Sealy[7] as arising "Whenever the plaintiff entrusts to the defendant a job to be performed."

Is the Fiduciary Doctrine a Doctrine of Civil Law?

It is very frequently said that the English fiduciary doctrine finds its origins in Roman Law.[1] This is, on the face of it, surprising. Although equity was, of course, known to Roman Law, it was, as Allen says, not "... introduced by a side-wind through the practice of the courts as against the strict theory of the imperial law."[2] Thus there is no trust concept in civil law. There is no system of equity requiring persons under certain circumstances to exercise their legal rights in a particular way. Sealy[3] says of that class of fiduciary relationship arising where one person has undertaken to act for another, that the duty here may simply be "a moral" one. It is difficult to know where one should begin to look in the civil law to find a concept such as this.

Vinter considers that the English doctrine is derived from Roman Law.

> "The Roman lawyers, by their official edicts as praetors or by their responses to applications created a body of legal doctrine and the doctrine of the fiduciary relation can be clearly traced to this source."(4)

But he points to no general doctrine. Instead he cites a number of specific rules more or less analogous to certain of the rules arising from fiduciary relationships. Thus he points to the fact that the magistratus provinciales and soldiers could buy nothing but necessary provisions and articles of dress in the provinces in which they were stationed or garrisoned.[5] So too a nobleman could not carry on a retail trade[6] and gifts between spouses and for pleading causes were prohibited.[7] Similarly a physician could not enter into a bargain for the cure of his patient[8] and the Macedonian Decree rendered all obligations contracted by a son by the loan of money while living in and subject to paternal authority were null and void.[9] And then, of more interest here, he points to the rules prohibiting a tutor from concluding transactions with his pupil[10] unless done through co-tutors or at a public sale.[11] These are the texts invariably referred to as evidence of the fact that the fiduciary doctrine was known to Roman Law.

These texts are, however, authority for no more than the fact that the Roman Law-makers frequently acted upon the same, or similar, considerations as did the Chancellor. None of these texts find their origin in a general doctrine of the law. As counsel argued in Preller v. Jordaan "The Romans regulated by statute transactions between persons in special relationships to each other, e.g. guardian and ward, agent and principal."[12]

Referring to sales entered into between tutor and pupil, institor and praeponens Voet says:

> "Neminem autem a se ipso emere potuisse, ne per interpositam quidem personam, adeoque nec institorem nec tutorem, res domini praeponentis vel pupilli vendentam, earundum posse emtorem existere constat."(13)

Of this text Solomon J.A. in Hargreaves v. Andrews[14] said:

> "In this passage an agent is put on the same footing as a tutor, the reason, no doubt being that each of them stands in a fiduciary relation, the former to his principal, the latter to his pupil."(15)

If by this is meant that this rule applies both to tutor and institor because the relationship between them and their beneficiaries falls within the ambit of a general "fiduciary doctrine", it is respectfully submitted that it is incorrect. On the other hand, if Solomon J.A. used the term "fiduciary " as a synonym for "administrator" and that therefore the rules applying to the one could be applied to the other by way of analogy, it is correct. Such is the process explained by Ulpian:

"Non possunt omnes articuli singillatim aut legibus aut senatus consultis comprehendi: sed cum in aliqua causa sententia eorum manifesta est, is qui iurisdictioni praeest ad similia procedere atque ita ius dicere debet." (16)

Thus the rule prohibiting a tutor from purchasing the property of his pupil was extended to all those administering the affairs of others.

"Tutor rem pupilli emere non potest: Idemque porrigendum est ad similia, id est, curatores, procuratores, et qui negotia aliena gerunt."(17)

Appropriately enough it is the latter text which Cujacius uses to explain the former ("... quod de tutore nominatum constitutum est, porrigendum esse ad similia.")[18]

The fiduciary doctrine is, of course, an extensive one relating not merely to transactions between the fiduciary and his beneficiary. The question therefore arises whether there is not a lacuna in our law which may appropriately be filled by a reception of the English doctrine. As we have seen, the fiduciary duties relating to those administering the affairs of another serve, broadly speaking, six functions. Three of these may be seen in the "profit rule". Firstly, although the administrator's duty to act in the interests of his beneficiary is not enforced as such, he is rendered accountable for any profit he obtains as the result of an act done contrary to that duty. Secondly, he is accountable for any profit made should he, without his beneficiary's prior consent, advance his own interests as well as those of his beneficiary. Thirdly, he is rendered accountable for any profit made by him whilst acting in the interests of his beneficiary. Fourthly, should he wish to transact directly with his beneficiary, he must act openly and disclose any relevant information concerning the transaction which he had acquired in his capacity as fiduciary. Fifthly, they render voidable certain transactions entered into by the fiduciary on behalf of his beneficiary in which he has a personal interest. These are those transactions entered into with himself and those entered into with a third party who was aware at the time of the fiduciary's interest in the transaction. Sixthly, they prohibit him from disclosing "confidential" information.

It is submitted that if it appears that certain of these rules do not exist in Roman Dutch Law this is only because they are treated from an entirely different stand point. Firstly, the administrator's duty to act in the interests of his beneficiary is enforced as such. He is under a positive enforceable duty so to act, the breach of which renders him liable in damages. Secondly, he is prohibited from acting in his own interests as well as those of his

beneficiary and he may only do so should this have been agreed upon before hand. It therefore follows that only two further rules are required. Firstly, the rule originally developed in regard to tutors but extended by way of analogy to all administrators, preventing such persons from acting on behalf of his beneficiary in matters in which he has a personal interest. Secondly, the rule to the effect that where one person carries on the affairs of another he must account to that other for all profits made during the course of his administration. These will therefore include profits made whilst acting in the interests of his beneficiary and profits made when acting in his own interests when not entitled to do so. Neither of these two rules exist in order to enforce the administator's primary duty.

The Enforcement of the Administrator's Duty to act in the Interests of his Beneficiary

That the duty of those administrators recognised in Roman Dutch Law to act in the interests of their beneficiary was enforced as such is too obvious to bear much comment. "The real business of the tutor" says Buckland, "was the patrimonium, and his functions were twofold: administratio, negotiorum gestio, management of the pupil's affairs, and auctoritatis interpositio..." His duty is to act for the benefit of his pupil "according to the best of his knowledge". "He is obliged to execute the tutorship and he shall be accountable, not only for what he has managed ill, but also for what he has omitted to do".[1)]

The mandatary's duty is similarly enforced. He must carry out what he has undertaken to do honestly, in good faith and with due care. These duties are all part and parcel of his duty to act in the interests of his mandator. "The effect of this contract," says Grotius,[2)] "is that the (mandatary) is bound to carry out the mandate according to the mandator's directions, without deviating from them at all, unless he does something which is patently equivalent to what was directed. Doing otherwise he is liable to make good all damage (including loss of profit)." Van Leeuwen,[3)] after pointing to the uncertainty that exists as to the mandatary's liability for diligence, says: "Now, all these passages can be most easily reconciled, if we only hold that in all the various affairs and business the mandatary is liable if either fraudulently artfully, corruptly or negligently, he omits what ou ght to be done in the nature of the case to carry out the mandate."

Thus the administrator's duty to act in the interests of his beneficiary is

enforced regardless of whether it arose ex lege or ex contractu.

Nothing underlines the vast difference between the approach of Equity and Civil Law more clearly than the gestor. Although A might be under a moral duty to administer the affairs of B he is under no legal duty to do so. The moment he begins to manage these affairs, however, a positive, enforceable legal duty is placed upon him and he is liable not only for all profits but also in damages for what he ought to have made for the dominus.[4]

The Administrator may not act on behalf of his Beneficiary in matters in which he has a Personal Interest

The best known text here is that of D.18.1.34.7, which forbids a tutor to buy the property of his ward and extends this rule by analogy to curators, agents, and persons who transact the business of others.

> "Tutor rem pupilli emere non potest: Idemque porrigendum est ad similia, id est, curatores, procuratores, et qui negotia aliena gerunt."

Thus where a tutor lends money to his ward or enters into a stipulation with him, the ward is not bound (... sed et cum solus sit tutor mutuam pecuniam pupillo dederit vel ab eo stipuletur, non erit obligatus tutori...)[1] nor can a tutor accept the assignment of a debt owing by his ward.[2] So too when a suit is commenced between a tutor and his pupil, the tutor cannot give authority to his pupil in regard to that action (quia ipse tutor in rem suam auctor esse non potest) and therefore a curator must be appointed for the pupil.[3] These rules cannot, of course, be circumvented by the interposition of a third party It is submitted, however, that this follows from the rules themselves and that D.26.8.5.3, 4 are not authority for this proposition.[4]

These rules were accepted generally on the Continent,[5] were part of Roman Dutch Law[6] and are applied by our courts.[7] The reasons for the rule can best be understood by first considering the so-called "exceptions" to it.

In D.26.8.5. Ulpian says that although a pupil cannot legally bind himself to his tutor by that tutor's authority, where there are more than one tutor one of them can give the pupil authority to bind himself to another. (Pupillus obligari tutori eo auctore non potest plane si plures sint tutores, quorum unius auctoritas sufficit, dicendum est altero auctore pupillum ei posse obligari, sive mutuam pecuniam ei det sive stipuletur ab eo). In D.26.8.5.2. he again says that although a tutor cannot contract with his ward, this may be validly done

with the authority of a co-tutor (sed enim si contutorem habeat, cuius auctoritas sufficit). If, however, the transaction is fraudulent (mala fide) it will be of no effect and therefore the property cannot be acquired by usucapio. In such an event, however, the contract will be valid if the pupil, on attaining majority, confirms the purchase (sane si suae aetatis factus comprobaverit empticnem, contractus valet). In D.26.8.5.3. he goes on to say that if a tutor should purchase the property of his pupil through the interpostion of a third party (per interpositam personam) such a purchase will be void for it will not be regarded as having been concluded in good faith (quia non bona fide videtur rem gessisse). It is submitted that Ulpian is here referring to a purchase made with the authority of a co-tutor and not to sales entered into by a tutor for his pupil with a third party on the understanding that the third party is in fact purchasing on behalf of the tutor. This can be seen from the fact that this text follows immediately upon a text discussing such purchases, from the fact that Ulpian does not say that such a purchase is no more than an attempt to circumvent the rule contained in D.18.1.34.7. and from the fact that in the very next text he goes on to say that if, however, the tutor should make the purchase openly and not fraudulently, the purchase will be valid even although he does not give his own name, as persons of rank are accustomed to do, who do not wish their names to appear on the records. Where, however, he does so craftily this will amount to the same thing as purchasing per interpositam personam.

In the Codex we find another situation in which the tutor may validly purchase the property of his pupil. In C.4.38.5. it is said that since a tutor is not prevented from buying, openly and in good faith, the property of his pupil when put up for sale, so much the more can his wife do so (Cum ipse tutor nihil ex bonis pupilli, quae distrahi possunt, comparare palam, et bona fide prohibatur; multo magis uxor euis hoc facere potest).

Do these texts alter the rule contained in D.18.1.34.7.? This has been a long and celebrated dispute. There can be no doubt that most of the old authorities were of the opinion that they did not and that this was the opinion of the Roman Dutch jurists. The dispute, naturally enough, centred mainly around C. 4.38.5. which, on the face of it, does appear to suggest that the Emperors Diocletian and Maximilian were prepared to allow sales between a tutor and his pupil. But the text cannot be read thus in isolation. Godthofredus in his note on this passage comments "alterius tutoris authoritate,

causa cognita, et judicis decreto interveniente".[8] Cujacius[9] similarly takes the view that the effect of these provisions is that although a tutor cannot sell to himself the property of his pupil nor give authority to his pupil to sell to him, he can purchase either from a co-tutor or at a public sale provided he does so "palam et bona fide". Donellus[10] states this most clearly. A tutor he says, may neither purchase from himself nor from his pupil with his own auctoritas but he may however, purchase as an "extraneus". When is he to be regarded as an extraneus?

> Primo si emat rem ab alio quam a pupillo dummodo emat ab eo qui jus vendendi habet. Jus vendendi rem pupilli habet tutor, proinde si tutore recte vendente, alius contutor ab eo emat, recte emit, quoniam emit ut quilibet faceret. Item jus vendendi rem pupilli obligata est. Creditore vendente, tutor ab eo recte emit, quoniam ut extraneus emit. Jus etiam distrahendi habet magistratus cuius decreto praedia minorum et res caeterae alienantur. Proinde, et ex decreto magistratus quivis tutor recte emit, postquam judex quoque jus vendendi habet. Item juste possidet, qui auctore tutore possidet. Sed iis modis tutor, ut extraneus, ita recte emit, si palam emat et bona fide,"

The reference here to purchases from creditors of the pupil is to D.26.8.5.5. which says that if a creditor of the pupil sells his property the tutor can purchase, provided he does so in good faith.

Merenda[11] deals with the question in some detail. He states the question thus.

> Controversi juris est, an regula, quae docet, tutorem in re propria auctorem esse non posse, habeat locum, cum id facit palam, et bona fide. Alii aiunt, alii negant. quorum opinio mihi placet.

In support of the latter contention he points to D.26.8.7. where it is stated that although a tutor cannot grant authority to his pupil to transact business with him this is only true where the stipulation is acquired by him, or by persons under his control. This text reads:

> Quod dicimus in rem suam auctoritatem accommodate tutorem non posse, totiens verum est, quotiens per semet vel subiectas sibi personas adquiritur ei stipulatio: ceterum negotium ei geri per consequentias, ut dictum est, nihil prohibet auctoritas.

Scott translates the latter part of this text "But there is nothing to prevent his authority from being exercised in the transaction of any business by which his ward will be benefited".[12] This does not appear to bring out its full meaning which seems to be that the tutor may give his authority in matters where he acts

for the benefit of the pupil although he may benefit himself. His interests may be affected per consequentias. Thus in D.26.8.1. it is said that the tutor may induce his pupil to accept an estate which is indebted to him; even though, by doing so, the ward will become his debtor. This being permitted for the reason "prima enim ratio auctoriatatis ea est, ut heres fiat, per consequentias contingit, ut debitum subeat". This is how Merende interprets it and thus he holds that the text does not support the argument that the tutor can purchase from his pupil palam et bona fide. The text, he says, rests upon the proposition that the tutor is not permitted to acquire per semetipsum, vel subjectas ei personas.[13)]

He then discusses D.26.8.1. and for the same reasons denies that it alters the rule. "Vides hic J.C. tum in id intendere, ut ostendat per se tutorum eo in casu non acquirere, sed per consequentias. Ergo ex hoc dependet vis regulae, de qua agimus". He points also to the provision in the same text to the effect that if a tutor causes anything to be given by the pupil to his son, such an exertion of his authority will be void (nulla erit auctoritas) for it is obvious that he acquires the property by his own act (evidentur enim sua auctoritate rem adquirit). D.26.8.5.2. - a text to which we have already referred - is also clearly contrary to the proposition:

> "Agitur hoc loco, quando liceat tutori a pupillo emere? et concludit J.C. id fieri posse, si emat a contutore, cuius auctoritas sufficit. Ratio redditur, quia tutor emptoris, et venditoris officio fungi non potest; quod est ipsum, quod dicebamus, per semetipsum tutorem sibi acquirere non posse."

Therefore, it is most clear, says Merenda, that a tutor may not purchase from him pupil et bona fide unless the purchase is with the authority of a co-tutor having plenum jus administrandi. If this were not so the tutor would be acting both as vendor and purchase, alienator and alienee, and this is forbidden. Furthermore, this text clearly denies any suggestion that the tutor can give his authority to his pupil in such a case. The text requires two things. Firstly, that the consent of the co-tutor be obtained and, secondly that the transaction be palam et bona fide.

Codex 4.38.5. Merenda considers was not intended to change the law. A tutor could always purchase at a public sale. Therefore there is no reason why his wife should not. The Emperors there gave their opinion as to the validity of a sale and, in doing so, simply did not state the obvious.

> At dices, cur in textu non sit de his mentio? Respondeo, textum illum esset rescriptum redditum mulieri, ut ex inscriptione patet, quae consulebat Diocletianum et Maximianum. Immp. an liceret sibi emere palam et bona fide res pupilli cuius tutelam gerebat eius vir? et respondent Imperatores, posse.

In D.26.7.56. it is said that where a guardian has sold property and animals of his ward and certain of the purchasers are unable to pay, he was entitled to take these for himself by paying his pupil himself and the pupil in such a case has no claim to the animals or their off-spring. Merenda considered that in such a case the tutor was not purchasing from his pupil but from his debtors. This view was accepted by Voet who says:

> The passage in D.26.7.56. is not inconsistent with this for where a tutor has in good faith sold property of his pupil, and on the purchaser not paying the price, retains the property himself, and places the price to the credit of the pupil in his accounts, he is considered here to have bought from the purchasers who made default in payment the purchase money.

After mentioning two further texts which appear to bear little relevance to the subject, Merenda notes that his opinion, that the tutor could not purchase palam et bona fide, was held inter alia by Azo, Baldus, Gothofredus and Faber. This view was shared by Perezius.[14] Brunneman[15] also says a tutor (itamagis uxor eius) may purchase with the consent of a co-tutor provided he does so openly and in good faith. So too does Domat.[16] Pothier[17] says that it is not allowed anyone from the office, which he performs, to buy anything through himself or another. He, however, also accepts that the tutor may purchase at a public sale or with the authority of a co-tutor. Wissenbach[18] says that although a tutor cannot purchase from himself or from the ward with his authorisation (Tutor, ut tutor, a se ipso, vel a pupillo, se auctore, rem pupilli emere non potest), he can buy as a stranger. Thus, for instance, if the wards property be sold openly, bona fide, and by public auction, then he is allowed to bid. (Tutor vero ut extraneus qulibet potest; nempe, si res pupilli palam bona fide, publicaque auctione distrahatur sub hasta, tutor and licitandum admittitur.) And this is also the opinion of Matthaeus.[19] Groenewegen[20] states that the law contained in the Code is part of the law of Holland and Voet who, as we have seen accepts the rule, sums up the position thus:

> "As regards a tutor, he is able to buy the property of his pupil openly at a public auction is also buy from a co-tutor, if the business is conducted in good faith."

In our law the rule prohibiting administrators from purchasing has long been accepted and the tendancy has been rather to deny the "exceptions" to the rule than to admit of any doubt as to their having displaced the rule itself. The earliest case (1837) in which we find mention of the rule is that of In re Neethling[22] where a sale by a trustee to himself was allowed. The court, however, undoubtedly accepted that the rule as part of the law of the Cape Colony for it referred to Matthaeus and Tudor and White. The sale was allowed upon the ground that all the creditors had agreed to the purchase. In Forbes, Still & Co. v. Sutherland[23] (1856) where the agent to sell was in fact a joint-buyer, Watermeyer J. stated the rule thus:

> "It is a clear rule of modern law, adopted from the Civil Law, that an agent for the purpose of sale cannot purchase his principal's goods - an agent for the purpose of purchase cannot himself be seller. The doctrine is in the well known text 'Tutor rem pupilli...' ... The rule is not alone in the Civil Law that the tutor, procurator or factor cannot purchase directly; but it is neque per se neque per interpositam personam."(24)

Since then the rule and its "exceptions" have been accepted in a number of cases. In Baxter v. Beningfield[25] Connor C.J. following only Civil Law authority, held that the purchase of the trust estate at a sale by some one acting on behalf of a trustee was bad. He accepted as undoubted that the exceptions are part of our law. In Hargreaves v. Andrews[26] the rule received the unqualified acceptance of the Appellate Division. It was said that since Forbes, Still & Co. v. Sutherland "the rule has never been questioned". Solomon J.A. stated the rule thus:

> "Now it is clear law, both in this country and in England, that an agent employed to sell, cannot legally purchase the property entrusted to him for sale, and that his principal, on discovering of the fact, is entitled to repudiate the sale. That is a settled rule which is quite independent of fraud or of the fact that the agent has gained any advantage by the transaction."(27)

He went on to say that an "exception" was admitted in Roman Dutch Law in the case of the tutor who could purchase openly at a public auction and that this had been accepted in Louw v. J.H. Hofmeyr and Others,[28] (in which he erred as that was a case of a sale made out of hand to a trustee by his co-trustees). Finally he said that he would express no opinion as to whether this exception applies to agents.

In Osry v. Hirsch, Loubser & Company Ltd.[29] an agent to sell had purchased himself at a sale. Counsel for the defendants argued that "...

while the Pandects prohibit a tutor from purchasing the property of his pupil, the subsequent Code has here altered the former rule, and allows a tutor to purchase the pupil's property, provided the purchase takes place openly and in good faith (palam et bona fide)". Kotze J.P. after an extensive survey of the authorities, came to much the same conclusion as Merenda had.

> "When the Emperors there (in C. 4.38.5.) state that 'since a tutor can buy openly and in good faith the property of his pupil, so much the more can his wife do so, they introduced no new law. They merely applied existing law to the case submitted to them for decision. They had evidently been approached on the point of a purchase of a pupil's property by the wife of his tutor, and they gave an affirmative answer to the question submitted for their determination. The Imperial reply then introduces nothing new, for it is quite clear that, at the time when the Emperors pronounced this decision and for some period before that, a tutor could buy his pupil's property from his co-tutor palam et bona fide, and so he could likewise purchase such property when sold under a judicial decree, as in those instances the purchasing tutor would be in the position of a stranger. He would not be supplying auctoritatem in rem suam."(30)

The position, Kotze held, was therefore as follows:

> "Firstly, the reason for the rule that a tutor cannot purchase the property of his pupil is twofold. It is founded on the principle auctor in rem suam tutor non esse potest, and no one can be both seller and buyer of a thing at the same time. Secondly, a tutor is, however, at liberty to purchase his pupil's property, where the reason for the rule does not apply; that is to say, where he is in the position of a stranger (extraneus). Thus, where the sale to him takes place by or with the auctoritas of another entitled to exercise this authority, a tutor can buy his pupil's property for instance from or with the consent of his co-tutor, having knowledge of the circumstances, or under judicial decree."(31)

. . .

Why does Kotze J.P. say that there are two reasons for the rule? There can be no doubt that our authorities support such an approach. The rule is said to be that a tutor may not purchase the property of his ward and to exist because of two further rules - a tutor may not give authority to his pupil to enter into a transaction in which he, the tutor, has a personal interest and that a person cannot be both a buyer and a seller of a thing at the same time. Thus Cujacius[32] says:

> "Ratio huius est, ne fraus aliqua fiat pupillo. Diende tutor esset auctor in rem suam, quod prohibitum est. Diende idem homo non potest fungio officio emptoris et venditoris. Fungeretur autem officio utriusque que si rem pupilli emeret."

Donellus[33] says:

> "Duplex ratio. Una quae illic redditur, quia non potest tutor emptoris et venditoris persona fungi; alium enim esse oportet et emptorem et alium venditorem. Altera ratio est, quod tutor in rem suam auctor fieri non potest. Hoc ipso facrere non potest, ut non possit, quamvis palam emat, aliis in rebus, bona fide."

Later in the same text he says that a tutor may not give authority to his ward in such a transaction because the granting of such authority must be always suspect. (Nam auctoritas omnis in rem suam suspecta est.) Thus, he says, a judge may not be a judge in his own cause. Merenda[34] says that those who contend that a tutor may purchase from his pupil provided he does so palam et bona fide argue that suspicion is the reason for the rule and therefore if it can be shown that a tutor has acted palam et bona fide this reason falls away. He rejects this argument because, he says, this is not the reason for the rule.

> "Nam respondeo, hanc non esse causam prohibitionis. Quod evidentur probatur ex D. 26.8.7. quibus diserte habetur, posse tutorem auctorem esse in re propria, cum per indirectum sibi acquirit, si enim suspicio esset causa prohibitionis nec eo casu, quo per indirectum acquiritur, liceret tutori auctorem esse; nam quid, quaeso, refert directe, an indirecte acquirere, dummodo vere sibi tutor acquirat?"

Whether this reasoning is satisfactory is doubtful. As we have seen the example of this rule to be found in the text and cited by Merenda is that contained in D.26.8. where it is said that a tutor may authorise his pupil to accept an estate which is indebted to him and this must equally cut across the rule auctor in rem suam non potest. In any event, Merenda considers that this rule and the rule preventing a person from being both a buyer and a seller in the same transaction are the reasons for the rule preventing a tutor from purchasing the property of his ward. As we have seen Perezius[35] gives only the auctor in rem suam rule and so too does Brunneman.[36] They do so, however, to explain why it is that a tutor can purchase as an extraneus. Domat[37] says that a tutor cannot authorise such a transaction because of the auctor in rem suam rule, and he cannot purchase either directly or by the interposition of a third person because "besides that he cannot be a seller and a buyer of the same thing, he might easily cheat, and purchase at an under rate what he has the sale of." Pothier[38] considered that the rule existed in order to prevent fraud on the part of the tutor. Voet[39] may not have accepted that a person could never be both a buyer and a seller in the same transaction for he refers to the note contained in Holl. Consult. vol.3,

amst. cons. 145 n.7 where it is stated that a factor takes over goods sent to him for sale from the very moment that he receives them, and immediately credits his principal with the price, at the ruling market rate, and has in turn sold the goods to third parties, such a transaction may stand unless the principal can show that he has been prejudiced thereby. It is, however, probably going too far to say that Voet rejected altogether this technical explanation of the rule. In any event the consultation referred to specifically states the rule and says that the reason for the rule lies in the fact that a person cannot be both a vendor and a purchaser.

This approach is open to serious objection. When Ulpian spoke of a prohibition against transactions carried out through the interposition of a third party he was referring to those cases where the tutor purchased from a co-tutor or at a public sale. In such a case to purcahse through a third party was to fail to act palam. Although our authorities at times refer to the sale by a tutor to a third party who is in fact purchasing on behalf of that tutor as a sale per interpositam personam this is clearly contrary to authority. Such sales are not void because the tutor has failed to act palam. If they are void at all, they are void because they are a breach of the prohibition itself. Yet, if the rule only exists because of a further technical rule to the effect that a person cannot be both a buyer and a seller in the same transaction, such transactions fall outside its scope. There could be no objection to A selling on behalf of his pupil to B on the understanding that B will resell to A. In any event, even if the Digest had contained a text specifically prohibiting such transactions, would it be reasonable to draw a distinction in principle between them and the case where the tutor sells to himself? Furthermore, it is very doubtful whether there is a rule of our law to the effect that a person cannot be both buyer and seller in the same transaction. The rule is rather that an administrator cannot enter into such a transaction unless he is duly authorised to do so. If this were not so the number of transactions entered into every day which would be rendered void by this rule would be considerable, for example, contracts entered into between directors of small private companies on behalf of their company with themselves.

Our courts have generally considered such transactions to be "vicious" and, undoubtedly influenced by English Law, have considered them to fall within a wider principle namely, that of "conflict of duty and interest" which principle includes both possible breaches of the administrator's undertaking and provides a basis for his duty to account for profits. Thus in Hargreaves v. Andrews[40] counsel argued that a sale by an agent to his partner should

stand because the principal had furnished him with all the terms of the sale and therefore there could be no question of a conflict of duty and interest. Solomon J.A. rejected this, pointing out that an agent's duty is to obtain the highest price possible and holding that the principal had merely given the agent a reserve price. He then went on to say, however, that the fallacy underlying could be seen from the fact that if the agent had sold to himself knowing that he could obtain a higher price and had then resold it at a profit "surely it is not open to question that he could have been compelled by action to hand over to his principal the profit made by him out of the transaction on the ground that he had been guilty of a breach of trust to his principal in not obtaining for him the highest price possible."[41] This is the wide concept of conflict of duty and interest based upon the idea of a possible breach of duty. There is no doubt that authority for it can be found in our old writers for, as we have seen many of them consider the rule to exist in order to prevent fraud. It is submitted, however, that the argument of Merenda is convincing. If the rule is to prevent the administrator from deliberately acting in his own interests instead of the interests of his beneficary, why is it not open to him to prove that the transaction was in fact bona fide? In Roman Dutch Law the administrator's duty to act in the interests of his beneficiary is enforced by means of an action for damages and there is no need for rules, as there undoubtedly is in equity, to be formulated so as to render wrongful acts done by him contrary to that duty. It is submitted that Donellus[42] pointed to the true reason lying behind all these rules when he drew the analogy between such transactions and the judge in his own cause. In other words, the administrator may not act on behalf of his beneficiary in matters in which he has an interest. This is a matter of policy based upon the idea that a person should not be a judge of his own good faith and the rule exists independently of questions as to breach of duty and fraud. It may be considered to rest upon the principle that the administrator may not place himself in a position where his interests conflict with his duty but it must be borne in mind that this principle is of far wider application in Equity. This would seem preferable to any attempt to interpret the rule that a person may not be a seller and a purchaser to mean just this as, for example, Wessels does:

> "The principle underlying the above rule is that an agent cannot play the double part of vendor and purchaser. It makes no difference whether the agent himself purchases or whether he does so through an intermediary."(43)

In Peffers N.O. and another v. Board of Control[44] Theron J. stated the rule as follows:

> "This principle is, of course, the universally respected one that no transaction where interest and duty conflict should be recognised or countenanced by the law... The reason why a tutor or executor is allowed to buy in the circumstances described above is that they provide some guarantee that, despite his position, he will be treated as if he were a stranger to the estate entrusted to him. In other words, the circumstances are such as to diminish the possiblity that the terms of the contract will be influenced by the conflict between the purchaser's interest and his duty."(45)

This is giving the principle a very wide meaning for it is usually thought that there is no conflict in the case where the tutor purchases as an extraneus.

MacKeurtan gives an accurate statement of the principle. He says that it is "based upon the unimpeached rule that no man will be allowed validly to contract where the contract comes into being in circumstances involving a conflict between his duty and self-interest".[46]

The Administrator's Transactions with his Beneficiary as an Extraneus

It is usually stated that the rules as developed for tutors are applied by way of analogy to all administrators. In doing so it must be borne in mind that certain of these rules cannot be so applied to all other administrators. The functions of the tutor are twofold: auctoritas interpositio and administratio. The former function does not, of course, exist in the case of a person administering the affairs of another who has full capacity. Therefore there is no reason why in such cases he should not deal directly with his beneficiary as an extraneus rather than through co-administrators - if there are any. It is submitted that in such a case, when he transacts directly with his beneficiary he stands in the same position as the tutor transacting with a co-tutor and should therefore similarly be under a duty to act palam et bona fide in such circumstances. What is the meaning of "palam et bona fide"?

For reasons that are not altogether clear, Kotze J.P. in Osry's Case creates the impression that Donellus was of the opinion that "bona fide" is to be equated with "palam". He gives the following translation of Donellus and C. 4.38.5.

> "...By openly is to be understood not at the sale as some have interpreted it, but so that he openly declares that he is buying from his co-tutor, which in itself is tantamount to purchasing bona fide. This clearly appears from D.26.7.54. Palam is the opposite to acting

> mala fide, and it is possible for a tutor to purchase male fide from co-tutor, a creditor or a judge, as for instance where the tutor does so per interpositam personam. So, a tutor may also purchase as extraneus things of his pupil, which he has sold to an independent buyer, where the latter has become insolvent and failed to pay the purchase price. There the tutor may retain the things for the same price, and in this particular instance the tutor will be considered to have bought palam et bona fide. D.26.7.56.) The conclusion is that, except in the instances specially mentioned where the tutor is regarded as a stranger (extraneus), he cannot purchase the property of his pupil. The same principle is to be applied ad similia, i.e. to curators, agents, and the like."(1)

Kotze J.P. then goes on to say that:

> "If we turn to Perezius we find that... he places the same construction on the words palam et bona fide."(2)

He then concludes, as we have seen, that a tutor may purchase as an extraneus. "Thus, where the sale to him takes place by or with the auctoritas of another entitled to exercise this authority, a tutor can buy his pupil's; for instance from or with the consent of his co-tutor, having knowledge of the circumstances, or under a judicial decree."[3]

This conclusion is unquestionably correct. The difficulty is as to why he places stress upon the interpretation of "palam et bona fide". Counsel argued that the Code had altered the law so that a tutor could always purchase provided he did so palam et bona fide.[4] Kotze J.P. held this was not so - a tutor could only purchase as an extraneus. It nevertheless seems reasonably clear that to him "Palam et bona fide" is part of the definition of extraneus. In other words the person who failed to act palam, which is equated with bona fide, and which means "he who purchases through the interposition of another", was not an extraneus. If this is not Kotze J.P's interpretation of the texts it is difficult to see why he considered that the "construction" of palam et bona fide was relevant, for all that had to be decided was whether or not a tutor could purchase at a sale which he himself had authorised. It was not contended that the agents concerned had acted in bad faith.

The argument for such an approach would be, no doubt, that as D.26.8.5.3. states that if a tutor should purchase the property of his pupil through the interposition of a third party such a purchase will be void for it will not be regarded as having been concluded in good faith (quia non bona fide videtur rem gessisse) and, as the Code does not alter the law, therefore when the Emperors spoke of "palam et bona fide", they meant not through the interposition of a third party.

The first difficulty this approach meets is that Donellus clearly did not

equate bona fide with palam but rather did he consider that failure to act palam was but an example of such mala fides as would invalidate the transaction. Thus the tutor will purchase mala fide if he bribes his co-tutor or deters other would-be purchasers from the sale in order to purchase more cheaply. The text of Perezius to which Kotze J.P. refers is ad C.4.38.5. which reads:

> Neque tutor recte emit rem pupilli nec curator rem minoris ut extraneus emere non prohibetur, dummodo emat rem ab alioquam a pupillo, ut in casu ubi tutori eiusque uxori permitturem rem pupilli emere, modo emat a contutore, palam et bona fide, vel etiam ad ipso pupillo, cum tutoris, auctoritate, neque enim ipse in rem suam auctor fieri postest.

It is respectfully submitted that there is nothing in this text to suggest that Perezius considered that "bona fide" meant "not through the interposition of a third party".

Donellus refers to D. 26.7.54.

> Non existimo maximis usuris subiciendum eum, qui a contutoribus suis mutuam pecuniam pupilli accepit et cavit certasque usuras promisit, quas et alii debitores pupillo dependunt, quia hic sibi non consumpsit nec clam nec quasi sua pecunia licenter abutitur et, nisi his usuris a contutore mutuum ei daretur, aliunde accepisset: et multum refert, palam aperteque debitorem se ut extraneum et quemliber faceret pupillo an sub administratione tutelae pupillique utilitate latente sua commoda pupilli pecunia iuvaret.

Although Donellus points to the fact that such a transaction was "palam aperteque", it is nevertheless clear that there are two factors taken into account. Firstly, that the tutor was paying the normal rate of interest and, secondly, that he did so openly. If he had not been paying the normal rate of interest then surely the transaction would not have been bona fide? Of course, it might then be said that the fault would then lie with the co-tutor. Whether the tutor could so escape liability is, however, very doubtful. If we suppose that, instead of a loan, we had a sale by the co-tutor who believed that the price he obtained from tutor was fair but the tutor purchasing knew that the price he was paying was well below the market value, would not the tutor there be acting mala fide? It is quite obvious from the examples given by Donellus that it would be mala fide.

There appears to in fact be no authority for the proposition that "bona fide" should be given such a limited interpretation. In those texts dealing with tutors it is repeatedly stated that where a tutor has acted without negligence and "bona fide" he will not be liable. Thus all business carried out by the tutor in good faith (quae bona fide a tutore gesta sunt) should be

ratified;[5] a guardian must render an account to his ward for any income which he could have collected "bona fide" and he must pay interest on it;[6] he may render account of all expenses incurred good faith during his administration (bona fide tutelam) but not those which he incurred for himself.[7] As has been said, it is evident that the reason for this restrictive interpretation is probably to be found in D.26.8.5.3. where Ulpian says that where a tutor purchases through the interposition of a third party the purchase will be void "quia non bona fide videtur rem gessisse". Yet this is to say no more than that where a tutor does not act "palam" he does not act "bona fide". Certainly where a third party has been interposed it is clear that the tutor has acted with a lack of candour which must surely amount in the vast majority of cases to mala fides. At the most, it is submitted, Ulpian is saying that such a transaction will always be treated as being not carried out bona fide.

It is submitted that C.4.38.5. is clear authority for the proposition that the tutor when transacting in the position of an extraneus must act both palam and bona fide and palam is distinguished from bona fide in that if the tutor has carried on the transaction secretly through the interposition of a third party, the transaction will be invalidated without further enquiry. Perezius does no more than state this rule in the above cited text. This too would appear to be the view of Cujacius.[8] After stating that the reasons for the rule preventing the tutor from purchasing his pupil's property are that a tutor may not give authority in rem suam nor be both a purchaser and a seller, he says that the Code is not opposed to this.

> Objicitur (C.4.38.5.) conciliatorem horum locorum petendum esse. Nam in ea dicitur non prohiberi tutorem emere rem pupillerem palam et bona fide. Ita igitur distinguendum est. Vel tutor emit palam et bona fide, et emptio valet: vel emit per interpositam personam et mala fide et emptio nulla est, et prohibetur haec emptio tutori.

That his meaning here is that, in such a case, the tutor must purchase as an extraneus can be seen from his commentary ad C.4.35.5. So too Merenda[9] says that such transactions must be palam et bona fide. Brunneman[10] is not altogether clear on this point but it is nevertheless submitted that the more reasonable interpretation is that he does not equate bona fides with palam. He suggests that tutor might purchase secretly even although he does not act through the interposition of a third party and this might well be correct.

> Tutor (ita magis uxor eius) a pupillo emere quid postest, modo fiat palam et bona fide et contutoribus si qui sunt, conciss et autoritatem suam accomodantibus (C.4.38.5., D.26.8.54., D.26.7.)

vel etiam judice suam autoritatem accomodante, nam autoritas judicis supplet tutoris autoritatem, Et tutor tunc probhbetur quando facit, ut tutor, vel clam, vel per interpositam, non vero quando facit palam, bona fide et ut quilibet ex populo.

Pothier[11] by laying stress upon fraud would appear to be of the same opinion. Wissenbach[12] simply states that the sale must be palam et bona fide and so too does Matthaeus.[13] Groenwegen[14] says that even where the purchase is so made it will probably be set aside if made dolus malus. Voet[15] appears to definitely require both "palam" and "bona fide".

In Baxter v. Beningfield[16] Connor C.J. was concerned not with the question of bona fides but with whether a transaction per interpositam personam should be struck down for that reason alone. Of D.26.8.5.3. he said:

> "This distinction appears to have been adopted generally by our jurists and though perhaps there may be a question whether some jurists did not think that still fraud was to be shown in order to defeat the sale, yet all seem to require that the guardian's purchase should be made openly (palam)...The purchase has to be not only bona fide, but palam."(17)

It is submitted that "palam" and "bona fide" are wide equitable terms. If the tutor acts secretly (no matter in what way he so acts) or mala fide (no matter in what way he so acts) the transaction will be set aside. It is also evident that this is so as to prevent him, although acting as an extraneus, from cheating the pupil by obtaining the merx at a lower price than could be obtained from a third party. This is not to say that he is bound to pay a fair price. He purchases as an extraneus and is not under a duty to act for the pupil. Nevertheless he must act openly and in good faith. What will constitute such behaviour will obviously depend upon the circumstances. It is submitted, however, that should the tutor be purchasing because he has information concerning the merx which his co-tutor does not have, and is purchasing in order to obtain the benefit of this knowledge for himself which he ought to have used for the benefit of his pupil, this will obviously be bad faith. Good faith requires him to inform his co-tutor of this. This duty arises not out of a general duty placed upon all purchasers to disclose but out of the tutor's duty to act in the interests of his pupil. As an extraneus he is, of course, not under such a duty when entering into the transaction itself but he cannot terminate this duty thus in order to cheat the pupil.

As this duty to disclose arises out of a prior duty, it would therefore seem reasonable to say that the tutor, when so terminating the relationship for the particular transaction, is under a duty to ensure that his co-tutor is acquainted

with all such information. There is to be no reason why he should be permitted to say that he did not intend to cheat his pupil - just as he will not be permitted to say that he did not act per interpositam personam with that object. Thus failure to act palam et bona fide renders the transaction invalid.

It is usually stated in our law that this duty arises out of "a special trust or confidence between the parties" in other words from the fiduciary relation existing between the parties. Millner argues that the key" to the question of fraudulent non-disclosure in the case of what he calls "designed concealment" (where the one contracting party deliberately refrains from disclosing a material matter known to him and unknown to the other party with the intention thereby of inducing a sale) lies "in the precise relationship between the parties, i.e. whether or not that relationship is one in which the ordinary contemplation of the parties is or ought to be that A will disclose to B material facts of a particular kind of which he knows B to be ignorant."[18] He argues that the factor common to contracts uberrimae fidei and the fiduciary relationship is "the element of dependence which is present",[19] for in contracts uberrimae fide the other party is "obliged to depend on him, i.e. to trust him to disclose"... In short, a relationship of involuntary dependence springs into being in these circumstances which, in so far as it obliges the one to repose confidence in the other, has a quality comparable to those subsisting fiduciary relationships which admittedly give rise to a positive duty of disclosure."[20] He thus considers that:

> "But that does not mean that such negotiations (contracts uberrimae fide), together with the recognised relationships of trust or influence, form closed categories which exhaust the situations calling for disclosure. The same relationship, and therefore the same duty of disclosure, can arise in any other negotiations which, in the particular case, are characterized by the involuntary reliance of the one party on the other for information material to his decisions."

It is submitted that in the case of the administrator is is incorrect to say that his duty to disclose is based upon a "relationship of confidence". For one thing when entering into such contracts the administrator stands in the position of an extraneus. His duty to disclose does not arise because the other relies on him to make disclosure. It arises because he undertook to act for the beneficiary and was therefore under a duty to use that information in order to advance his interests. Therefore he must disclose it. The "relationship of confidence" is a doctrine of Equity where, it will be recalled, undertakings are not enforced as such.

Profits

Our authorities are very clear as to the administrator's liability for profits. Watson states the rule succinctly thus; "The obligations of the mandatary are to carry out the mandate properly and with care, and not to retain any profits from the mandate except in so far as this is foreseen and intended by the mandator".[1] The mandatary was accountable for all profits made in the course of his administration. The obligation to account for these profits arose out of the mandate itself and was not based upon a presumed fraud. The rule did not exist in order to prevent possible fraud. It was based upon the fact that the mandatary was carrying on the affairs of the mandator and, therefore, just as he was liable for all expenses incurred by the mandatary so too had he the right to all profits. Thus Paul says:

> "Ex mandato apud eum qui mandatum suscepit nihil remanere oportet sicuti nec damnum pati debet si exigere faeneratam pecuniam non potuit."(2)

And Gaius, speaking of the procurator says:

> "Procurator ut in ceteris quoque negotiis gerendis, ita et in litibus ex bona fide rationem reddere debet. Itaque quod ex lite consecutus erit sive principaliter ipsius rei nomine sive extrinecus ob eam rem, debet mandati iudicio restituere usque adeo, ut et si per errorem aut iniuriam iudicis non debitum consecurtus fuerit, id quoque reddere debeat. Item contra quod ob rem iudicatam procurator solverit, contrario mandati iudicio reciperare debet: poenam autem, quam ex suo delicto praestitit, reciperare non debet."(3)

Thus where crops were gathered from land which the mandatary had purchased for his mandator, these had to be accounted for.[4] So too where he purchased a slave he had to account for any accretions to the slave.[5] Where the mandatary acted in his own interests he was accountable for all profits, although in doing so he had not failed to carry out what he had undertaken to do. Thus where he was given money to lend to another without interest and he lent it at interest, he was accountable for the interest.[6] Furthermore, it was irrelevant whether or not he could have obtained the profit for his mandator. Thus Ulpian says that where a person instructed his physician with whom he lodged, to build at his own expense, a place for playing ball, a hot bath, and other buildings for his health, the physician could not claim all the costs of erecting these but only those costs less the amount by which the property was improved.[7] This text also illustrates the point that even if it was agreed that the manda-

tary should have an interest, that interest only extended in so far as it was specifically agreed. As we have seen, Watson states that the mandatary could not "retain any profit from the mandate except in so far as this is foreseen and intended by the mandator". This is, of course, correct. Viewed against the background of Equity, however, it may be somewhat misleading to state the rule thus. Clearly if the mandatary made a profit during the course of his mandate, the mandator could permit him to keep it. On the other hand where it was agreed before hand that the mandatary should take for himself certain "profits" and could, therefore, act in his own interest as regards certain matters related to his mandate, the Romans do not appear to have looked upon this as the granting of prior consent to retain a "profit" but rather the introduction of a further transaction. Thus where the mandator directed his mandatary to take a certain sum of money and lend it at interest at his own risk provided he paid him, the mandator, certain interest, this was held to be a loan.[8] This would seem, in principle, to be correct for whether on the facts such an agreement amounts to a partnership or whether it amounts to a loan, if the mandatary is entitled at the outset to do something in his own interests, the transaction is not mandate (although it may be coupled with a mandate). Thus if one person lent money to another and permitted him to lend it to whomsoever he pleased and take for himself the interest, the transaction is said to fall outside the scope of mandate.[9] In these cases everthing depends upon what in fact the mandatary undertook to do. Thus although a mandatary may be instructed to lend money at a certain rate of interest with permission to lend it at a higher rate, this will not be considered to be a loan if the mandatary was charged with the general administration of all the mandator's affairs.[10]

These rules formed part of Roman Dutch Law. Grotius[11] states the general rule thus:

> "The effect of this contract (mandate) is that the acceptor (mandatary) is bound to carry out the mandate according to the mandator's directions, without deviating from them at all, unless he does something which is patently equivalent to what was directed. Doing otherwise he is liable to make good all damage (including loss of profit). He is also bound to make over to the mandator all fruits, profits and advantages which in any way come to him in connection with his mandate, and to transfer to him all personal claims to which he may have become entitled."

Thus we see that in Roman Law and in Roman Dutch Law profits are something quite distinct from damages. Where the mandatary failed to carry out his undertaking altogether or failed to carry it out as best he could, he was liable for damages. Profits do not relate to this question.[12] They are advantages

accruing either as the result of the mandatary having carried out his mandate or because he had not only carried out his mandate but had also used it to further his own interests.

Obviously, in many cases what are termed "profits" in Equity will amount to much the same thing as damages. Thus where an agent is instructed to sell, and, ascertaining that he can obtain R1,000 for the merx, he sells it to himself for R500 and then resells it for R1,000, the damage that the principal has suffered is R500 and this he could claim in Equity as a "profit". Nevertheless, this will, obviously, not always be the case. If in the above example he had in fact been unable to resell the merx for R1,000 because, before he could resell it, its market value had fallen to, say, R600, then his profit is R100 and the damages his principal has suffered is R500. Furthermore, the mandatary may make no profit at all. Thus if he sold the merx not to himself but to a friend who had no knowledge of his breach of duty. Here the principal's remedy can only be in damages.

It is therefore submitted that in Roman Dutch Law we may distinguish between two situations. Firstly, where the mandatary acts in breach of his duty (where he is liable for damages) and, secondly, where the mandatary acquires profits during the course of his administration, either as the result of carrying out his undertaking or because he attempted to convert a mandate mea gratia into one mea et tua gratia.[12] He is under a duty to account to his mandator for these profits.

N.B. Our courts have, however, been strongly influenced by the principles and rules of Chancery. This has had three important consequences. Firstly, the administrator is said to be accountable for "profits" because he is a fiduciary. Thus, for example, in Transvaal Cold Storage v. Palmer[13] Innes C.J. said:

> "I should like to quote ... from ... Story's Equity Jurisprudence: 'where one sustains any such fiduciary obligation to another, that such other is fairly entitled to his advice and services, either for the joint benefit of the two or the exclusive benefit of himself; and the party sustaining such relation, in violation of his obligation and duty, enters into a subsidiary contract with a view to his own advantage, all profits thus resulting belong to the party for whose benefit he ought to have acted.'"(14)

This has been invariably accepted.[15] If it were merely a matter of nomenclature no harm would be done but, unfortunately, with it has come the principle of conflict of interest and duty. Thus it is said a fiduciary may not place himself in a position where his interests conflict with his duty and therefore he is accountable for profits. In Union Government v. Chappel[16] Gardiner J. held:

> "It is a clear principle of our law that an agent must show good faith in a transaction which he carries out for his principal: he must make his first and only consideration his principal's interest, and he must not allow himself to be diverted from the course which is best for his principal by any private agreement of his own. For this reason, where an agent in the course of, or by means of, his agency acquires a commission from some third person he must account for this to his principal. The reason is obvious. If an agent were allowed to receive remuneration from parties with whom he has to deal at arms length, if he were allowed to be paid by the persons who are dealing with his principal, he would have a strong inducement to conclude contracts which are not the best that could be entered into for his principal but which he concludes in order to obtain not the advantage of his principal but some advantage to himself."(17)

It is submitted that in our law there is no need for such a prophylactic rule for if the agent fails to carry out his mandate he is liable in damages. The result of adopting this approach, however, has been that the agent has been held liable for profits and not damages in many cases where he has quite clearly breached his mandate. Thus in the Transvaal Cold Storage Case mentioned above the manager of a company had entered into a contract which he ought to have entered into on behalf of his company. Nevertheless the case was seen as one relating to profits.

> "A difficulty lies in the application, and especially in deciding whether the profits made in this case were made 'in the course of by means of an agency', or whether the agreement complained of was 'a subsidiary contract'. That it was a contract entered into in violation of P's obligation and duty as the plaintiff's manager, I have no doubt whatever... If these conclusions are right, then I am of the opinion that the profit earned by P in connection with the landing and handling of this meat, was a profit made in the course of his agency, and that the contract he entered into with the Imperial Company was one which he ought to have secured for his principal, and not for himself... I think, therefore, the defendant must account for and pay over to the company all profits made by him in connection with this meat contract." (18)

It is submitted that if an agent acts in his own interests, when he ought to have acted in the interests of his beneficiary, he breaches his mandate and ought to be liable in damages. There can be no question of a profit as he did not act for his beneficiary. Equity, in such a case, will hold him to be a trustee of the "profits" but this is achieved by means of proprietary concepts and is done because it cannot give a remedy in damages.

In some cases the principal may claim either profits or damages or both should he suffer damage over and above the amount of profits. In Davies v. Donald[19] the respondent authorised C to sell a motor-car, giving him the right to retain any amount over £70 which he might obtain for it. The appellant

subsequently approached C and instructed him to look out for a car for him and agreed to pay him a commission in the event of his finding a suitable car. C sold to him the respondent's car for £75. The transaction was set aside for the following reasons.

> "One of the remedies is that the contracting party, whose agent has been bribed, can claim to set aside the contract. The reason for the rule seems to me to be founded on the general principle that an agent is never allowed to act in a matter where his duty to his principal conflicts with his own interest, and if one contracting party knowlingly places the agent of the other contracting party in a position where his duty and his interest are in conflict, he commits a fraud upon the other contracting party if such party is ignorant of the arrangement."(20)

Firstly, it is submitted that the respondent did not place C in any position at all. What he did was to knowingly participate in C's breach of duty.[21] Secondly, C was not merely in a position where his interests conflicted with his duty. He would appear to have been under a duty to obtain a car for the appellant at the lowest possible price and not only did he fail in this duty but he also fraudulently held out to the appellant that he had properly fulfilled his mandate. Thus he should have been liable in damages. Nevertheless, he also obtained a profit during the course of his administration of the appellant's affairs and was therefore liable to account to him for it.

In Mallinson v. Tanner[22] an agent received a mandate to sell his principal's house for £2,000. Knowing that there was a prospective purchaser who was prepared to pay that price, the agent, without informing his principal of this, offered to purchase it from him for £1,800, which offer was accepted. That same day he resold the house to the prospective purchaser for £2,000. It is submitted that although the agents "profit" here probably amounted to exactly the same sum of money as the damages suffered by the principal, this does not alter the fact that the principal's action should have been for damages. The court, however, citing The Restatement of the Law, held that the defendant was liable to account for the "profit" he had made. Thus Barry J.P. said:

> "The author (of the Restatement) indicates that it is the duty of the agent to act solely for the benefit of his principal. He acts only for his principal and for his principal's benefit. He cannot have an adverse advantage of his principal. Where the agent has an interest that is adverse to his principal's interest, then the onus is thrown on the agent to show that he had made a complete disclosure to his principal and, in addition to that, that the principal has acquiesced in the transaction. This principle is to be gathered from paragraphs 387 to 389 and I need only refer to one passage where it is stated that 'Unless it is otherwise provided in the agreement, however, an agent

> acting as an adverse party, even though with knowledge of the principal that he is doing so, is subject to the duty to reveal to the principal all the material facts he knows or which he should know, and to deal fairly with the principal.'"(23)

Of course, the parties to a contract can always vary its terms but it would seem incorrect to hold that such an agreement amounts to a "disclosure". Again, it is submitted, we are not dealing here with a "profit" for the agent had quite simply breached that duty which he had undertaken to carry out. He could have obtained the higher price for his principal. The confusion of principle is even more evident in the judgment of Price J. He too cited the Restatement of the Law, quoting from it the following passages.

> "The agents duty is not only to act solely for the benefit of the principal in matters entrusted to him, but also to take no unfair advantage of his position in the use of things acquired by him because of his position as agent or because of the opportunities which his position affords."

> "Ordinarily, the agent's function is to make profits for the principal and his duty to account includes accounting for any unexpected and incidental accretions whether or not received in violation of duty."(24)

The first mentioned paragraph is a statement of the agent's duty in terms of the principles of Equity. The second paragraph, however, is clearly entirely compatible with our law but was irrelevant in Mallinson's Case and the rule there stated is, in any event, based upon the principle of "conflict of interest and duty". This principle, as we have seen, was evolved by Chancery in order to ensure that if the agent acted at all, he acted in terms of his undertaking. It was evolved because Chancery was unable to enforce his undertaking as such. This can be seen very clearly from another passage from the Restatement cited by Price J.

> "The rule in this section is not based upon the existence of harm to the principal in the particular case. It exists to prevent a conflict of opposing interests in the minds of agents whose duty it is to act solely for the benefit of their principal. The rule applies therefore although the transaction between the principal and the agent is beneficial to the principal."(25)

Another important consequence of our courts reliance upon English Law has been the introduction of concepts of property into situations where they can hardly be appropriately used in our law. In Jones v. East Rand Extension G.M. Company[26] the plaintiff was employed by the defendant company to ascertain whether coal existed in payable quantities on a certain farm. In

carrying out this mandate he discovered that there were valuable coal deposits on an adjoining farm. Subsequently he obtained an option over that farm to which the court held the defendant company was entitled. Bristowe J. held that:

> "It is clear that the plaintiff having been a servant of the company, the principles of the law of principal and agent apply, and a fiduciary relation was constituted between them... The principle is that an agent... cannot make a profit out of anything (including information which can be used for the purposes of the principal's business) which belongs to his principal and which the agent possess merely in a fiduciary capacity... (The information) was obtained by him in the course of his employment, and was therefore covered by the fiduciary relation between him and the defendant company, and it was information the utilisation of which was within the scope of the defendant company's business. Accordingly I hold that the defendant company is entitled to the contract." (27) if held bona fide!

One would think that these reasons are not sufficient to hold that the party granting the option was bound to the company in terms of an agreement which he entered into with the plaintiff. This conclusion is clearly arrived at as the result of holding that the information was the "property" of the company. This is the reasoning of Chancery. In fact Bristowe J's. judgment was based on two decisions of that court, namely, Dean v. MacDowell [28] and Aas v. Benham.[29] As we have seen in Chancery such a contract would be looked upon as "belonging" to the company because it had been obtained by means of the wrongful use of the company's "property" - the information. It appears to have been accepted that there had been no breach of mandate and therefore if Jones was to be held accountable it had to be on the basis of profits properly so-called. As to whether or not the approach adopted by the court can be justified in our law is doubtful. We will return to this question. For the moment it must be noted that the same reasoning has been applied to cases where the agent has undoubtedly acted in breach of his undertaking. Thus in Peacock v. Marley[30] Gardiner A.J.A. held:

> "This claim is based upon the allegation that the defendant was employed by the plaintiff, that in 'the course and by reason of his said employment' he obtained certain information and that he used this information to get a benefit for himself, which his employer was desirous of obtaining. If the plaintiff proves this allegation, then he should succeed. The law governing the matter is clearly put by Bristowe J. in Jones v. East Rand Extension Company Ltd."(31)

He then went on to quote Bristowe J. where he had said that an agent cannot make a secret profit out of anything, including information, which "belongs"

to his principal and which he "possesses" merely in "a fiduciary capacity".

In those cases where the administrator has, without actual breach of duty, made a profit in the course of his administration, there is, of course, no need to base his liability upon the principles of Chancery. In West Coast and Rand Labour Agency v. Abernethy[32] the defendant had agreed, for remuneration, to devote his whole time to the recruiting and engaging of native labourers on behalf of the plaintiff company. While this agreement was enforced, he and another entered into a partnership as market and commission agents, and that partnership entered, on its own account and without knowledge or permission of the plaintiffs, into contracts for the supply of native labourers. A considerable part of the commissions obtained by the partnership were earned while, owing to lack of orders, there had been a stoppage of recruiting on the part of the plaintiff company. Nevertheless, during this period the defendant still received an allowance for his expenses and, what is more, the partnership used the plaintiffs' premises for the purpose of its own transactions. It was held that the defendant was accountable to the company for all the commissions he had so earned. Juta A.J. said that:

> "The question is whether, this being an action for an account of profits, and not for damages for breach of contract, the plaintiffs are entitled to succeed. It is a clear principle of law that an agent, if he wishes to carry out his duty, may not place himself in such a position that the interests of his principal conflict with his own. If he does so, we know from experience of human nature that it is highly probable that the conflict will be in his favour, that the interests of the principal will suffer and those of the agent will be furthered. It is a further principle that a principal may claim from an agent all profits made by virtue or in connection with, or through or by means of the agency."(33)

It was upon the latter ground that the agent was held accountable. The former ground, it is submitted, is the tragic assumption as to the nature of man upon which Equity acts in order to enforce undertakings and has no place within the principles of Roman Dutch Law.

To return to the case of Jones v. East Rand Extension G.M. Company; in that case it was decided that the agent was accountable for the option upon the ground that he had used information acquire during the course of his mandate which belonged to the company. It is submitted that information as such can never be "property" in our law and that the only test is whether or not the profit was made in the course of carrying out the mandate. The rule of Equity that a fiduciary must account for all profits made as the result of his use of information acquired whilst acting as such is impossibly wide. If

applied as such, it would virtually bring commerce - and the professions - to a stand still. What would the court have held if Jones, instead of discovering coal deposits under the neighbouring farm, had ascertained that it was excellent land for growing mealies and, having fulfilled his mandate, had purchased it and gone farming? It is too absurd to suggest that the coal mining company could, on hearing that the farm was paying well, demand transfer of it and, of course, Bristowe J. would never have entertained such a proposition. Following what Lindley L.J. said in Aas v. Benham, he limited the scope of the concept by holding that "it was information the utilization of which was within the scope of the defendant company's business". This points to the true ground upon which such liability arises and it does not require that information, or at least certain types of information, must be considered to be property.

There are two grounds upon which Jones' liability may have arisen. Either he obtained the option in the course of his administration or he obtained it in breach of his undertaking. As he obtained the option sometime after he had completed his mandate it is obvious that the former ground falls away. The question therefore is "Was he under a duty to inform his company of his find and under a duty not to take the farm until he had ascertained that the company had no intention of acquiring it?" After all, this must be the reason why, if Jones had acquired a mealie farm, one would not hesitate in rejecting the company's claim. In order to find a breach of duty on the part of an agent in such a case it is not necessary to find, as it seems invariably to be thought, that the agent had been under a duty to purchase for the principal. This was certainly Bristowe J's. view. It is surely sufficient that he had a duty to disclose. The fact that it is usually necessary for Equity to find that the agent had been under a duty to acquire the property before it will deem him to be trustee of the property for his principal, is probably the reason for this approach. Finally, it is submitted, if the court had found that such a duty existed, the company's action should have been for damages. After all how could the company have had a right to be substituted for the plaintiff in the contract?

As the law now stands it is nevertheless clear that a beneficiary may, at least in certain circumstances, hold the administrator liable not only for profits made during the course of his administration but also for any profits he may have subsequently made by the use of knowledge acquired whilst in that position.

This raises the question as to whether our courts have, by following the rules of Chancery, introduced an alternative remedy to damages in the case where the administrator has breached his undertaking. May he now either sue for damages or profits? There can be little doubt that this is in fact the position - at least where the administrator has acted contrary to his undertaking. There appears to be no authority in our law, and there is certainly none in English Law, to the effect that the beneficiary has an action for profits made by the administrator where he has failed to act at all but has nevertheless profited. It is submitted that to grant such a further remedy is not only contrary to authority but is to introduce into our law an arbitrary and unreasonable method of assessing the administrator's liability for breach of duty.

Whether these profits are claimed as the result of a breach of duty or merely as profits made from the use of information, there is, it is submitted, no possible way of defining them or, at least, of limiting "profits" so as to keep the concept within reasonable proportions. If A, using information acquired while employed by B, starts up his own business and develops it into a large and flourishing concern, can B claim the entire business? Under American Law he very probably could[34] and, on principle, this would also be the position in English Law. His former employee's profit need bear no relation to the damage which he has suffered - in fact he need not have suffered damage at all. The only factor to which his claim is related is his former employee's ability to make use of the information. The administrator's liability for profits made during the course of his administration can readily be understood. He is carrying out his beneficiary's affairs and therefore it is only reasonable that the profits so made should accrue to the beneficiary. On the other hand, it is submitted, liability for profits made as the result of using information has no reasonable basis. If the administrator should have used the information so as to advance the interests of his beneficiary or, at least, if he was under a duty to disclose it to his beneficiary, his liability should be for damages. If he was under a duty not to make use of information so acquired his beneficiary should be able to interdict him. Why should the beneficiary have any further remedies? It is usually suggested that the administrator's liability for profits is placed upon him in order to ensure that he acts in good faith. His duty to do so, however, can be perfectly effectively enforced by an action for damages and, where necessary, the granting of an interdict. Where he is, in addition, held liable for "profits" this means that the beneficiary is entitled to punitive damages and thus may claim a totally unmerited profit as

the result of his administrator's breach of duty.

One further question remains. It is generally accepted that where an administrator enters into a transaction with himself on behalf of his beneficiary, the beneficiary may, instead of setting the transaction aside, affirm the transaction and claim any profit made by the administrator as a result of it. The cases that are usually cited as authority for this proposition are cases where the administrator has actually breached his duty, selling to himself at a lower price and then reselling at a higher price. If, however, the transaction had been bona fide the beneficiary would, of course, have suffered no damage. May he, nevertheless, claim any profit subsequently made by the administrator?

It might be thought that if the beneficiary can reclaim the property, there can be no reason why he should not, instead, claim its increased value. Furthermore, it would seem unreasonable to hold that he should be prejudiced where he is unable to have the contract set aside - especially when this will usually be because the administrator has resold the property. In Osry v. Hirsch, Loubser & Company Ltd.[35] the plaintiff delivered a quantity of ostrich feathers to the defendants for sale on his account. After some delay the defendants sold these feathers on the Municipal Feather Market and purchased them themselves. The plaintiff sued for redelivery of the feathers and damages in the sum of £3,750 being the difference in the market price of the feathers between the date upon which the defendants had rendered the plaintiff their account and the date of issue of summons. Alternatively, he claimed damages in the sum of £7,500 being the highest price which could have been obtained for the feathers between the date on which the defendants purported to sell the feathers and the date of issue of summons. And, in the alternative again, for an order directing the defendants to render an account of their dealings with the feathers and, in the event of their having been sold, judgment for the amount realised by the sale. There certainly appears to have been evidence to the effect that the defendants had failed to fulfil their mandate. Thus it was said that the sale was not held at a good time, that the feathers would have reached a higher price had they been sold in smaller parcels and there was evidence that certain prospective purchasers had taken no further part in the bidding once they had ascertained that the seller's brokers were themselves bidding. The court, however, made no attempt to assess the plaintiff's damages. Instead the plaintiff was awarded the difference between the price paid for the feathers by the defendants and the price they obtained for them on resale.

"I do not think that under the circumstances the purchase by the defendants

> can possibly stand, and the plaintiff will be entitled to whatever profits the defendants have made on the resale of his feathers. Such is the natural consequence where a person in a fiduciary capacity obtains any benefit or advantage for himself out of the property committed to his keeping and administration. That this is in accordance with the sources of our law and the exposition of the jurists thereon and of the decisions of our courts has already been demonstrated... In the present instance the defendants may have considered that they were proceeding within their rights in acting as they did; but in doing so they acted in a manner which the law does not permit."(36)

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Although Kotze J.P. says, as we have seen, that this is in accordance with our authorities he did not, however, consider them on this point, citing only Robinson v. Randfontein Gold Mining Company.[37] Again, it is clear that although he purported to set aside the sale, this in fact was not done. Nevertheless, as suggested above, it would seem reasonable to grant the beneficiary such an action and to base it upon the fact that such a profit was made as a result of carrying out the mandate.

In conclusion, therefore, it is submitted that the position in our law is as follows. If the administrator failed to do what he undertook to do he is liable in damages. If he made a profit as the result of carrying out his undertaking, he must account for that profit. A profit is something that arises directly out of the fulfilment of the undertaking. Information is never "property" and the wrongful use of (or even failure to disclose) it gives rise to an action for damages.

i) fails - ik delict;

ii) succeeds, he must account;

PART 4

THE DIRECTOR

THE DIRECTOR

The analogy.

The director is, from the point of view of his relation to his company, in the position of one person administering the affairs of another. As we have seen, in civil law the rules relating to such persons were developed and extended by a process of analogy, the rules formulated for one species of administrator being adapted and applied to others. This process has four stages. Firstly, the classification of the person as an administrator, then the statement of his particular function for which rules are required, his identification with another administrator who is most closely analogous to him in regard to that particular function, and, finally, the adaption of the rules formulated for that administrator to him.

In English Law the same process has, of course, taken place. Its working has, however, been largely obscured by the fact that the existence of the common law along side Equity required the Chancellor not merely to classify such a person as an administrator but, at the same time, to place him within the jurisdiction of Chancery, In other words, to state that he is in a relationship of "confidence". that he is a type of "trustee" or, in modern phraseology, that he is a "fiduciary".

Generally speaking the directors of a company have two functions in law. They administer the company's assets and they represent the company in transactions with third parties. Thus, naturally enough, the courts in England have, in the main, used two analogies - the trustee and the agent. Not surprisingly the former has played the predominant role as far as the directors' fiduciary duties are concerned. It is usually said that this is due to the fact that prior to 1844 most joint stock companies were unincorporated and depended for their validity on a deed-of-settlement vesting the property of the company in trustees. Thus frequently, but not always, the directors were in fact trustees. Where the property was vested in passive trustees the court would, nevertheless, clearly regard the company's directors as being bound by the same duties. Thus Gower concludes, "(w)ith directors of unincorporated companies the description 'trustees' was less apposite but it was not unnatural that the courts should extend it to them by analogy. For one thing, the duties of the directors should obviously be the same whether the company was incorporated or not; for another, courts of equity tend to apply the label 'trustee' to anybody in a fiduciary position." [1] Sealy considers only this latter proposition to be true. [2] The former,

he says, cannot be substantiated and no support for it can be found in the old books and reports. It is wrong for three reasons. Firstly, the earliest cases in which directors were held liable on trust principles all concerned corporations and not trusts. Secondly, in most deed-of-settlement companies the directors were not the trustees of the company's property. Thirdly, many of the early cases in which the directors' duties were evolved were in fact cases of corporations and not deed-of-settlement companies and in these cases it is usually evident that the court did not consider the directors to actually be trustees properly so-called. He considers that:

> "There is no hidden mystery, no missing link lying undiscovered in the pre-history of company law, behind the trustee appellation; the real mystery is why the old label has survived in modern usage. In the limited legal vocabulary of the day, there was no other word which the judges would wish to use. It was sufficient for them to reason that the directors had accepted an appointment or 'trust'; therefore they were 'trustees' and accountable for 'breaches of trust'. The 'trustee' in a strict sense, in whom property is legally vested for the benefit of others, was not separately identified until well into the 19th century, when the expression 'fiduciary' was eventually accepted to differentiate trusts from those other relationships, like that between a director or a promoter and his company, which in some degree resembled them." (3)

It is respectfully submitted that this is equally unacceptable. The trust in the "strict sense" was recognised during the eighteenth century - in fact, in the late seventeenth century we already find Lord Nottingham defining the trust in reasonably modern terms. [4] It is submitted that the courts, always fully aware that the director could never properly be defined as a trustee, quite deliberately used the analogy of the trustee in order to develop rules for the director. He too held property which he was bound to use to the benefit of others and in this respect their positions were identical. Furthermore, in both cases, the beneficiaries were not the legal owners of the property. It would have been very surprising indeed if the Chancellor had adopted any other course. It is usually said that the director has been described as a trustee since ~~Sutton's Hospital Case~~ THE CHARITABLE CORP V. SIR ROBERT SUTTON [5] and a consideration of it is therefore both relevant and instructive. Here Lord Hardwicke L.C. held that the directors of a chartered company who had misapplied its funds were liable as trustees for "actual breaches of trust". He was, however, clearly aware that they

were not trustees properly so-called and this can be seen from the manner in which he dealt with their breaches of the company's by-laws. He formulated the legal basis of their duties here as follows:

> "Consider first the foundation of this general charge. I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the Crown. But it cannot be said to be an employment affecting the public government; and for this reason none of the directors of the great companies, the Bank, South-Sea, & c., are required to qualify themselves by taking the sacrament. Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of mal-feasance or non-feasance." 6)

He then went on to say that they were guilty of "breaches of trust" in this regard. It is clear that here he is using the word "trust" in a wide sense and that he is not imposing these duties on the directors because they are in fact trustees. But although he uses the word "trust" in its wide sense he is nevertheless at the same time doing so in order to apply the rules of the trust properly so-called.

Sutton's Case was, of course, primarily concerned with the mis-application of company funds. It is just here that the obvious analogy between the position of the director and that of the trustee lies. They are both in control of funds in which others are beneficially interested. Thus the trust has been used to evolve rules as to the manner in which a director (and those taking through him) are held accountable to the company for property which he has misappropriated. In other words the remedies for a breach of duty by a director relating to his control of the company's funds have been evolved by borrowing and adapting those rules developed for the trustee in this regard. This is what happened in Sutton's Case and this has remained the approach of the courts. We see this, for example, in Russell v. Wakefield 7) where Jessel M.R. said:

> "In this court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee."(8)

In the recent case of Selangor United Rubber Estates Limited v. Cradock and Others [9] Ungoed-Thomas J.

> "Directors are clearly not trustees identically with trustees of a will or marriage settlement. In particular, so far as at present relevant, they have business to conduct and business functions to perform in a business manner, which are not normally at any rate associated with trustees of a will or marriage settlement. All their duties, powers and functions, qua directors are fiduciary for and on behalf of the company. So property in their hands or under their control is theirs for the company, i.e., for the company's purposes in accordance with their duties, powers and functions. However much the company's purposes and the directors' duties, powers and functions may differ from the purposes of a strict settlement and the duties, powers and functions of its trustees, the directors and such trustees have this indisputably in common - that the property in their hands or under their control must be applied for the specified purposes of the company or the settlement; and to apply it otherwise is to misapply it in breach of the obligation to apply it to those purposes for the company or the settlement beneficiaries. So, even though the scope and operation of such obligation differs in the case of directors and strict settlement trustees, the nature of the obligation with regard to the property in their hands or under their control is identical, namely, to apply it to specified purposes for others beneficially. This is to hold it on trust for the company or the settlement beneficiaries as the case may be. That is what holding it on trust means. That is why a misapplication of it is equally in each case a breach of trust." (10)

Thus we see that although these rules may be applied to the director because he is a fiduciary, the rules that are in fact applied are those rules which were developed first for the trustee and then applied to the director, as a fiduciary, by way of analogy. Nevertheless, even in relation to "property" the courts have never hesitated to reject the analogy when inappropriate. For example, in In re Forest of Dean Coal Mining Company [11] Sir George Jessel held

> "... directors are called trustees. They are no doubt trustees of the assets 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 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." (12)

As Ungoed-Thomas J. pointed out in Selangior's Case, the purposes for which directors are appointed and those for which trustees are appointed are very different. This means that the content of the duties evolved for trustees must inevitably, at times, be such as to render their application to the director impossible. If the same caution were demanded of a director as is required of a trustee it is obvious that the business of most companies would be most severely hampered. Those Romer J. in Re City Equitable Fire Insurance Company [14] when considering the directors' duties of care and skill, was forced to abandon the analogy.

> "It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement." (15)

So too the trustee, whose duty it is to conserve the trust fund and to dispose of it only in accordance with the directions of the settlor, is given but little discretion as to the kind of investments he may make. Obviously the rules here are totally inapplicable to the director.

As regard those duties, however, which are imposed upon the director to ensure that he fulfils his undertaking to act to the benefit of the company, the analogy between his position and that of the trustee is strong. As we have seen, however, the bald statement that a director is a fiduciary does not tell us what his duties are. It merely establishes that his relation to his company is a relation of confidence. Formally, no doubt, the courts would have simply referred to the director here as a "trustee". Today he is referred to as a fiduciary. This does not, however, obviate the necessity for drawing an analogy between him and some other person standing in a similar position for whom the law has already developed rules. In other words the fact that a director is a fiduciary serves the same function in English Law as Ulpian's injunction in Roman Law, namely, that the rules developed for one type of administrator should be applied by way of analogy, to other administrators. During the nineteenth century, when the fiduciary doctrine was still largely concerned with the abuse of "influence" of one kind or another, the courts referred to the director as being in a similar position to that of the trustee when making use of the trust analogy and did

not, generally speaking, insist that he was in fact a trustee properly so-called. This can be clearly seen in two judgments of Romilly M.R. In York & North-Midland Railway Company v. Hudson [16] he said "... the directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders therefore, that shares or any other species of property shall be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees, in other words, that the persons entrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to the benefit of their cestuis que trust ..." [17] If Romilly M.R. appears to be saying that the director is in fact a trustee, his judgment in Turquand v. Marshall [18] explains all. Here it was argued that directors are "not trustees but simply agents required to perform the duties imposed upon them by the deed-of-settlement, and subject to the liability which everyone is exposed who acts on fixed instructions, but to no other." That the only cases which directors had been fixed with liability as trustees were those in which they had made profits by their position or where they had received promotion money not mentioned by the articles of association. Therefore a director was not liable in equity for a deviation from the strict line of duty which may lead to loss, but which does not bring profit to him. If he acted ultra vires, but bona fide, there can be a case for an action at law, but unless he makes a profit by the transaction a bill will not lie. Against this the plaintiffs argued that in Chancery directors had "always been treated as trustees". Here Romilly M.R., speaking of the directors as "quasi-trustees", said :

> "In my view this was a clear breach of trust, and one which the persons who were directors during those nine years, from 1849 to 1858, are bound to make good, if alive, and which the estates of those who have since died are liable to replace. I cannot look at the acts of the directors as different in this respect from those of ordinary trustees. They undertake for a salary - to perform a duty for certain persons, and for this purpose they undertake to hold and employ the money of those persons who entrust them, one of the promises they make is, that they will not lend the money to anyone of themselves without taking such precautions as will practically make loss impossible. They do nothing of the sort. They take no precaution, no security, and they throw away the money of those who have trusted them by giving it to one of their own body. Are they not to make it good? I think they are,

> and that the old rules of equity do not require any aid from the dictum of Lord Cottenham in Wallworth v. Holt where he states that it is the duty of the court to adapt its practice and course of proceeding to the existing state of society, and not by too strict and adherance to the forms and rules established under different circumstances to decline to administer justice, and to enforce rights, but that the first principles of equity make the directors of a joint stock company liable to the shareholders where, for the benefit of one of themselves they have violated one of the express rules of the company to which they undertook to conform." (19)

I do not think that there could be a clearer statement of the process of the development of the directors' duties than this. But Romilly M.R. was saying nothing new. Some fourteen years earlier we find Lord Cranworth in the leading case of Aberdeen Railway Company v. Blackie Bros. [20] saying that the chairman of the board was a trustee "... or at all events ... as between himself and the company, he was subject to the same obligations ..."[21]

Today, as we have seen, the courts speak merely of the directors as being fiduciaries and not as being "trust-like". Nevertheless the process of analogy continues. For example in Regal (Hastings) Limited v. Gulliver [22] we find it agreed by all the judges that the director is accountable for profits because he is a fiduciary and support for this is found in such cases as Keech v. Sandford.[23]

The other major source of analogy has been the agent. Obviosuly as far as the agent's fiduciary duties are concerned this would not be an analogy of prime importance in Chancery because the agent's duties here were also evolved on an analogy with the trustee. It is, of course, in connection with the question of the imputation of the director's act to the company that the analogy of the agent has been used. For example in Ferguson v. Wilson [24] we have the famous dictum of Lord Cairns L.J.:

> "What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Whenever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company." (25)

This analogy is similarly rejected when found inappropriate. Thus we find Lord Goddard C.J. in Newborne v. Sensolid (Great Britain) Ltd.[26] saying:

> "The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature of one of the directors." (27)

Finally, we may mention the dictum of Bowen L.J. in Imperial Hydropathic Hotel Company, Blackpool, v. X. Hampson[28] where he described rather aptly the abovementioned process of analogy. He said:

> "I wish ... to begin by remaking 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 not used as exhaustive of the powers and responsibilities of those persons but only as indicating useful points of view from which they may for the moment and for the particular purpose 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." (29)

N.B. SA law

In South African Law this question is greatly simplified for our courts are under none of those crippling limitations under which Equity laboured in regard to the enforcement of obligations. As we have seen, our law developed its rules relating to administrators by a continuous process of adapting the rules evolved for one type of administrator to all others. Of course we may adopt the rules applicable to any of of these where they are suitable but the fact is that most administrators known to our law fulfil specialised functions. Thus the guardian and the curator, because they act for incapables, can seldom be used as useful analogies with any precision. So too is the position as regards executors and trustees. With the latter too, however, there is the further difficulty that our law here has been strongly influenced by English Law. The result is that the trust concept has had a marked influence on the rules of our law regarding their duties. Furthermore, because equitable ownership is unknown to our law the value of the trustee here is markedly

N.B.

diminished for, as we have seen, the analogy between his position and that of the director is, in English Law, at its weakest in regard to the content of their specific personal duties. N.B.

In marked contrast to these is the position of the mandatary. Here we have a most flexible institution of administration fully developed in our common law. Furthermore, it is the institution upon which our modern law of agency is based. As we use the analogy of the agent in regard to the imputation of the directors' acts to the company it is therefore most apposite that we should use the analogy of the mandatary in regard to his relationship with it. Strangely enough it is just where the strength of this analogy lies that its acceptance appears often to have been rejected. In Robinson v. Randfontein Estates Gold Mining Company [30] Solomon J.A.:

> "It is true that the board of directors is the agent of the company to manage its affairs, and accordingly stands in a fiduciary relationship to it. But each individual director is not such an agent of the company and is therefore, as a rule free to transact business on his own account even in competition with the company of which he is a director."(31)

The fact that a director owes a duty to his company to act in its interests has, in principle, nothing to do with the fact that he may also have a power to represent it. Normally, of course, most directors do not have such a power but this does not free them from their duty TO ACT IN THE INTERESTS OF THEIR COMPANY. In fact the very basis of their relationship is to act in the company's interests and it is here that the analogy between the directors's position and that of the mandatary is strong. When a mandatary is also given a power to represent his mandator this does not alter the nature of the legal relationship between them,

Perhaps one of the most striking charactertistics of the duties of a director in English Law is the fact that the rules relating to him were not evolved in the harsh world of the market place but from the enforcement of undertakings of high good faith made between persons whose motives were thought to be untainted by any desire to profit by their undertaking. Bearing in mind that our company law is so strongly related to English Company Law, it is interesting to note that the mandatary's origins are in this sense very similar to that of the trustee. Thus Watson argues convincingly "... mandate derives from the habit of close friends of asking one

another to act for them, rather than from commercial practice. Mandate after all, is said by Paul to originate ex officio et amicitia, and it is essentially gratuitous with liability generally for dolus only."[32] The result has been that, relying heavily upon honour, both institutions developed broad flexible rules rather than a multiplicity of rules regulating particular duties.

Finally, it was mandate that was developed in the middle ages to enforce the duties of representatives of corporations[33] and has since then been used in civil law as the institution from which to draw such analogies. We may take but one example. Domat when treating of "Syndics, directors and other administrators of companies and corporations", warns that these people must not be confused with agents because the agents "engagement is made by covenant" he nevertheless considers that they stand in a position analogous to those of agents for he goes on to say that they are "obliged to show the same care and diligence as factors and agents."[34] The position of the director in our law was, it is submitted, correctly stated by De Villiers C.J. in Trustees of the Orange River Asbestos Co. v. Hirsche and Others:[35]

> "As directors, they occupied a fiduciary position towards the company. Their position was analogous to that which in Roman Law, the institor held towards his praepones. The mandate which they had from the shareholders, quite independantly of any articles of association, was to do their duty faithfully, honestly and with sole regard to the company's interests." (36)

THE DUTY TO ACT BONA FIDE IN THE INTERESTS OF THE COMPANY

"The principle is undoubted that the directors must act 'bona fide in what they consider - not what the courts consider - is in the interests of the company'". [1] Referred to as a "cant expression ... but not yet a shibboleth," [2] the rule, so simple in appearance, must surely be one of the most complex in company law. [3] When Parsons says that the concept "remains miserably indeterminate" he is stating no less than the truth. [4]

This is a fiduciary duty which we have not met before in connection with other fiduciaries. Those ficudiary duties which we have considered may, generally speaking, be said to serve the function of preventing a fiduciary from acting in interests other than those of his beneficiary. Is this duty merely the other side of the coin? If all fiduciaries are prevented from acting in interests other than their beneficiary cannot it be said that they are under a duty to act for their beneficiaries if they act at all? This is certainly Walsh's [5] view of the rule for he says:

> "It is surprisingly difficult, however, to give content to the phrase excepting in the negative sense that a person exercising the powers of a company must not act in his own interests." (6)

Thus Gower, too, says:

> "... there may be a breach of duty notwithstanding that it is not shown that they (the directors) have acted with any conscious dishonesty, but have acted as they did, because it was in their own interests or that of some third party, without considering whether it was also in the interests of the company." (7)

This is not, however, what the courts appear most frequently to have meant when they stated the rule. Rather do they seem to have meant that, provided a director acts in a manner in which he considers would advance the interests of his company, they, the courts, will not take it upon themselves to decide whether what he did was in fact the most appropriate way to advance the company's interests. In other words no action may be based upon the claim that, although the directors of a company are acting in what they believe to be its best interests they are, in fact, not acting in its best interests because another course of action would be far more beneficial. This is clearly what was meant by Lord Loreburn when he said:

"It is not part of the business of a Court of Justice to determine the wisdom of a course adopted by a company in a management of its own affairs." (8)

In Levin v. Felt & Tweeds Limited [9], Centlivres C.J. dealt with this question at some length. He said:

"The next contention advance on behalf of the appellant was that the scheme was not a bone fide scheme in the interests of the company. It was submitted that the proposed reduction of capital was a scheme devised solely in the interests of the preference shareholders and was not a bona fide scheme in the interests of the company as a whole or of the ordinary shareholders whose rights would be seriously jeopardised in the event of the proposed scheme taking effect. In making this submission counsel for the appellant stated that he was not attacking the bona fides of the directors. It is clear from the papers before us that those directors of the company who are in favour of the scheme genuinely believe that it is in the interests of the company, its objects being to enable the company to obtain further working capital. To hold that the scheme was devised solely in the interests of the preference shareholders would be tantamount to saying that the directors were not bona fides in proposing the scheme. But the appellant has through his counsel disclaimed mala fides on the part of the directors.

What then is meant by suggesting that the scheme itself (apart from its authors) is not bona fide? Counsel for the appellant correctly admitted that a court is not concerned with the commercial wisdom of the scheme, yet in order to prove that it was not bona fide he endeavoured to show that there were other and better ways of raising additional capital ... In the absence of any allegation that the directors acted mala fides this amounts to asking the court to usurp the functions of the directors and to consider what is the best for the company from the business point of view." (10)

This stand taken by the courts has been criticised. Thus Parsons says that, taken so far, the principle that a director must act for the benefit of the company can only serve as a basis of judgment if one seeks to distinguish what a director has done from what a director feels he ought to have done. He says that such a principle "may be welcomed by a theologian but will have little significance as a legal control." [11]

Such criticism can hardly be maintained. The director undertakes to act to the best of his ability in the interests of the company and, provided he does so, he should be free from all liability. To suggest that there should be some objective

standard would be both unreasonable and contrary to the usual understanding existing between a company and its directors.

When will the court interfere in terms of this rule? It is usually stated that the court will not permit a director to act mala fides. By this, of course, is not meant that there is any such thing as acting "mala fides in the interests of the company". Rather it is meant that the courts will only interfere when directors have deliberately acted contrary to their undertaking. It is just here that all the difficulties concerning this duty find their origin.

If A is a director of B company he may act contrary to the interests of the company by, inter alia, simply acting for the company in a manner detrimental to its interests without any intention of advancing other interests, or he may do so by acting in his own interests or those of another instead of acting in the interests of the company. In both cases he may act mala fides or he may act bona fides. In the former case, provided A has acted bone fides he will not have breached his fiduciary duty for the courts will not decide upon matters of business judgement. Can this also be said of the latter case? Here A may act in the interests of another bona fide believing that he is entitled to do so or, indeed, bound to do so. Nevertheless this is a mistake of law and not one of business judgment. If the company is denied a remedy in such a case it will mean that its directors are able to determine their own beneficiary provided they do so in good faith. If, on the other hand, the company is given a remedy, the question of bona fides will be irrelevant.

These two situations are hopelessly confused in English Law. Thus Gower says of the rule:

> "In most cases compliance with this rule is tested on common sense principles, the court asking itself whether it is proved that the directors have not done what they honestly believe to be right, and normally accepting that they have unless satisfied that they have not behaved as honest men of business might be expected to act." (12)

According to the rule as so stated the director is liable if he had acted mala fides and not if had acted bona fides. It is thus a statement of the rule that a director must act bona fide in what he believes, not what the courts may consider, is in the interests of the company. Gower, however, then goes on to say:

> "As we have seen, that there may be a breach of duty, notwithstanding that it is not shown that the director acted with any conscious dishonesty, if he acted in his own interests or in the interests of a third party "without considering whether it was also in the interests of the company.'"(13)

Thus both situations are said to fall within the same rule. Thus Wedderburn says:

> "The directors' first duty is to exercise their powers bona fide, that is to say, 'in what they consider - not what the courts may consider - is in the interests of the company', and not for any collateral purpose... There can be no doubt that the acts which are mala fides, in the sense that directors have primarily consulted interests other than those of the company, are open to challenge by the minority on the ground of fraud." (14)

Here it would seem that directors must act in what they believe to be the interests of the company but if they act for a collateral purpose, even if they did so in good faith, they are deemed to have done so mala fides. Walsh considers that the words "bona fide" are mere surplusage - "The words 'bona fide' add nothing to the test."[15]

Thus we see that there is not one rule but two rules quite different from each other. Firstly, there is the rule that the courts will not interfere in matters of business judgment provided there is no question of mala fides involved. Secondly, there is the rule that a director must act in the interests of his company and not in the interests of any other person. The first rule is wholly dependant upon bona fides. The second rule is a question of whether, as a matter of law, the director acted with the purpose of furthering the interests of his company or to further the interests of another. Here the question of bona fides is, in principle, irrelevant.

The reason for this confusion lies in the fact that it has been found necessary to formulate the second rule at all. It might be thought that as all the fiduciary duties applying to other fiduciaries apply also to the director, there would indeed be no need to state the second rule. If the director may not act in the interests other than those of his company, why have a further rule to the effect that he must act in his company's interests and not in the interests of others? The reason for this lies, in the first place, in the fact that in equity, the fiduciary relationship has two aspects - the relationship itself and the duties arising from it. The fiduciary relationship creates the vinculum juris and therefore the fiduciary is under a fiduciary duty to act on behalf of his beneficiary and not on behalf of any one else.

Compare this to the position in our law where the vinculum juris arises either ex contractu or ex lege and then, because of the legal duty so created, the fiduciary duties arise. Thus in English Law, unlike South African Law, the director is under a fiduciary duty to act for his company and not for a third party. In the case of the fiduciary acting for a human beneficiary this duty goes almost unnoticed for it is very difficult to see how a fiduciary can be heard to say that he intentionally acted in interests other than those of his beneficiary and yet acted bona fide. In the case of companies the position is by no means so simple. Frequently directors act in interests other than those of the shareholders, or at least a majority of them, and yet believe that they are entitled to do so and even, at times, that they are acting "in the interests of the company." Thus attention is focused upon the question as to what is meant by the word "company" in the sentence "a director must act bona fide in the interests of the company" and this is treated as part and parcel of the same rule.

The difficulties that arise here therefore relate to the nature of companies. Generally speaking, they have two particular sources - the "legal entity" theory of corporate personality (in particular that variant of it known as the "Modern Organic Theory") and, generally, a failure to distinguish between those interests of the shareholders which are the company's interests (their intermediate interests) and those which are not.

The duty to act for the benefit of the Company and the Modern Organic Theory

One of the major difficulties arising in connection with this duty results from the "legal entity" theory of corporate personality and, in particular, the internal aspect of the modern organic theory. It will be recalled that, according to the latter theory, before the Automatic Self Cleansing Case [1] in 1906, the courts regarded the decisions of the majority of the members of a company in general meeting as the acts of the company. [2] As a result of this case and a subsequent series of cases based upon it, this rule has been altered:

> "The modern rule, therefore, is that under an article in the terms of Table A the members in general meeting cannot give directions on how the company's affairs are to be managed, nor can they overrule any decision come to by the directors in the conduct of its business...

> This means that the old idea that the general meeting is the company whereas the board of directors are merely agents requires modification. It seems that both the general meeting and the board may be the company according to whether they are acting under the reserve powers, or express or general delegation respectively. Or to put it another way, both the general meeting and the board are organs rather than agents of the company." (3)

This theory has had two quite distinct and very important consequences as far as questions relating to the administration of companies are concerned. Firstly, the members in general meeting are seen to be administering the company's interests and this when coupled with the entity theory, results in the idea that the members, like the board of directors, are administering the interests of an entity the interests of which are entirely different from their own. Therefore the question arises as to just what are "the interests of the company". Secondly, because the general meeting is held to be an administrative organ of the company administering interests other than those of the shareholders, it is considered that the members, or at least a majority of them, should be under a similar fiduciary duty to that placed upon directors. It is the former question which concerns us here.

To those holding the modern organic theory it is anomalous that the courts should hold the director bound to act in the interests of the members of the company. The courts are felt to have failed to appreciate that the directors are bound to act on behalf of a legal persona quite distinct from its members. Thus Walsh [4] says:

> "The idea that a corporate act must pass the test that it is done solely in the interests of the shareholders, probably derives from the early tendency to look upon the relation between directors and shareholders as the same as that between trustee and cestui que trust. This is, however, quite inconsistent with the nature of a registered company if only for the reason that it ignores the company itself." (5)

Sealy [6] is of much the same opinion.

> "In a deed-of-settlement company, the members were the company. The directors, as their agents, were subject to direction and control by their decision in general meeting. The members' unanimous voice was an authority superior to the deed itself; they could by novation bring about anything they wished, and they could ratify or acquiesce in any irregularity."

> The introduction of general incorporation meant the substitution of a metaphysical being for a collective organism or group; and in due course the jurisprudential significance of this change was recognised in the form of various rules which we now regard as fundamental to our company law - for instance, the ultra vires rule, the need for the maintenance of capital, the doctrine of separate corporate personality, and the organic theory of corporate acts. But by the time that these new rules were settled authoratively, the principles of the director's fiduciary obligations were already well established on the basis that the members collectively were the company. Some of the fiduciary principles still rest on this out-of-date assumption; and further, even although the separateness of the corporate entity is recognised, the economic advantage of the shareholders alone is still regarded as the measure of 'the interests of the company' in which directors must act. A reappraisal of this issue is long overdue; but for the present, the directors especially of large companies find themselves in the position of being expected as a matter of business to consider the claims of many competing interests, while being legally answerable to only one." (7)

Thus in seeking to ascertain what those interests are which the director must advance, we find that we do not even know whose interest they are. The answer actually appears to be anybody's guess. Thus Palmer asks:

> "As already observed, the directors have to exercise the managerial powers vested in them for the benefit of the company; their fiduciary relationship is with the company, and not with the individual shareholders. Who, then, are the company? Are they the majority of the shareholders, or all the shareholders, or the company as a business concern, or a combination of the proprietary, employees' and public interests as represented by the shareholders, the company's employees, and the consumers or public at large, or who else?" (8)

This is quite a remarkable state of affairs. Surely the determination of the company's interests is the most important question in all company law and yet there is hardly a modern writer upon the subject who does not state this question, decry the attitude of the courts as "anachronistic" and suggest a wide variety of persons or groups of persons whose interests are, or should be, those of the company.

There can be little doubt that this problem finds its origin not in a new insight into the nature of corporations but in the great shift of power, which has taken place in the last hundred years or so, from the owners to the managers of capital. The modern shareholders meeting has been described, with much justification, as "a

ceremony in which banality is varied chiefly by irrelevance." [9] The reason for this does not, of course, lie within the law. It is a de facto shift in power which as taken place in the wealthier countries, resulting from the great increase in the availability of capital and the relatively short supply of managerial skill. Lawyers have responded to this change either by insisting upon greater legal protection for the shareholders or by an acceptance of the fact that the role of the shareholder has diminished and suggesting the imposition upon directors of far wider duties requiring them to act in the interests of certain other groups within the community or, even, in the interests of the community generally. The question not surprisingly received wide attention during the time of the great depression.[10] It was then that Berle and Means published their famous treatises. [11] They pointed out that individual ownership had become defused among large numbers of shareholders and considered that this had resulted in the transformation of basic notions of property. The shareholders ownership was now purely passive and the substance of his ownership had become lodged in the control of corporate management. They considered that the power of management in the modern corporation both threatened individual freedom and democratic tradition.

> "In examining the break up of the old concept that was property and the old unity that was private enterprise, it is therefore evident that we are dealing not only with distinct but often with opposing groups, ownership on the one side, control on the other - a control which tends to move further and further away from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own position. The construction of economic power separate from ownership has, in fact, created economic empires, and delivered these umpires in to the hands of a new form of absolutism, relegating 'owners' to the position of those who supply the means whereby the princes may exercise their power." (12)

Their solution was for the law to ensure a greater control of corporate affairs by shareholders. Berle developed this further in his thesis to the effect that the wide powers granted to management should be curtailed by an extensive development of the trust concept. [13]

This latter suggestion sparked off his famous debate with Dodd. [14] The latter wrote that whilst he agreed with Berle, he considered that corporations had a social service as well as a profit making function, a view which, according to Berle, was

"an invitation ... to a process of economic civil war." Nevertheless it was Dodd's suggestion which had the more profound effect upon later thinking.

Modern discussion upon this subject usually begins with a consideration of the Savoy Hotel Case.[15] The facts of this case are dealt with in some detail later and for the moment it is sufficient to say that here a government inspector was appointed to investigate the circumstances surrounding a certain take-over bid. In his report he appears to have accepted the view expressed by counsel for one of the parties as to "the interests" for which a company's directors should act. Counsel had advised "the board that so long as they acted bona fide in what they believed to be the best interests of the company a sale of the character contemplated was within their powers. He considered that in the phrase 'the best interests of the company' the expression 'the company' did not mean the sectional interest of some (it may be a majority) of the present members, but of present and future members of the company. The board should conduct the company's business upon the footing that it would be continued as a going concern and accordingly should balance a long-term view against short-term interests of present members." This formulation of the rule appears to support the so-called "economic entity" theory. According to this theory the directors are bound to act in the interests of the company as such; the company is seen as a sort of economic, metaphysical entity the "interests" of which are, presumably, to be as economically powerful as possible. "The two keys to this abhorrent theory", says Rubner, "are that the corporation must be maintained in perpetuity and must continuously grow."[16] It leads to all sorts of strange conclusions the most remarkable of which is the widely held view that the payment of dividends is an act contrary to the interests of the company. Protagonists of the theory have even suggested that directors should only pay such dividends as the company's shareholders are able to force them to pay.[17] Thus, too, the directors may be acting "in the interests of the company" when attempting to foil a take-over bid even when they use the company's machinery to prevent the majority of its shareholders from selling their shares. This was the opinion of the Inspector in the Savoy Hotel Case, an opinion which is widely accepted.[18] "Once one accepts that it is a holy mission to strengthen the corporation, as an economic unit per se, it follows that directors may use corporate funds to defend their own position against attacks by shareholders squawking for dividends, because management is loyal to

the corporation and shareholders are manifestly disloyal." [19]

To some, however, this theory does not go far enough. Gower is one of these:

> " ... it is apparently only the interests of the members, present and future, to which they are entitled to have regard; the interests of employees, the consumers of the company's products or the nation as a whole are legally irrelevant. This, it may be thought, is an increasingly anachronistic view". (20)

If the theory of the "economic entity" requiring the director to amass a fortune for nobody's benefit is rather sterile, this can hardly be said of a theory requiring him to act in the interests of employees, consumers and even the nation as a whole. This view, as we have seen, probably finds its origins in the writing of Dodd. To him business enterprise was only private property in a qualified sense. Society could demand that corporations be run in a manner that would protect the interests of those who came into contact with it and this was to be accomplished by an extension of the director's fiduciary duties to such persons.

The group whose interests are usually considered to be the most deserving here is that comprising of the company's employees. Beuthin [21] suggests that his interests may be "more compelling" than those of the shareholders. He says:

> "Once he enters the employment of the company he will find that his whole existence and personality becomes even more closely interlinked with that of the company than does that of the shareholder. He can hardly avoid his life becoming by and attuned to his relationship with the company, and in consequence, it is said, he is unable to limit his risk to what he originally put into the company. With every day that passes he will have invested more of himself in the company, and even although he may in this way invest the greater portion of his life in the company, his relationship with it may yet be terminated on a few days' notice. All too often, when the blow falls, it will be found that the skills he has acquired over the years are so specialised that they limit the available market for his services, and that even if he is able to obtain new employment it will be difficult for him to retain his old senior position. Not for him the advantages of being able to assess exactly what he can afford to lose and of then being able to pay it in advance .
> ... In so far as there is any true association in the modern public company, it really exists between management and workers and not between the shareholders themselves or even between the shareholders and management. Their relationship is not simply that which exists between a master and servant. A company cannot live by capital

> alone. Management must have also the approval and the loyalty of the company's employees, for in the last resort it is with the latter that the decision whether the company will indeed function at all will lie." (22)

On the other hand, he says, the shareholder is no longer the bold entrepeneur of before the 1862 Companies Act. Today he obtains the benefit of any growth in the capital value of the undertaking but stands only to lose his original investment.

Rubner asks how are a company's employees defined. "Is it only the currently engaged labour force, or are the retired workers also claimants? What about the moral right of the farm labourers helping toproduce the food consumed in the canteen? And what of the self-employed company lawyer?" [23] As he points out, however, the main argument against this is that corporations pay their employees in accordance with the latter's bargaining strength.

> "The firm with high money wages and low fringes will perhaps not be described as a social entity, while the corporation with relatively low money wages and high fringes may accord itself the title. Basically there is not much difference, the workers are just as 'disloyal' to paternal employers as to those corporations which are said to have no conscience. (24)

The consumer is also said to be entitled to the consideration of company directors. Directors should be under a duty to neither extort excessive prices from him nor to pass off shoddy products on to him. It is said that companies are, usually, not only able to pay dividends but also to plough back reserves into the business. Why should not the consumer benefit thereby? [25] This argument is too absurd to bear comment.

Finally, it is argued that companies must take the interests of the local and even the general community into account. [26] The obvious argument against this is that the interests of the local community and the nation are better served by taxing the companies and in leaving the decision as to what is in the interests of the local community or the nation to the elected representatives of the people.

If the theory of the corporation as an economic entity is to make sense, the directors' obligations to accumulate wealth must have the object of benefiting the community and thus the corporation may be seen as "an arm of the state". Similarly, those who propound the "social entity" theory of corporations must

inevitably come to the conclusion that the director is not merely an agent. In terms of that theory he must decide between the conflicting claims of various groups. In other words the next step, if it is a step at all, is to hold that the corporation is a "governing entity". Thus reference is made to the fact that the origins of incorporations lie in the field of administrative law for their original purposes were "regulative and monopolistic". [27] During the 19th century, in the atmosphere of laissex faire in which the freedom of the individual trader was considered paramount, "(t)he strictly regulated control under which corporations had originally existed was forgotten." [28] The principle of limited liability "became the raison d'être of the corporation and questions of public control were lost sight of." Under the Companies Acts the practice developed of creating companies which were "really nothing more than ordinary partnerships." [29] During the course of this century, however, the status of the corporation has once again changed and it is really now a subject of public law rather than commercial law. It is our philosophical approach to corporations which has failed to keep pace with this change.

> "Today, the corporate entity is no longer a fiction which in appropriate cases we can ignore. The corporation is really separated from its shareholders, who are investors in rather than members of the corporation in any true sense of the term. 'It is impossible to think of great banks and insurance, steel, newspapers and manufacturing companies in terms of their shareholders - a faceless and ever-changing body of people. It is perhaps easier to think of them in terms of their directors. But even these are a changing body who frequently possess very small shareholdings in the companies they control. The company itself is permanent and real, and indeed in some cases national institutions. In these circumstances we may think it strange that we still maintain the principle that directors, while they owe their fiduciary duties to the company itself, are nevertheless bound to exercise these duties for the benefit of the members and the members only.'" (30)

"It is", says Tarver, "one of the ironies of corporate history that management has arrogated to itself the responsibilities for which Prof. Berle said it, not should be, but was, within constitutional discoverability." [31] For this they are very frequently praised. It is, however, doubtful whether this praise is entirely merited. As Tarver himself says: "Corporate managers are neither frank nor as articulate as treatise writers, so it is hard to discern what is motivating the self-styled

social worker in the grey flannel suit." [32] It is most probable that when directors take the interests of employees, customers etc. into account they doing so because they consider it is in the interests of the shareholders to do sc. In other instances their motives may be no more than self-aggrandisement. But even where they do in fact act in these other interests it should not be forgotten that the largesse which they distribute is not their own.

. . .

But of course all this is a political question. The acceptance of such a definition of "corporate interests would, in fact, amount to a complete change in the structure of the state. Furthermore, it would be a complete change of political theory, rejecting the idea that society's interests are best served by permitting the individual as much freedom as possible to pursue his own interests and replacing it with direct state interference. Even if it were accepted that this should be done it is extremely doubtful whether the company director is in a position to carry out such a policy. But whether or not such a scheme of things would be workable is irrelevant here. It is manifestly absurd to suggest that the courts should bring about such a change and there is something more than a little ridiculous in suggesting that this should be done upon the "true" meaning of the word "company" in the phrase "company's interests."

N.B. Corporations can be used for a number of purposes and it is not my intention to suggest that they could not possible be used for the purposes suggested above. This has, however, not been the subject of the debate which has centred around the registered trading company. Incorporation is after all nothing more than a legal device. Nothing can be deduced from it.

The need, in English Law, for a further duty

The rule requiring a director to act in the interests of his company is therefore seen in fact to embrace two further rules (i) it requires him to act so as to advance the company's interests in a manner in which he, bona fide, believes will be the most expeditious manner and (ii) it requires him to act in the interests of those persons whose interests are the interests of the company.

Because the second duty is brought within the rule as formulated for the first duty, the question therefore arises whether a director fails to comply with this duty if he acts in the interests of those persons which he bona fide believes to be the interests of the company although they in fact are not.

It was suggested that to admit bona fides as part of this second rule is untenable. This should be a question of objective law for an administrator should not be able to determine his beneficiary provided he does so in good faith. The writers upon this subject treat the rule as one and it is therefore not easy to ascertain their views upon this question. Wedderburn originally appears to have taken the view that bona fides is part of the test and therefore acts done for a "collateral purpose", although done in what the directors believe to be the best interests of the company, are void because they are ultra vires. [1] Gower's view appears to be that a director may act in the interests which he knows are not in the interests of the shareholders but nevertheless act bona fides or, at least, not act mala fides. Thus he says the duty to act bona fides in the interests of the company may be breached by a director although he has not acted with "any conscious dishonesty". [2] He gives as "a good illustration of this" the case of Re W. & M. Roith Limited. [3] There, in order to make provision for his widow, the controlling shareholder and director of two companies entered into a service agreement with one of the companies in terms of which, on his death, she would be entitled to a pension for life. The sole object of the contract was to make provision for his widow and the court therefore held that it was not binding upon the company. There was no question of the director acting mala fides. Later, under the same heading, Gower cites the case of Parke v. Daily News Limited. [4] In that case the controlling shareholders wished to distribute the whole of the purchase price accruing to the company as a result of the sale of its undertaking among its employees. The court held that such an action was not in the interest of the shareholders and they were therefore restrained from doing so. Of this case Gower says that it "starkly illustrated" the difficulty that arises "when the company's business is about to cease, for then no commercial purpose can be served by keeping other interests happy and the interests of the company can mean only the economic interests of the present members." [5] He is thus clearly of the opinion that the action taken by those controlling the company was not, in any sense, mala fides. Sealy, on the other

hand, holds that bona fides is required here. [6] The problem here is essentially one of principle. In equity undertakings are not enforced as such. Therefore, as we have seen, the fiduciary relationship includes both the duty constituting the directors relation to his company (i.e. to act in its interests) and the further duties arising from that relation. If the director acts in good faith in interests other than those of the company he breaches no fiduciary duty. What renders this question even more complex, however, is the fact that these writers are all adherents to the corporate entity theory with the result, as we have seen that they tend to consider that directors may, in truth, act in the interests of their company although not acting in the interests of its shareholders. This has led to a wide acceptance of the definition of "the interests of a company" as formulated by counsel in the Savoy Hotel Case [7] and which in turn means that directors are thought to be acting in the interests of their company provided they believe they are acting for the benefit of the company as an entity (taking the future shareholders into account) although they may be acting contrary to the wishes of the present shareholders.

This view is strengthened by a failure to distinguish between the intermediate interests of the shareholders (the company's interests) and their immediate interests (their "own" interests). Thus when directors exercise their power to allot shares it is thought that this power must be exercised "in the interests of the company". If this is accepted, it follows that the company's interests may be contrary to those of its shareholders because, for example, if the power to raise capital must be exercised in the "interests of the company" one is forced to give "interests of the company" some content. This is inevitably found in the idea of the company as a continuing economic entity. To put it another way, if such a power must be exercised in the interests of the company, one cannot then say that the directors must ascertain whether or not the shareholders wish to put more money into the company or consider it will be to their benefit if further shareholders are admitted, for this would mean a total disregard for the corporate persona. It would mean that the interests of the company are the personal interests of its shareholders and this is contrary to their theory.

As has been seen, the rule that directors must act in the interests of the company cannot be made to depend simply upon their bona fides. Apart from Sealy, this seems to be generally accepted. Thus although they do not purport to do so,

it is clear that both Gower and Wedderburn accept that where a director acts in interests which are not the interests of the company, the question of bona fides is not relevant. Their only difficulty is that, naturally enough, they do not wish to label an act as "mala fides" where the directors have not acted fraudulently but have in fact believed that they were entitled so to act. Their problem here would be solved by distinguishing between the two rules and by dropping the requirement of bona fides in the latter, i.e. by simply stating the second rule as being "a director must act in the interests of his company and not in the interests of others."

As we have seen, however, these writers hold an extensive view as to what are "the interests of the company". They therefore consider that there are cases where directors, believing themselves entitled to do so, may act contrary to the interests of the present shareholders and yet act "in the interests of the company". These cases usually have arisen where directors have exercised powers which could never have been exercised in the "interests of the company" such as their power to allot shares. As we have seen, it is just here that the entity theory insists upon a distinction between the shareholder's interests and those of the entity as such. Nevertheless, it is obvious to all that directors should not be permitted to exercise these powers to the detriment of their existing shareholders without first obtaining their consent. If the "interests of the company" test, as formulated by these writers, fails to prevent such actions then some other test must be found.

To sum up: because equity does not enforce the director's undertaking as such but merely imposes a fiduciary duty upon him to act in good faith (if he acts at all), the director does not breach this duty when he acts bona fide in the interests other than those of the company. All attempts to formulate the rule that a director must act "bona fide in the interests of the company" so as to render these acts voidable are therefore doomed to failure. The confusion there is made worse by the fact that the modern organic theory leads to the conclusion that a director may, in certain cases, act in the interests of his company" even although he deliberately acts contrary to the interests of the shareholders. Nevertheless it is felt that some restraint must be placed upon the director when doing so. Their theory, however, forces them to look elsewhere to find a duty by means of which this restraint can be imposed. Because of the limited principles upon which equity acts they are forced to find this duty either in the rules relating to the extent of directors' powers or, rather anomalously, in a further fiduciary duty.

The Further Test

Gower is of the opinion that there is a further fiduciary duty requiring a director not to use the powers with which he is vested for "purposes other than those for which they were conferred." [1] He says:

> "If directors exercise their powers for purposes other than those for which they were conferred, it may be said that they have exceeded their authority and are liable accordingly. But it probably makes for clarity to distinguish between an act ultra vires the directors because they have usurped a power which they never had, and an act prima facie is within the powers delegated to them which they have abused by exercising it for an improper purpose. Thus directors will normally be authorised to issue further capital, but they will be liable if they exercise this power for the purpose of maintaining their control of the company, and this notwithstanding that they have honestly believed that to be in the best interests of the company."(2)

This view has come in for a good deal of criticism. [3] It appears to be an attempt to cover the ground of the case where the mandator gives his mandatory a general power but privately limits this power to only certain types of transactions, e.g. a power to purchase on his behalf with the further condition, not known to third parties, that he is to purchase only a specific merx. Thus here the mandatory might purchase another merx, acting in the interests of the mandator and within his ostensible power, yet have breached the contract between himself and the mandator. Because of the peculiar approach of English Law to this subject it is clear that such a position could only really be met by adding a further fiduciary duty such as Gower does or, by including the duty to act intra vires within the duty to act in the interests of the company. This clearly would cause considerable confusion and render the phrase virtually meaningless. Before going on to consider the criticism of Gower's contention we will examine it more closely.

Gower takes the example of the Savoy Hotel Case [4] to explain his theory. During 1953 the directors of The Savoy Hotel Limited, a company both itself and through its subsidiary owning a number of well-known hotels in London, became aware of unusual activity in regard to its shares on the stock market. It was clear to them that someone was attempting to take over the company. This would not have been too difficult to accomplish because the management held a relatively small portion of its shares. Although they did not know who was buying the shares or what

he intended doing with the company in the event of his taking it over, they suspected that the main object was to get control of the Berkley Hotel. They determined to combat this bid.

It was first suggested that they increase their holdings by issuing certain unissued shares to themselves. Counsel, however, advised that any such issue could be set aside on the grounds that in so doing they had failed to exercise their powers to issue shares as fiduciaries for as such they were required to issue them in the interests of the company and not simply to obtain or maintain control for themselves. Finally, the following scheme was put forward. A new company, the Worcester Building Company, was formed. To it was sold the Berkley Hotel, the price for which (to be determined by independent valuers) was to be paid in first and second preference shares of equivalent nominal value. The Savoy Company then was to set up a staff benevolent fund under a trust deed, in terms of which approximately £30,000 was to be transferred to the trustees who, in turn, were to use part of this to subscribe for all the ordinary shares of the Worcester Company. The ordinary shares were to receive a fixed 6% dividend and complete voting control of the Worcester Company. What is more, the trustees of the benevolent fund were not removable by the company (the Savoy Hotel Co.). Finally, the hotel was to be leased back to the Savoy Hotel Company for a period of 50 years with the covenant to the effect that without the consent of the Worcester Company it would not be used otherwise than as an hotel.

The directors, in stating their case to counsel, frankly admitted that the object was to "remove from the speculator's grasp at least the most valuable of the group's properties, to the extent that even if he did obtain control ... he would then find that these particular properties were beyond his control. If the speculator was aware of this beforehand, he might consider that there was not sufficient profit in the whole venture to make it worth while pursuing it."

After a further bout of heavy buying the would-be purchaser threw in the towel and sold his shares to the management. Public interest was, however, aroused and the Board of Trade appointed an inspector and instructed him to report "(w)hether or not, in his opinion, the persons concerned with the management of the hotel companies, entering into or promoting (the Worcester Scheme) ... committed any breach of their duty to the hotel companies or the members thereof."

He found that the object of the scheme was to put the control of the Berkley Hotel beyond the power of the majority of the members of the Savoy Company and that this was done to discourage the take-over bid. Assuming, without investigation, that it was to the company's benefit to retain the Berkley as an hotel, they had nevertheless acted in what they genuinely considered was, on a long-term view, for the benefit of the stockholders, namely, that the existing use should remain unchanged. Furthermore, they had acted on the opinion of counsel who had advised that the scheme was valid.

Counsel had advised them that the scheme was valid provided that the directors acted bona fide in what they believed to be the best interests of all the "present and future members, balancing the long-term view against the short." The inspector, however, did not think that this was sufficient. He considered that the powers delegated to them were so delegated for the purpose of managing the company's business and here they had been exercised "in order to render irrevocable for all time the policy of the present board", the shareholders thereafter being unable to alter their decision as to the use of the hotel. Of this opinion Gower says:

> "There can probably be little QUARREL with this conclusion Once the directors conceded, and they appear to have done so, that their duties were owed to the shareholders present and future of the Savoy Hotel Limited, the impropriety of their actions seems obvious. Prior to the Worcester Scheme these shareholders enjoyed rights both to the fruits of the company's property and to the control (through their power to 'hire and fire' the board of directors) of the future use of the property. Both sets of rights contributed to the value of their stock. After the Worcester scheme they retained only their rights to the fruits of the property and lost, without compensation, their rights to control its future." (5)

He then sums up:

> "In effect the thesis is that, while the courts will not interfere with the directors in the exercise of their business judgment on matters of management, they will not allow directors or anyone else duly to fetter the discretion of a future board."

The above quotations are from an article written by Gower in 1955.[6] In "Modern Company Law", however, he says that the directors had used their powers to keep themselves "in the saddle" instead of using them for the purpose for

which they had been delegated, namely, to "raise money if the company needs it." [7] One would have thought that the conclusion that he had come to in 1955 was that the directors had failed to act in the interests of the company. But then, of course, it is clear that Gower does not accept the identification of the shareholders' interests with those of the company. They may be worse off and yet the company's position improved. The difficulties, however, do not end there. If we look at the "purpose" approach we see that it cannot possibly be said, in the case of a company, that the directors are given wide powers subject to a "private" restraint as to the purpose to which they may be used. This can be seen quite clearly in the Savoy Case. The directors had the power to do everything that they did in terms of the particular articles and there were certainly no objective restraint preventing them from doing so. The suggestion that there is a further duty lying somewhere in between his duty to act in the interests of the company (a duty which he owes to the company as an "entity") and the question of the limit of his powers as defined by the articles is based upon the proposition that a director may act within his powers and bona fide in what he believes to be the interests of the company and yet not exercise these powers for the purpose for which they were intended. Thus Gower says:

> "... directors will normally be authorised to issue further capital, but will be liable if they exercise this power for the purpose of maintaining a control of the company, and this notwithstanding that they honestly believe that to be in the best interests of the company. The power is delegated to them in order that they can raise money if the company needs it ..." (8)

It is submitted that this reasoning is unconvincing. In the first place this is not the only reason for which shares may be issued. Thus for example in Punt v. Symons [9] Bryne J. correctly points to the fact that there may be purposes other than raising capital for which power of allotment may be bona fide used. [10] And, one might add, used for the purpose for which it was delegated. Before discussing this question further, however, it is necessary to consider the authorities which Gower cites in support of this proposition and two subsequent cases dealing with the matter.

The first case that Gower cites is that of Punt v. Symons. [11] Here the directors had issued shares with the object of creating a sufficient majority to enable them to pass a special resolution depriving other shareholders of special rights conferred on them by the company's articles. Bryne J. said:

> "A power of the kind exercised by the directors in this case is one which must be exercised for the benefit of the company; primarily it is given to them for the purpose of enabling them to raise capital when required for the purposes of the company. There may be occasions when the directors may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance, it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised; but when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that it is a fair and bona fide exercise of the power."(12)

The second case which Gower cites is that of Piercy v. Mills.[13] Here the directors had issued shares with the object of creating a sufficient majority to enable them to resist the election of three additional directors whose appointment would have put the two existing directors in the minority on the board. The directors were held to have acted improperly. Peterson J. held:

> "... directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as the majority remained, to have their views prevailed in accordance with the regulations of the company; and it is not, in my opinion, open to the directors, for the purpose of converting a minority in voting power into a voting majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action." (14)

Gower is of the opinion that directors cannot be relieved by the general meeting of their duty to act bona fide in the interests of the company. Placing "proper purpose" alongside "bona fides" as a "subjective" fiduciary duty, he considers that the general meeting is also powerless to ratify breaches of this duty. In the case of Hogg v. Cramphorn Limited, a case which we will shortly be considering in detail, it was held that although the directors thought that they were acting bona fide in the interests of their company, they had exceeded their powers by using them for an "improper purpose". The court, however, held that this breach of

duty could be ratified. As directors' acts "ultra vires" their powers can be so ratified, Wedderburn's suggestion that Gower was incorrect in maintaining that there was a fiduciary duty requiring the director to use his powers for the "proper purpose" and that in truth this is a question of vires, must be considered.

Wedderburn first expressed this view when writing on the Savoy Hotel Case.[15] Here he expressed the view that:

> "Even if this (the inspector's) conclusion be correct, the route by which it is reached seems unnecessarily tortuous, for there appears to be little advantage in the suggested distinction between acts done bona fide by the directors ulta vires the articles, and acts, done bona fide, intra vires, but invalid because of their purpose. ... it seems unnecessary and might be confusing. The powers of directors must be used for the benefit of the company, for this is a fiduciary relationship; but all further limitations must be found in the articles, and the problem is one of construction." (16)

He therefore considered that if the directors in this case had, in truth, been granted their powers for "the management of the business" and they had used them for something else, then they had acted "ultra vires" the articles. In support of this contention he cited the case of In re Smith and Fawcett Limited.[17] Here the articles of the company gave its directors uncontrolled discretion to refuse to register transfers. A, as executor of his father's estate, claimed to be put on the register in respect of 4,001 shares held by his father. The directors refused to do so. Instead they informed him that they would register 2001 shares in his name provided he sold 2000 shares to one of the directors. The court held that as the directors were acting in the best interests of the company as they saw them and as their discretion was unlimited, their refusal to register these shares was valid. Lord Green said:

> "The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company ... The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline

> to write into the clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company." (18)

As Parsons points out, however, it is not easy to see why the directors enjoyed freedom of action here in respect of share transfers while they were denied it in Piercy's Case in regard to a share issue.[19] The only difference appears to be that in Smith's Case the directors were given "absolute and uncontrolled discretion".

Wedderburn[20] considered that his approach was not, however, supported in the case of Hogg v. Cramphorn Limited.[21] Here we again have the question of a take-over bid. The defendant company was a public company but its shares were, however, not quoted on any stock exchange. Its authorised capital was £136,000 divided into 96,000 5% preference shares of £1 each (of which 90,293 were issued) and 40,000 ordinary shares of £1 each (of which 35,888 were issued) and all these shares, both preference and ordinary, carried one vote. 37,000 of these shares were effectively held by the directors and it was therefore with some alarm that they were informed by a certain Baxter that he intended to make an offer for the whole issued share capital of the company at 25s for each preference share and 50s for each ordinary share. In order to meet this challenge to "the established management of the company" the company entered into a trust deed for the benefi of its employees. The trustees were the chairman of the company, an auditor of the company and one of its employees. To the trust were allotted the 5,707 unissued preference shares each to carry 10 votes and the money to pay for them took the form of an interest-free loan to the trustees out of the reserve funds of the company. Now in effective control of a majority of the votes at a general meeting, the directors advised Baxter that his offer was inadequate and would not be submitted to the shareholders. They then resolved to advance the balance of the company's reserve fund (£28,000) to the trustees - again interest free - so as to enable them to purchase preference shares from the shareholders at 25s per share. They then sent the company's shareholders a notice informing them of what had transpired and inviting them to sell their preference shares to the trustees. Baxter's offer was formerly made to the shareholders but was not accepted and the plaintiff, who had been associated with Baxter in his bid to take over the company, instituted proceedings on behalf of himself and all other members of the company

to have the scheme declared void.

It was common cause that the purpose of the scheme was to foil Baxter's bid to take over the company. The board alleged that, as Baxter had had no experience of the particular kind of business carried on by the company, "there would be a change in the nature of the company's trading" and that it "would unsettle the company's staff". The court held that the directors had not been actuated "by any unworthy motives of personal advantage" and had acted in what they believed, in good faith, would be in the interests of the company in that the trust, in giving the staff a voice, however indirect, in the affairs of the company would both benefit the staff and the company. Furthermore, it was accepted that they bona fide believed that "to keep the management of the company's affairs in the hands of the existing board would be more advantageous to the shareholders, the company's staff and its customers than if it were committed to a board selected by Mr. Baxter." Nevertheless, as the "primary purpose" was to ensure the control of the company by the directors, [22] Buckley J. held that the allotment was liable to be set aside. Citing Punt's and Piercy's Cases, he held that the power to issue shares was a fiduciary power and that so to exercise it was to exercise it for an improper motive, even although the directors had acted in what they bona fide believed to be the interests of the company. The directors of a company may not interfere with the right of the majority of its shareholders to pursue whatever policy they may choose within the company's powers. The court will not hear the directors to say:

> "... that what we seek to prevent the majority from doing will harm the company and therefore act in arming ourselves or our party with sufficient shares to outvote the majority is a conscientious exercise of our powers under the articles, ..." (23)

Nevertheless, contrary to the view of Gower, he held that the establishment of the trust and the granting of the loans to it could be validly ratified by a majority in general meeting. His reasoning here was as follows:

> "Counsel for the plaintiff says no doubt rightly, that the company in general meeting could not by ordinary resolution control the directors in the exercise of the powers under Art. 10. He goes on to say, I think with less justification that what they could not ordain a majority could not ratify. There is, however, a great difference between controlling the directors' exercise of a power vested in them

> and approving a proposed exercise by the directors of such a power, especially where the proposed exercise of the power is of the kind which might be assailed if it had not the manifest approval of the majority. Had the majority of the company in general meeting approved the issue of the 5,707 shares before it was made, even with the purported special voting rights attached (assuming that such rights could have been so attached conformably with the articles), I do not think that any member could have complained of the issue being made; for in these circumstances, the criticism that the directors were, by the issue of the shares, attempting to deprive the majority of their constitutional rights would have ceased to have any force." (24)

Beuthin,[25] considers that Hogg's Case is an authority for the proposition that we are dealing here with a question of vires. He says:

> "Although Buckley J. did not expressly say so, his decision seems to involve a rejection of the idea that the 'purpose' for which powers are conferred upon the directors is inextricably linked with their duties of good faith. 'Purpose' appears to be rather a part of what may be termed the 'literal' powers conferred by the articles. The question as to the nature of the purpose for which any particular power has been conferred will generally be a matter of construction depending upon a true interpretation of the articles ..." (26)

This approach presents many difficulties. Firstly, as in all these cases the articles were silent as to the purpose for which the directors were to use their powers, just how was this interpretation made? Furthermore, in making such an interpretation, one will have to assume it to be intended that the directors were not given the power to do certain things even although it would be in the interests of the company for them to be done. Finally, how can one speak of such an exercise of a power as being the breach of a fiduciary duty? It is submitted that it is absurd to suggest that a director has a fiduciary duty not to exercise his powers ultra vires. He simply cannot do so. But if he has no such power how then can one speak of his action as being "an improper use" of it?

Sealy,[27] rejecting both the abovementioned views, suggests that there is only one test, namely, whether the power was exercised by the directors in what they bona fide believed to be the interests of the company. He says that in neither Punt's Case nor Piercy's Case was there a finding that the true motive of the directors was to benefit the company[28] and that Re Smith and Fawcett Limited was decided on the

basis that the directors had been granted an unlimited power to approve or disapprove of share transfers. Because of these facts and because the directors had the power to allot employees' shares pursuant to Section 54(b) of the Companie 1948, Buckley J. in Hogg's Case ought to have felt himself free both on authority and on the merits of the case, to uphold the directors own bona fide view that the action was in the best interest of the company. He expressed his view as follows:

> "There should be no test other than the genuiness of the directors own motive, provided of course, that their view is one that could reasonably be held - the line is drawn short of there being 'amiable lunatics'. (In passing one may ask, how else could the extraordinary power of the Savoy directors, to dispose of the whole of the undertaking of the company, be used 'for the purpose of managing the business' except to deal with just such a crisis in the history of the company as it arises?)"(29)

Although this view avoids the difficulties that arise from the approaches of Gower and Wedderburn, itunfortunately raises even more. We have to look no further than Hogg's Case to see that if Sealy is prepared to accept, as he does accept, that the court was justified in holding the directors to have acted bona fide in the interests of the company and this view was a reasonable one, we are forced to come to a completely untenable conclusion. If the law requires the directors to act in the company's interests and these interests are the interests of its shareholders we cannot at the same time permit them to act in interests which are patently adverse to those of the shareholders. Even it it is said that the test is a subjective one, that all depends on what the directors bona fide believe, it cannot be accepted that provided they bona fide believe something to be in the interests of the company although they know full well that it is not in the interests of the shareholders, that their actions are valid. In Hogg's Case the directors believed that the take-over would be either in the interests of the staff or in their own interests. Admittedly the court held that they acted in what they bona fide believed to be the interests of the company, but, it is submitted, this view cannot be accepted. The question as to whether a company's shareholders sell their shares or not has n -ing to do with the interests of the company. To use the company machinery to prever them from selling their shares and to claim to be doing so in the interests of the company is utterly absurd.

At first sight Sealy's view appears to find support in Bamford v Bamford [30]

This case also concerned the issue of shares by directors in an attempt to foil a take-over bid. Here the directors, who had express power to issue shares in terms of the company's articles, allotted shares to another company so as to secure a majority of votes at the company's general meeting. Two shareholders institutes proceedings to have the allotment set aside on the grounds that, in allotting those shares, the directors had not acted bona fide in the interests of the company. After they had done so, however, the matter was referred to the general meeting of the company which ratified the allotment by an ordinary resolution. The case then came before the court on a preliminary point of law:

> "On the assumption (which is made solely for the purposes of the hearing of this preliminary point of law) that the allotment by the board of Bamford's Limited of 5,000 shares at par to Fredk. H. Burgess Limited on November 20, 1967, was not bona fide in the interests of Bamford's Limited because it was a tactical move in a battle for control of Bamford's Limited, having as its primary purpose to make it more difficult for J.C. Bamford (Excavators) Limited to obtain such control.
>
> Whether as a matter of law on the true construction of the memorandum and articles of association of Bamford's Limited such allotment was capable of meaning effectively ratified and/or approved by an ordinary resolution of a general meeting of Bamford's Limited." (31)

As we have already noted, Plowman J. held that he was therefore to assume that the allotment had not been made "bona fide" in the interests of the company but that there had been no suggestion that the defendants had acted "fraudulently" or "Mala fieds." [32] Although, as Wedderburn says, the facts of the case were "parallel to Hogg v. Cramphorn Limited" it is therefore clear that at the very outset there was this one important difference of approach, namely, that in Hogg's Case it was accepted that the directors in so acting may well have done so in what they believed to be the interests of the company whilst in Bamford's Case this was denied. Nevertheless Plowman J. said that "(i)f the decision of Buckley J. in Hogg v. Cramphorn Limited is good law, the question which I am called on to decide must be answered in the affirmative." [33] Then, however, referring to the decision in that case, he said that there Buckley J. had held "that the power to issue shares was a fiduciary power; that if it was exercised for an improper motive, the

allotment was liable to be set aside even if it was made in the bona fide belief that it was in the interests of the company." 34)

It was argued, inter alia, on behalf of the plaintiffs that the purported ratification by the general meeting was invalid because a company cannot by ordinary resolution dictate to or over-rule the directors in respect of matters entrusted to them by the articles. Here the directors had been vested with the power to issue shares and therefore this was just what the general meeting of the company was attempting to do. Plowman J., however, held that this was not so.

> "Did the extraordinary general meeting of Bamford's on December 15, 1967, attempt to do any such thing? I think not. What happened was that the directors referred to a general meeting of the company, to which they were answerable, the question whether it wished the allotment to stand, and the general meeting said "Yes". There was no question of the general meeting usurping the powers of the directors under Art. 12 or controlling or dictating their exercise, and none of the cases cited by counsel for the plaintiffs, in my judgment, goes to the length of saying that the result was annullity." (35)

Nevertheless, argued the plaintiffs, the power to allot shares was a fiduciary power; and if you allow general meeting to exercise it, or validate its use, you are "altering the whole nature of the power; it is a fiduciary power for the protection of the minority and if you allow it to be exercised in general meeting you are allowing it to be exercised by persons who are entitled to consult their own interests." 36) On the other hand the defendants argued that those powers of a company which are delegated to its directors are delegated to them subject to the limitation that they can only be exercised bona fide in the interests of the company. Therefore their powers are less extensive than those of the company and therefore a residual power remains in the general meeting to exercise these powers in interests other than those of the company. Plowman J. accepted this argument. He considered that support could be found for it in Irvine V. Union Bank of Australia 3 and in Grant v. United Kingdom Switchback Railway Company. 38) In the former case it was held that where the articles of a company placed a limitation on the amount which the directors could borrow, this was not a limitation of the general powers of the company but merely of the directors' powers. Therefore the acts of the directors in excess of their authority might be ratified, although the general meeting could not by a simple majority authorise the directors to borrow beyond these

limits for that would be to alter the articles. In Grant's Case the memorandum of the defendant company authorised the sale of part of its undertaking to any other company, and its articles contained a provision prohibiting any director from voting in respect of any contract in which he was interested. The directors entered into a contract of sale of part of the company's undertaking to another company, of which all of its directors, except one, were also directors. An ordinary resolution was passed at a general meeting of the company authorising the contract. It was held this was not an alteration of the articles. Here Bowen L.J.said:

> "The company did not purport to alter the limits of the authority given generally by the articles to the directors. The articles limit that authority, but there is nothing in them to prevent the company from giving special power to the directors in a particular case as to a particular contract. The company at a general meeting adopt this agreement, and make it their own. That is a ratification of an unauthorised act, not an alteration of the articles." (39)

In the third edition of his work Gower cites Bamford's Case not under the rule that a director must act "bona fides in the interests of his company" but under his suggested further rule that in so doing the director must use his powers for the "proper purpose." [40] There he cites it in support of the proposition that "... directors will normally be authorised to issue further capital but they will be liable if they exercise this or any other power for the purpose of maintaining their control of the company, and this notwithstanding that they honestly believe that to be in the best interests of the company." [41] It is also cited for the proposition that a general meeting may ratify any act by the directors in excess of the powers conferred on them. [42] In a foot note the following explanation is given. It is said that in Bamford's Case "'not bona fide in the interests of the company' was used in the narrower sense of an act which exceeded the directors' powers because they were not authorised to act for that purpose; the directors' good faith was not questioned." This appears also to be the view of Wedderburn for he comes to the conclusion that Bamford's Case equated "bona fides in the interests of the company" here with "collateral purpose". [44] He also remarks that "one short answer" to the plaintiffs argument that to permit the general meeting to exercise this power would be to "alter its character" " might have been that since the phrase 'interests of the

company' here means, in English Law, the interests of the shareholders as a whole, no change in the character of the decision could be detected." 45)

It is submitted that to equate "bona fides in the interests of the company", as the term was used in Bamford's Case, with "proper purpose" means that in fact the bona fides rule now only concerns the rule to the effect that the courts will interfere where the director has attempted to advance the interests of the company, bona fide, in the manner which he considers most expeditious. On the other hand, his duty to act in the interests of the company in the sense that he must act for those particular interests which the law considers to be the interests of the company, now becomes equated with his duty to exercise his powers for those purposes for which they were vested in him. One cannot say that an act was not done for the "proper purpose" and determine this from the fact that it was not done "in the interests of the company" without coming to this conclusion. It is therefore respectfully submitted that the distinction drawn by Gower between acts done in interests other than those of the company but not done mala fides and acts done in what the directors believe to be the interests of the company but done to further an "improper purpose" cannot be maintained. On the other hand, it is submitted, that Plowman J's. contention that the general meeting of the company may act contrary to "the company's interests" cannot be accepted nor can Wedderburn's suggestion that the interests of the shareholders are always the interests of the company. It is only certain interests of the shareholders (their intermediate interests so recognised) which are the interests of the company. It is submitted that the decision itself did not relate to the interests of the company but to the personal interests of the shareholders.

In all those cases where the directors have acted to prevent the majority from selling their shares to a person wishing to take over the company, the directors have acted either to maintain their position for their own benefit, or to protect their minority holding, or, because they believe that the take-over bidder intends altering the nature of the company's business, to protect the company's staff. None of these reasons can be justified and none of them can be said to be the "interests of the company".

It is clear that directors should not be permitted to use their powers, even when not acting fraudulently, to prevent the shareholders from selling their shares.

It is of course quite a different matter if the general meeting empowers them to do so by altering the articles of the company. We are not, however, dealing with that situation here. It is also clear that neither the idea of a fiduciary duty requiring the director to exercise his powers for the "proper purpose" nor the suggestion that somehow or other a limitation of the directors' powers be read into the articles of association, provides a satisfactory answer to this question. It is submitted that in order to answer it we must return to first principles.

Let us suppose that A has a small, unincorporated business and that he hires a manager to run it for him, giving him a general mandate to do all such acts as will advance the interests of the business. It is obvious that the manager has no authority whatsoever to prevent A from selling his business - in fact such a suggestion would be ridiculous. His reasons for wishing to prevent A from doing so are irrelevant. Even is he wishes to do so, not to protect his job, but because he believes that A would in fact be acting against his own interests should he sell the business, this cannot alter the fact that the decision is not his. If he attempted to do so neither in A's interests nor in his own but in the "interests of the business" he would not only be evidencing a misunderstanding of his mandate but also a certain mental instability.

Why should there be any difference between such a manager's position and that of a director of a company? Surely the reasoning must be exactly the same and this is what Buckley J. in Hogg's Case meant when he said:

> "It is not, in my judgment, open to the directors to say "We genuinely believe that what we seek to prevent the majority from doing will harm the company and, therefore our act in arming ourselves or our party with sufficient shares to out-vote the majority is a conscientious exercise of our powers under the articles which should not be interfered with' such a belief, even if well-founded, would be irrelevant." (46)

It is submitted that such a belief can never be "well-founded". The question of whether or not the majority of shareholders of a company sell their shares has absolutely nothing to do with the "company's interests".

Of course, there is nothing to prevent the vesting of such a power in the directors. The reasons why shareholders may wish to do so are many but probably the most usual one is that they consider that the directors are in a better position

than they are to decide upon certain matters. Thus, for example, the director will usually be better able to know whether or not further capital can be profitably invested in the company. The directors would therefore decide in such a case that it would be in the interests of "a shareholder" to put more money into the company. If the majority do not wish to do so they may simply decide not to take up the shares and, if they consider that by so doing they might lose control, they can always prevent the allotment from being made. If the directors should decide, however, to issue shares not because it would benefit "a shareholder" but to advance their own interests, e.g. to keep themselves in office, they would be breaching their mandate. This is not because they have failed to act in the "interests of the company" for this question simply does not arise. The question as to the amount of capital in the company determines the extent of the shareholders intermediate interests which the directors are under a duty to advance and a decision as to it therefore is not a decision as to "the company's interests". Rather it is a question relating to the shareholders immediate (their "own") interests. If we wish to call these immediate interests of the shareholders "the company's interests" whenever the shareholders empower the directors to make decisions concerning them, we must bear in mind that we are using the phrase to mean two entirely different things and it would therefore seem better not to do so. These interests could, perhaps, be called "the interests of the shareholders qua shareholders". In truth, however, they are not interests properly so-called for they are simply what the directors consider would be in the interests of "a shareholder" in the circumstances.

The statement in Punt's Case by Byrne J. to the effect that the power to issue shares is a power given to the directors "primarily ... for the purpose of enabling them to raise capital when required for the purpose of the company" is therefore incorrect not because there are other interests of "the company" for which shares may be issued but because there are other reasons why a shareholder qua shareholder may desire them to be issued. The issue in that case should have been set aside on the ground that the directors had not exercised their power as they were under a duty to do, namely, in the interests of the shareholders. It is obvious that in many cases shares may be issued for a purpose which by no stretch of the imagination could ever be considered to be in the "company's interests" and yet

their issue may be perfectly valid. In such cases the courts are compelled to abandon the approach of Byrne J. Thus in Mills v. Mills, [47] a case concerning a bonus issue of shares, Latham C.J. concluded:

> "The question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between classes of shareholders. Where such a case arises, some other test than that of the 'interests of the company' must be applied." (48)

It is submitted that the essence of the problem can be clearly seen in what appears to be the only South African case on the subject, namely Treasure Trove Diamonds Limited v. Hyman. [49] The capital of the plaintiff company was £235,000 divided into 940,000 ordinary shares. The directors decided to issue a further 2,000,000 deferred shares at 6d. each to an investment company, the shares to rank equally with the ordinary shares as to voting. A shareholder petitioned the court alleging that although a circular had been sent to the shareholders concerning this decision it had not disclosed the fact that the shares were to rank equally as far as voting was concerned and that the effect of the issue would be to give entire control of the company to the investment company. In other words the investment company will be obtaining control although it had subscribed less than a quarter of the sum subscribed by the ordinary shareholders. He went on to allege that the shareholders had been given no opportunity of expressing their view as to whether these shares be issued and had been given no opportunity of subscribing for them. He was of the opinion that they would not have consented to the issue unless given such an opportunity.

It is submitted that these allegations are, on the facts, entirely reasonable and show clearly that it is not a question of the company's interests which are at stake. The matter concerns the personal interests of the shareholders in the company. The directors may have genuinely believed that they were doing was what the shareholders would have wished them to do but, if they were wrong in this, their decision could not stand and they certainly should not be heard to say that they were acting in the company's interests whilst the shareholders were not.

Curlewis J.A. in granting a provisional interdict said:

"Where wide powers are conferred on directors by the articles of association of a company in respect of the issue of shares, as in the present case, these powers are primarily given to them for the purpose of enabling them to raise capital for the purposes of the company, and the directors as occupying a fiduciary position towards the company must exercise those powers bona fide solely for the benefit of the company as a whole, and not for an ulterior object ... On the facts disclosed on the affidavits and documents before us, in the absence of a full and satisfying explanation on the part of the directors, I have come to the conclusion that prima facie they establish that the directors of the Treasure Trove Company did not act bona fide and solely in the interests of that company when they entered into the agreement with the Investment Corporation whereby the two million deferred shares were issued to that corporation for the sum of £50,000 and that the paramount object was not so much the obtaining of the fresh capital of £50,000 but to enable the Investment Corporation to obtain control of the Treasure Trove Company, and that therefore the court below was justified in granting the provisional interdict pending action.

This interdict is only provisional in its nature, and it may be that at the trial when evidence is heard, the directors may satisfy the court that they acted entirely bona fide, and that what now looks on the face of it a transaction with an ulterior motive and for the benefit of the company, was quite genuine ..."(50)

Thus Curlewis J.A. was of the opinion that the directors could have issued the shares if they had considered that the company needed further capital regardless of wishes of the shareholders and that to exercise their powers for a "collateral purpose" or "ulterior object" was to fail to exercise these powers "in the interests of the company". For the above reasons it is submitted that this approach cannot be accepted.

. . .

It is submitted that we must firstly distinguish between "the Company's interests" and the shareholders' interests qua shareholders. Where we are concerned with "the company's interests" it must be accepted that we have two rules. Firstly, the rule to the effect that a director breaches no duty provided he does what he bona fide believes will advance the interests of his company. Here we are only concerned with his decisions as to the manner in which these given interests should be advanced. Secondly, the rule that the company will not be

bound if he acts, albeit bona fide, to advance interests which he mistakenly thought were the interests of the company. This situation is analogous to the position where A is under a duty to act for B but mistakenly acts for C. This rule cannot depend upon the state of mind of the director. Nor is it a question as to the extent of his powers. It is simply a question of mistake.

When directors are given powers to exercise in the interests of the shareholders qua shareholders exactly the same principle apply. The important point is that there can be no question of the directors justifying their acts upon the basis that they were done in "the interests of the company".

Sealy's opinion to the effect that all depends upon bona fides therefore cannot be accepted. Gower's attempt to combine these rules is equally unacceptable. Wedderburn's suggestion (which he has now abandoned) that acts done for a "collateral purpose" are acts done beyond the directors' powers is certainly an improvement upon the views of Gower and Sealy but is incorrect for the reason that it is not a question of vires but relates to the determination of the beneficiary.

Finally, it should be noted that this second rule cannot, in principle, be a fiduciary duty. Fiduciary duties compel A, when he acts for B, to act only in B's interests. They are duties of good faith.

The rule that a director must act in the interests of his company as a separate test for the validity of directors' actions

If a director may not act in interests other than his company's interests regardless of whether or not he acted "bona fides" does this mean that the rule imposes a separate test for the validity of his actions? Parsons says:

> "The duty to act for the benefit of the company imposes a test of the validity of directors' actions which is distinct from the test imposed by the doctrine of ultra vires and the doctrine that sets the scope for the authority of directors as agents of the company." (1)

If this is so what is the nature of this test? Perhaps this question may be best approached by first considering Walsh's [2] contention that it does not provide such a test and that the only true test is one of vires. The rule, he says, has no separate existence from the ultra vires rule. Powers are usually given incidental to a purpose and the "test of 'interests of the company' is no more than an aid

in construing the scope of the relevant power, in as much as an act done in the interests of the company as a commercial entity likely to be within its power." Thus he says:

> "Is it the law that an act in purported exercise of the powers of general management must pass the test of vires, in this case more particularly in the Ashbury sense, and also an independent test of interest of the company? It is, of course, this power that may particularly effect persons other than shareholders, for that reason, the question whether 'the interests of the company' means the shareholders only, has particular interest.
>
> It can only be said that there is little in the authorities to justify the view that there is such a test independent of vires. The question of gratuities to employees has often raised the point. Must a gratuity not only be reasonably incidental to the pursuit of the business of the company, but also capable of passing the test that the directors, in giving it, acted solely in the interests of the shareholders in a sense other that that the gratuity was reasonably incidental to the pursuit of the company's business in which all shareholders, of course, have an interest. The proposition is grotesque, and the cases confirm this with the exception of some remarks, albeit ambiguous of Plowman J. in Parke v. The Daily News Limited." (3)

Although Walsh's contention is not widely accepted, the general view appears to be that there is some sort of connection, at least at times, between the rule and the ultra vires doctrine. Thus Hahlo says:

> "The ethos of our time required companies, especially large and prosperous companies, to be generous - generous in granting 'fringe' benefits to their directors and employees, from subsidised canteens and sporting facilities to retirement benefits, generous in contributing freely to deserving charities. Recent cases, both in England and South Africa suggest that there is somewhere a line beyond which the distribution of largess by a company becomes ultra vires." (4)

It is submitted that there is a clear distinction between the rule and the ultra vires doctrine. It is true that the same act may be at the time both a breach of this duty and ultra vires but his should not lead to their identification with each other. The ultra vires doctrine provides a purely objective test and rests upon the requirement that a company state in its objects clause the business which it proposes to carry on. Whether or not any particular transaction is intra or ultra vires is a

decision made upon objective criteria. The fact that the Gold Mining Company in Gower's famous example [5] cannot operate a fried-fish shop has nothing to do with the question as to whether the directors wished to advance the interests of the company's shareholders when opening the shop. The questions are, in principle, totally unrelated to one another. It was never contended that the directors were not acting in the interests of their company in Ashbury Railway Carriage & Iron Company v. Riche [6] when they entered into the contract to purchase a concession for constructing a railway. In fact it was stressed in the judgment that the question of the willingness of the shareholders to enter into the contract was irrelevant.

The fact that the courts are willing to construe "incidental" objects does not alter the nature of the doctrine in the slightest. An activity is reasonably incidental to the objects of the company if it is so upon objective criteria. This is well illustrated by Buckley L.J. in Attorney General v. Mersey Railway Company [7] when he

> "By way of illustration, let me suppose that the main purpose found in the statute or in the memorandum of association of a statutory company is to establish and carry on an hotel, and that express power is given to buy land at a particular place and to build, and that as to anything further the statute or memorandum of association is silent. It is clear law that all such acts as are reasonably necessary for the effectuating that purpose are intra vires, such for instance, as the purchase of furniture, and of linen, of provisions, and of wines and spirits, the hiring of servants, the payment of licences, the ownership probably of horses and carriages, etc. ... (8)

If I have dwelt too long upon the obvious it is because this fact has been frequently overlooked. It has been said that certain transactions are ultra vires because they do not forward the interests of the company but the interests of others. Admittedly the question has been rather confused by the practice of drafting powers and not objects into the memoranda of companies and the tendency to state their objects subjectively. It would appear, however, that the judgment in Introductions Limited v. National Provincial Bank [9] has gone a long way to curb the former practice. There Buckley J. said:

> "Where a company ... has the power to borrow, that fact must be discovered from its memorandum of association. The power may be one which has to be inferred from the objects of the company, or it

> may be one that is expressly conferred on the company by terms of its memorandum. If the power to borrow is one which is inferred, it naturally follows that the borrowing is only within the power of the company in relation to those matters in respect of which the inference arises. Where the memorandum is one in which those sub-clauses of the objects clause which confer what are truly powers rather than objects, are to be read as sibsiduary to the main and real object of the company, in such a case also the borrowing power must be read as confined to borrowing for the purposes for which the company is formed. Moreover, borrowing for any purpose other than the legitimate activities of the company will be ultra vires, and if the lender is aware of the circumstances which render the borrowing ultra vires he will be unable to recover the monies as monies lent." (10)

The more serious question arising from the drafting of objects clauses in subjective terms has, however, of late been rendered rather more difficult by the decision in Bell Houses Limited v. City Wall Properties Limited. [11] There it was held that an objects clause reading "To carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to ... the general business of the company" was effective. Salmon L.J. saying:

> "As a matter of pure construction, the meaning of these words seem to me to be obvious. An object of the plaintiff company is to carry on any business which the directors genuinely believe can be carried on advantageously in connection with or as ancillary to the general business of the company. It may be that the directors take the wrong view and in fact the business in question cannot be carried on as the directors believe. But it matters not how mistaken the directors may be. Providing they form their view honestly, the business is within the plaintiff company's objects and powers."(12)

As Gower points out "this comes close to saying that the company could carry on any business it chose." [13] The judgment has come in for considerable criticism which, one would think, it thoroughly deserves. Nevertheless, it is submitted, such drafting of companies' objects clauses does not in any way affect the rule which is that a director must act in the interests of his company and not in the interests of another.

If there is such a clear distinction between the ultra vires doctrine and the rule, why is it that it has been contended that there is no separate test other than that of vires? As we have seen, Walsh says "the question of gratuities to employees has often raised the point" and asks " must a gratuity not only be reasonably

incidental to the pursuit of the business of the company, but also capable of passing the test that the directors, in giving it, acted solely in the interests of the shareholders ...?"[14] He then proceeds to refute the suggestion by examining three cases concerning gratuities. The first of these cases is that of Hutton v. West Cork Railway Company.[15] Here the company had sold its undertaking and had resolved to go into liquidation. A resolution was passed in general meeting to pay its directors certain sums by way of remuneration for past services. The articles, however, made no provision for the remuneration of directors and the court held that the proposed payment was in the nature of a gratuity and was therefore ultra vires. The case therefore did not concern the exercise by directors of their powers but the principles stated therein are clearly equally applicable to cases of donations by directors. Bowen L.J. said:

> "Most businesses require liberal dealings. The test is not whether it is bona fide, but whether as well as being done bona fide, it done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit." (16)

He then went on to say:

> "A railway company or the directors of the company, might send all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carry on of the business of the company, and a company which always treated its employees with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted- at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say there can be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company ... Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose." (17)

The next case considered by Walsh is that of Re Lee Behrens & Company Limited.[1] The memorandum of association of the company authorised its directors to make

provision for the welfare of employees or persons formerly in their employment, their widows and children. Five years after the death of a former director the board of directors entered into an agreement under which a pension was granted to his widow. Three years later the company went into voluntary liquidation and the widow lodged a claim for the capitalised value of the pension. The liquidator rejected it and his decision was upheld by the court. Eve J. holding

> "It is not contended, nor in the face of a number of authorities to the contrary effect could it be, that an arrangement of this nature for rewarding long and faithful service on the part of persons employed by the company is not within the power of an ordinary trading company such as this company was, and indeed in the company's memorandum of association is contained an express power to provide for the welfare of persons in the employment of the company or formerly in its employment, and the widows and children of such persons.
>
> But whether they be made under an express or implied power, all such grants involve an expenditure of the company's money, and that money can only be spent for purposes reasonably incidental to the carrying on of the company's business, and the validity of such grants is to be tested, as is shown in all the authorities, by the answers to three pertinent questions: (1) Is the transaction reasonably incidental to the carry on of the company's business? (2) Is it a bona fide transaction? and (3) Is it done for the benefit and to promote the prosperity of the company?
>
> The conclusion to which in my opinion such evidence as is available irresistably points is that the predominant, if not the only, consideration operating in the minds of the directors, was a desire to provide for the applicant, and that the question what, if any, benefit would accrue to the company never presented itself to their minds." (19)

The third case cited by Walsh is that of Parke v. Daily News Limited.[20] Here the directors had sold the company's most important asset and intended to use the major part of the sum so obtained to pay compensation to those of its employees who were rendered redundant by the sale. One of the shareholders applied for an injunction to restrain the company and its directors from doing so. In holding that the shareholder had made out a prima facie case, Plowman J. held that the directors had acted from "philanthropic motives" rather than from consideration as to the interests of the company. In the course of his evidence on behalf of the company,

an "accountant of great experience" stated that "... the prime function must be to the shareholders; but boards of directors must take into consideration their duties to employees in these days." Plowman J., however, held that "no authority to support that proposition as a proposition of law was cited to me; I know of none, and in my judgment such is not the law."[21]

Walsh comments upon this case as follows:

> "(Plowman J.) could not have intended to imply that directors could not take into consideration their duties to employees where this was incidental to the carry on of the company's business. The fact is that the cases show, that the question of the validity of an act purported exercise of the powers of general management is to be treated as a matter of construction of the articles and the objects clause of the memorandum rather than the application of a test of what is in the interests of the shareholders." (22)

It is difficult to see that these cases support such a contention. Nevertheless, they do appear to indicate that acts not done in the interests of the company are ultra vires. Before considering this point we will take three further cases. In Cyclists Touring Club v. Hopkins [23] Swifden Eady J. held that a grant of a pension by way of a gratuity to a retired secretary was intra vires, saying:

> "The payment to a retired servant of the club by way of an annuity, or by way of pension, or by way of gratuity, is within the powers of the club as being a payment in furtherance of the best objects of the club. The fact that the payment is made by way of gratuity and not made under any legal liability does not make it a payment outside the objects of the club ..." (24)

In Evans v. Brunner & Company [25] Eve J. held that an authorisation by the general meeting of the company, that its directors make a payment of £100,000 to such universities and other institutions as they might select for the furtherance of scientific education and research generally, was intra vires because "On the evidence I think that the company ... has proved that the proposed expenditure will not only be to the direct advantage of the company but us also conducive to, and indeed necessary for its continued existence." [26] In Re W. & M. Roith Limited [27] a service agreement was concluded between a company and its managing director not long before his death with a purpose of providing a life pension for his widow.

That the contract was entered into without any consideration of the company's interests can be seen from the fact that the directors had been advised by his solicitor to enter into such an agreement with either one of his two companies. Previously, however, an extraordinary general meeting had been called to alter the memorandum and articles of association of the company and in particular there was inserted in the former a clause permitting the company to "... give pensions, gratuities, or charitable aid to any person who may have served the company or its predecessors in business, or any subsiduary allied or associated company or to the wives, children or other relatives or dependants of such persons..." On the director's death the executors claim for the capitalised value of the widow's pension was rejected by the liquidator of the company. Plowman J. held that the liquidator had discharged the onus of proving that the pension agreement had not been made bona fide for the benefit and to promote the prosperity of the company. Five factors led him to this conclusion. These were: (1) That the only motive for the agreement was to provide for his widow's pension. (2) The director had already controlled the company, which could not, on the evidence obtained further benefit from the service agreement, (3) The provision that he would devote the whole of his time and abilities to the company was a sham because he clearly intended to go on working for it, (4) Under the solicitor's advice, it had been regarded as immaterial which of the companies provided the pension, and (5) There was no evidence from "either of the other directors of the company explaining the purpose of the service agreement or the company's motives in entering into it."

In his note upon the case Wedderburn asks, "Was it really a case about ultra vires? One head note writer and indexer thinks so." [28] He points to the fact in Parke's Case the payments were gratuities and not made by reason of contractual obligation and the objects clause of the company's memorandum included no express power to make donations. This, as we have seen, was not the position in Roith's Case. Referring to the five factors taken into account by Plowman J. he asks:

> "What do these arguments add up to? Surely, not to a finding that the transaction was ultra vires. Plowman J. surely held that the directors had not satisfied that primary and elementary requirement of the directors' fiduciary duty, that is to say, that they

> must act 'bona fide in what they consider - not what the courts may consider - is in the interests of the company, and not for any collateral purpose'." (29)

Apart from the question of "collateral purpose" this must surely be correct.

It is thus clear that support for either of two propositions can be found in the cases, namely, that a donation by a company is ultra vires if not made for a purpose incidental to the objects of the company and that such payments are ultra vires if not made in the interests of the company. Nevertheless a consideration of Roith's Case, without regard to its head note, shows the clear distinction between ulta vires and the rule in regard to donations. Why then has so much difficulty been experienced in connection with gratuities? It is submitted that the reason is this, that a gratuity may be both ultra vires and a breach of the directors' duty to act in the interests of their company. This may, perhaps, best be illustrated by way of example. An airline company enters into a contract to purchase an aeroplane. Here the seller, on ascertaining that the company's memorandum provides for the carrying on of such business, knows that the contract is intra vires the company. If the Company had wished to purchase a ship the seller would similarly know that the contract was ultra vires. These judgments are made by considering what the company is seeking to achieve and are made upon purely objective criteria. The position of the recipient of a donation is somewhat more difficult but not, in principle, different. If he sees that the donation is made in order to achieve something incidental to the company's business it is intra vires. This is so even although the directors were not in fact acting in the interests of the company when making the donation. Thus, for example, if at the end of the year the airline company made a donation to each of its employees it is obvious that the gifts would achieve an object incidental to the main object of the company. If, however, the directors did not make the donation primarily to achieve this object but because they all held service agreements with the company and thus qualified, as employees, to receive a donation themselves and if the payment was made for this purpose, they would have breached their fiduciary duty. It is submitted in such an event the payments to the company's employees would, nevertheless, be made intra vires and could only be reclaimed if the employees had known of the directors' breach of their duty. To take another example, if the directors considered that a donation

of R100 to each of its employees would be sufficient to maintain good relations with them but nevertheless decided to pay them R300 because they liked their employees and did not like their shareholders, such payments would also be intra vires but nevertheless made in breach of their duty. Finally, if the company made a donation to The Wild Life Society of Tibet such payment would be neither incidental to the company's objects nor in its interests.

Thus if we return to Hutton's Case it is evident that the payment, made on liquidation of the company, of remuneration to the directors by way of a gratuity for past services was neither made to achieve an object incidental to the company's business nor made in the interests of the company. In Re Lee Behrens & Company it might be said that the payment of the pension was incidental to the objects of the company as it would surely have promoted the company's interests by encouraging its directors and staff to act for it. But the court found in fact that it was made with no consideration of the company's interests at all. The directors therefore acted in breach of their duty. In holding that the pension was ultra vires the court was driven to the manifestly unfair conclusion that it should be set aside. Surely, if the directors had breached their duty they should have been accountable but why should the director's widow have not been able to hold the company to the contract?[30)]

What is the position where included in the company's memorandum is the independent object "to make donations"? Of this Parsons says:

> "One would hope ... that an independent object 'to make gifts' taken by way of an express provision in the memorandum must be exercised in the interests of the company as determined by reference to all its objects. If this is not so, it will follow that the independent objects clause has ... gone some distance towards sterilising the equitable principle that powers must be exercised in the interests of the company, by making it impossible to identify the interests of the company in cases which do not involve the rights of shareholders inter se." (31)

It is submitted that "donation" is a power and not an object and no drafting technique should obscure this fact. After all, the very reason for objects clauses is to limit the company's powers. Finally, the question came before the court for crisp decision in a case not concerning donations. In Charterbridge Corporation Limited v. Lloyds Bank Limited[32)] C company was a member of a

large group of companies trading as property developers. Its objects were, inter alia, to acquire lands for investment and "to secure or guarantee by mortgages, charges, or otherwise the performance and discharge of any contract, obligation or liability of the company or any other person or corporation with whom or which the company is concerned or interested whether directly or indirectly. At the head of this group of companies was P Limited. This latter company had become heavily overdrawn and C company entered into a guarantee and gave a charge in favour of the defendant bank. When the bank subsequently demanded payment the Charterbridge Corporation Ltd. (not to be confused with C company), a company financially interested in the group's affairs, sought a declaration that the guarantee and charge were void as being ultra vires. This was argued upon two grounds. Firstly, that it was created for purposes outside the scope of the company's business. Here Pennyquick J. held, however, that the guarantee and charge fell within the ambit of the memorandum. Secondly, it was argued that they were given for purposes which were not for the benefit of the company. This argument was based upon the case of Re David Payne & Company Ltd. [33] where, after stating that a trading company did not need a specific power to borrow in its memorandum, Buckley J. said:

> "Every trading company has power to borrow for the purpose of its business ... A limitation of the borrowing to borrowing for the purpose of the company's business is necessary, of course. A corporation cannot do anything except for the purposes of its business, borrowing or anything else; everything else is beyond its power, and is ultra vires." (34)

Buckley did, however, go on to say that if the purpose of a borrowing was illegitimate this was normally a matter between the shareholders and the directors and not something which concerned the lender. In any event, Pennyquick J. held that the state of mind of the directors in giving the guarantee and charge could not make these charges ultra vires. In this he was clearly correct.

CONFLICT OF INTEREST AND DUTY

We have seen that this principle is said to apply to certain transactions entered into by a fiduciary on behalf of his beneficiary, namely, where he enters into such a transaction with himself or with a third party but has a personal interest in its outcome. It also covers the following situations whether the fiduciary acted on his own behalf: where he transacted with his beneficiary but did so secretly or failed to disclose information acquired by him during the course of his administration, where he transacted with a third party on his own behalf instead of doing so on behalf of his beneficiary, and, in certain cases, where he transacted with a third party on his own behalf and, although he did not do so in breach of his duty to act in the interests of his beneficiary, he is nevertheless deemed to have transacted on behalf of that beneficiary. Finally, the principle said to cover the case where he divulges confidential information and where he acts on his own behalf or in anothers interest in competition to those of his beneficiary. We have also seen that the principle applies to some situations where the fiduciary has purported to act both in his own interests and interests of his beneficiary and to other situations where he has acted only to advance his own interests. It applies in some situations where he has breached his duty to act in the interests of his beneficiary and in others where he has not. It applies to certain cases where he has made a profit and to others where he has made none.

Accepting for the moment the wide application given to this principle and, in particular, that it includes both the true conflict situation and cases of breach or possible breach of duty, we may distinguish the following situations:

(1) Firstly the case where the director has an interest in a transaction which he, himself, is carrying out on behalf of the company. This is what we have referred to as the conflict situation "properly so-called". It may be distinguished from what Parsons calls the "classical conflict" situations which, he says, arise where the director contracts "with the company of which he is a director or (is) interested in a contract with the company of which he is a director".[1] These situations would only be "true" conflict situations if the director in both cases acted also for the company.

Here the rule is as stated in Aberdeen Railway Company v. Blackie[2] and it would appear that this is the situation upon which Gower formulates the general rule for he says:

> "Good faith must not only be done but must manifestly be seen to be done, and the law will not allow a fiduciary to place himself in a situation in which his judgment is likely to be biased and then escape liability by denying that it in fact was biased."(3)

Strangely enough, however, he does not limit the rule as so formulated to the conflict situation "properly so-called".

(2) Then we have the case where the director acts for his company but as a result of so acting acquires an incidental profit.

(3) Thirdly, all those other situations which, although he has not purported to act for his company, are said also to be situations where his interests conflict with his duty. Here we may distinguish between two situations; firstly, where the director acts on his own benefit and, secondly, those situations where he neither purports to act for the company nor for himself.

(A) Firstly, we will consider those situations where the director acts on his own behalf. Here again we may distinguish between two further situations, namely, where the director enters into transactions with the company and where the director enters into transactions with a third party.

(i) Where the director enters into a transaction with his company he may do so in breach of his duty to act for it or not in breach of that duty and he may or may not make a profit from the transaction. Where such a transaction continues over a long period of time with the result that the director will be acting for the company in other matters during the course of that transaction, it is clear that although he did not act for the company in respect of the transaction itself, he has an interest in the company's affairs which may well affect the manner in which he acts for the company in regard to its other affairs. Should this situation arise it will fall within that category already discussed, namely, (1) above. We therefore are only considering here transactions entered into between the director and his company as far as the actual transaction itself is concerned. Here we have seen that a trustee may transact with his cestui que trust provided he severs the relationship as far as the transaction is concerned, acts openly and discloses all information that he has ascertained concerning the asset during the course of his administration. Let us consider the position of the director here by taking a few examples.

> (a) A company wishes to sell a certain plot of land and X, one of its directors, wishes to purchase it in order to build a house for himself. He offers to pay the company the highest price it can obtain for it. There appears to be no reason why the transaction should not be allowed for there can be no question of conflict of interest and duty nor is there any question of profit.

(b) The situation here is the same as in (a) above except for the fact that the company did not wish to sell the plot even at the best price that could then be obtained for it. Here there is a conflict of duty and interest but no question of profit.

(c) Here X wishes to purchase the property and again offers to pay the best price but his reason for doing so is that he considers that in the near future there will be a sharp rise in the value of land in that area. What is more X is an expert on matters relating to property and it is for this very reason that he was appointed to the board. Here there is both a conflict of interest and a profit.

(d) The position in this situation is the same as in (c) above but the company was compelled for other reasons to sell the property at that particular time even although it was aware that there would, in the near future, be a sharp rise in its value. Thus we have a profit but no conflict.

(e) Here X knowing that his fellow directors have no idea of what the present market value of the land is, offers to purchase it from the company at a price well below its present market value. There is therefore a conflict of interest and a profit.

Two points arise from these examples. The fact that a director enters into a transaction with his company does not mean, ipso facto, that there is either a conflict of interest and duty or a profit. Secondly, it would seem that the old ideas based upon the concept of trusteeship - usually trusteeship in the static form of one person maintaining property for another - are rather far removed from the case of a director. The director must not only take no advantage at the expense of the company, he is very definitely under a positive duty to exert his skills and ability to advance its interests and for him to fail to do so completely negatives the reason for his appointment.

(ii) Then we have the situation where the director acts on his own behalf in a transaction with a third party. Here he may act for himself instead of acting for the company and in such a case he will undoubtedly breach his duty and the position can therefore be said to be one of conflict of interest and duty. On the other hand if he had not been able to act in that matter for the company and in fact the company had not been able to act in that matter at all, the question is not so clear. It might have been nevertheless contrary to the company's interest that the transaction took place, for example the company may have not been able to afford to purchase a particular undertaking and it was then in the company's interests that no one else did so. Again, the director may have entered into the transaction as part of a general scheme to advance the company's affairs and it might therefore be said that any profit he should make ought to accrue to the company as being a profit made in the course

of his administration - even although he was not acting as such on behalf of the company. And then, of course, such a transaction may be entirely unrelated to the company's affairs. Finally, there are two further situations here which may be treated as falling within this class of case. The director may, in breach of his duty, divulge information concerning the company's affairs to another and he may, by competing with the company, make it impossible or more difficult for himself to carry out his duty to act in the company's interests as best he can. Such conduct may also have a similar affect upon the ability of his fellow directors or the employees of the company to carry out their duties towards the company. In either event the director may or may not make a profit.

(B) The director may have an interest in the company's affairs although he neither acts for it nor for himself nor a third party. This is a situation which we have not met before for in most cases which we have discussed the fiduciary has been the sole fiduciary acting on behalf of his beneficiary or, like the trustee, he is under a duty to act jointly with his co-fiduciaries. A director is, however, not under such a duty and therefore he may simply stand aside when matters of the company related to his interests come before the board. Here again it is clear that his interests may conflict with those of the company or they may not and he may or may not make a profit as a result of any transaction entered into by the company related to them. Once again the problems that arise may best be illustrated by examples.

(a) Company A enters into a contract with company B. X is a director of company A and a shareholder in Company B but takes no part in the transaction. Here it might be said that although he did not purport to act for company A, he nevertheless breached his duty because he placed himself in a position in which he was unable to act, and therefore his interest in the contract resulted in a breach of his duty. Furthermore a profit might or might not have accrued to him as a result of the transaction.

(b) Here we have the same situation as in (a) above except for the fact that A owns shares in company B as trustee for Y. Here there can be no question of profit.

(c) X personally guarantees A company's indebtedness to its bank. The company then borrows money from the bank but X takes no part in the transaction. Here there is neither conflict nor profit and yet, nevertheless, X most certainly has an interest in the contract of loan.

It is evident from the above that we cannot, as is sometimes suggested, base these rules on the single principle which denies the director the right to make a profit from his administration of the company's affairs. As Parsons says:

> "The principle is sometimes expressed as a prohibition on the making by a director of a profit from his office. Such a formulation is too limited. It will be seen that it covers only one aspect of the principle. A director may be in breach of his duty, such that a contract by him by which he has sold property to the company is voidable at the option of the company, not withstanding that he has made no profit on the sale and notwithstanding that his contract is fair."(4)

Just as in the case of other fiduciaries, the conflict of interest and duty principle is said to underlie all these rules. As we have seen, Gower stated the general rule thus:

> "As fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests. Good faith must not only be done but must manifestly be seen to be done, and the law will not allow a fiduciary to place himself in a situation in which his judgment is likely to be biased and then escape liability by denying that it in fact was biased."(5)

Such a formulation of the principle, one would think, should apply to those cases where a company may rescind a contract entered into by a director on its behalf in which he has a personal interest, (situation (1) above). It seems anomalous to hold that a director can be "liable" to a company in any other sense where he has in fact breached no duty and it seems even more anomalous to say that he is held liable in such cases so as to prevent his "escaping" liability by denying that he did not. Nevertheless, Gower does not so confine the principle. He deals with the following situations as applications of it: (a) contracts with the company, (b) other secret profits, (c) abuse of confidence, and (d) competition.(6) This is, of course, the usual treatment of these fiduciary duties both in relation to directors and other fiduciaries such as agents and trustees. Parsons attempts to state the principle in somewhat more general terms so as to more readily include these situations. He says:

> "A director must not place himself or allow himself to be placed in a situation in which he has an interest or duty which conflicts with his duty to act bona fide for the benefit of the company of which he is a director."(7)

Of the application of this principle he says:

> "Where the principle forbidding conflict of duty and interest is in play, it is enough to show that the situation is such that the duty to act for the benefit of the company is raised. Proof of breach of this duty is not a condition of recovery."(8)

In other words this appears to be a frank admission that the rule as to conflict of interest and duty means that a director must not breach his duty to act in the interests of the company or place himself in a situatuion where he may breach that duty.

It is submitted that the treatment of all these various duties thus is, in principle, no more justifiable in the case of the director than in the case of other fiduciaries. There is only one situation where it might be said that a director is "liable" because he placed himself in a position where his interest conflicted with his duty and that is the case where he acted for the company in a matter in which he had a personal interest. It will be seen that although the rule is so stated, a director is in fact never (with one possible exception) held liable simply because he acted in a situation where he may possibly have breached his duty to act in the interests of his company.[9] This approach is, however, so universally accepted both by jurists and by the courts that it is almost impossible to abandon it when treating of these duties. On the other hand, it is too confusing to accept the usual treatment of these duties in its entirety and I therefore propose to deal separately with those situations where the company's remedy is rescission and those where its remedy is to sue for "profits".

A Director may not act for his company in a matter in which he has an interest.

This general rule has already been discussed at some length. Both in English Law and South African Law it has been held that such transactions are voidable unless entered into with a third party without notice of the director's breach of this rule. Undoubtedly the leading case here is that of Aberdeen Railway Company v. Blackie.[1] There a company director contracted on behalf of his company for the firm in which he was a partner. The rule is, however, perhaps more accurately stated by Sir Richard Baggallay in North-West Transportation Company v. Beatty.[2]

> "... a director of a company is precluded from dealing on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect... Any such dealing or engagement may, however, be affirmed or adopted by the company."(3)

In the Aberdeen Railway Case Lord Cranworth L.C. explained the reasons for the rule. He stated that it was a director's duty to "make the best bargains he could for the benefit of his company."[4] He went on to point out that

because a director is under such a duty, if he purports to enter into a transaction on behalf of his company with himself his personal interests would conflict with his duty and this the law will not permit.

> "While he fulfilled that character,... he entered into a contract on behalf of the company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the company imposed on him the obligation of obtaining those chairs at the lowest possible price.
>
> His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed,... It was Mr. Blackie's duty to give to his co-directors, and through them the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject... as far as related to the advice he should give them, he put his interest in conflict with his duty and whether he was sole director or only one of many, can make no difference in principle."(5)

It is interesting to note that Lord Cranworth cited Keech's Case[6] and Whelpdale v. Cookson[7] and Lord Brougham, in his judgment concurring with Lord Cranworth's, cited also Ex parte James[8] and Ex parte Lacey[9] and noted:

> "And it is observable that Lord Eldon, in both Ex parte James and in Ex parte Lacey, goes even further than Lord Hardwicke did in Whelpdale v. Cookson, and considers (though he expressed it, no doubt, with respect due to that eminent judge rather as a grave doubt that was a well-matured opinion) that Lord Hardwicke had scarcely given full effect to the principle, when he said it was possible that the assent of the creditors might validate the sale."(10)

What Lord Hardwicke had said was that the majority of the creditors could assent to the purchase of trust assets by the trustee. Lord Eldon was of the opinion that this was not sufficient. The extent to which this opinion has prevailed may be clearly seen in the case of E.B.M. Company Limited v. Dominion Bank.[11] In this case three partners, who were also directors of a company, furnished a bank, as security for a loan to them, a document charging the company's interest in certain bonds. No resolution was ever passed either by the company or by its directors authorising the creation of this charge. These three partners were, however, the sole directors of the company and held all the shares in it except for two which were owned by two of their wives. Subsequently the bonds were sold and the bank claimed the balance of the proceeds in reduction of the partners' indebtedness to it. It was argued that although the company had not consented in general meeting to the security, it was bound by the unanimous consent of all the shareholders. The court, however, held that it could not accept that the wives were not the beneficial

owners of their shares and, as they had not assented to the transaction and as the bank had known of the existence of these two shares, the transaction could not stand. Lord Russel of Killowen said:

> "... even if (contrary to their Lordship's opinion) some benefit did accrue to the company from the transaction, the overriding fact remains that the ... company (acting through its directors, and not by its shareholders in general meeting) purported to apply its property for the benefit of those directors. In such a case it is well settled that the court will treat the transaction as unenforceable, and refuse even to enquire whether the company has derived any benefit from it and that on the ground that the company has not received the protection to which it is entitled."(12)

After citing Lord Cranworth's statement of the rule, he went on to say:

> "Their Lordships are conscious that, in the result, the bank will be deprived of a security which will revert to the ... company ... For this they have only themselves to blame, for taking a security for the personal indebtedness of three directors of a limited company a charge on property of that company, without any enquiry, and without satisfying themselves that the seal of the company had been affixed to the security in such circumstances as to make the security a charge binding on the company. This was not a case, as was suggested in argument, in which the bank had had no notice of anything extraordinary being done. It was a plain case of directors using their powers as directors to cause a limited company to apply its property for the benefit of those directors as debtors to the bank."(13)

The case of Victor Limited (in liquidation) v. Lingard[14] illustrates the inflexible manner in which the rule is applied. Here the company had an overdraft which was secured by its directors personal guarantees. The company subsequently furnished the bank with security over its assets. It was held that all the directors were interested in the bank receiving such security and were therefore precluded from voting in the matter.

> "Now it cannot be doubted that each of the directors, if he merely consulted his own interest, must have desired to see the bank protected by debentures as soon as possible."(15)

It is not necessary for a director to have a beneficial interest in the transaction, it being sufficient if he has a duty in conflict with his duty to the company. Thus in Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company[16] a director held shares as trustee in a company with which his company contracted and for which contract he had voted. The transaction was set aside, it being said (after, of course, the usual citation of Lord Cranworth), whenever a director of a company "has an interest as a shareholder in another company or is in a fiduciary position towards and owes a duty to

another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within the rule. He has a personal interest within this rule or has a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as a trustee for others... The validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent anymore than upon how far in any particular case the terms of the contract have been best obtainable for the interest of the cestui que trust, upon which subject no enquiry is permitted."(17)

This rule, which as we have seen is also a rule of the civil law, is unquestionably part of our company law. In Cohen v. Directors of Rand Collieries[18] Bristowe J. stated it thus:

> "Now I conceive it to be clear that if directors under powers as the company's agents sell the company's property to themselves or their own property to the company, the company has the option either to affirm or disaffirm the contract. I think that the case is the same if the directors instead of contracting with themselves contract with another company in which they are interested, and if the contract instead of being a sale is a loan. In all cases the contract is prima facie voidable, but it is not void."(19)

In Gundelfinger v. African Textile Manufacturers[20] Stratford C.J. said:

> "It is an elementary principle of company law that (apart from explicit power in the articles of association) a director cannot vote for the adoption of a contract or on a matter in which he is an interested party ..."(21)

In Trek Tyres Limited v. Beukes[22] Boshoff J. stated the rule in almost identical terms. In that case it was held, following the English decision of Foster v. Foster[23] that a director may vote at a meeting where his appointment as managing director is being considered, want so 'n aanstelling is bloot 'n delegasie van die direkteure se bevoegdhede aan hom en stem 'n groot mate ooreen met die bevoegdhede wat direkteure het om komitees van hulle self aan te stel en om hulle bevoegdhede aan sulke komitees oor te dra."[24] The position is, however, otherwise where a salary or remuneration is attached to the appointment.[25]

A Director has an interest in a contract of his company but neither purports to act on its behalf nor contracts with it.

Here we appear to be dealing with the question not covered by the fiduciary

rules developed for trustees. A trustee can never be in such a position. If there are two or more trustees a cestui que trust is thought to have the right to the protection of all his trustees and they are all necessary parties to a contract. It therefore follows that in the case of the trustee there are only three possible situations, namely, the trustee transacts on behalf of the trust with himself or with a third party in a matter in which he has an interest (dealt with above) or he transacts directly with his cestui que trust. In the case of a director there is the possibility of his being able to simply stand aside - to neither act on behalf of his company nor transact with it - and yet have an interest in the contract of the company.

We know that a director is not a necessary party to a contract of his company and therefore the first question that arises is whether or not the director is, nevertheless, bound to take part in the decision of the board as to the contract.

One of the earliest cases on this subject, and the earliest case to which the courts have looked to as authority, is that of Benson v. Heathorn[1] (1842). The case actually dealt with a contract by a director with his company but it later came to be seen as providing the reasoning upon which the courts acted in those cases where the director neither acted on behalf of the company nor contracted with it. In this case the rule relating to trustees was simply modified to meet the company situation, it being held that although the director might not be a necessary party to a company's contracts, he cannot simply stand by for he is under a duty to take part in the deliberations of the board. Here a director was held to be accountable to his company for profits he had made in the sale of a ship to it and certain commission he had earned whilst acting as its agent, (its "ship's husband"). We will discuss the ruling of the court in connection with the sale at a later stage, what is relevant here is the reasoning for the court in holding him liable for the commissions, for here he had acted with the full knowledge and consent of the board. Knight-Bruce said:

> "It may be right, probably is fair, to assume, for the purpose of argument, that all these charges and allowances to Mr. Heathorn were such as would have been according to usuage, and proper in the case of a stranger. His position was, however, very different. He was one of six directors of this company, to whom exclusively the entire management of its affairs was entrusted... These six directors being so entrusted, receiving among them, from the funds of the company, as remuneration for their trouble in being the exclusive acting partners in this concern, a sum of no less than £650 per annum... Now, it is obvious that persons so circumscribed were under an obligation to the shareholders at large to use

> their best exertions in all matters which related to the affairs of the company ... I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in their engagement, that they should not make any other profit to themselves of that trust or employment, and should not acquire to themselves, while they remained directors, an interest adverse to their duty.
>
> The main or only business of this company consists in acquiring, managing, and working steam vessels. It may have been that a ship's husband was necessary... if (this was so), it is obvious he would become the responsible servant of the directors, in an onerous office - that he would become an accounting party to them, and his conduct as well as his accounts, however respectable he might be, would require a constant and vigilant superintendence and control, one all of the directors had, for value contracted to give... (The result) of his being the company's ship's husband had the effect of paralyzing him as a director in this respect, and leaving the company, as far as these important matters were concerned, under the protection of but five while they believed themselves to be under protection to six."(2)

Thus he could not so contract with his company. Knight-Bruce then goes on to consider why he was accountable for the profit he had made:

> "... if the court were to allow to a person so circumstanced that which might fairly be allowed to a stranger, it would obviously afford the strongest encouragement to the departure from what is the right and regular course in every similar establishment. A party would take a situation of this nature with certainty of having a fair remuneration, and with probable advantage of retaining what was unfair. It is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees and all parties whose character and responsibilities are similar (for there is no magic in the word) induces the Court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those cases where one man is trusted by another) or adhere strictly to the rule, that no profit of any description shall be made by a person so circumscribed... It is on this principle that Lord Eldon proceeded in the cases so familiar to us all of purchases by trustees. It is only an instance of the application of the rule, not the rule itself. In those cases Lord Eldon said (I allude particularly to Ex parte Lacey ...) '(The rule) is founded upon this, that though you may see in a particular case, that he has made no advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court, by which I mean, in the power of the parties, in ninety nine cases out of a hundred, whether he has made advantage or not.'"(3)

He then concluded that if, however, Heathorn had obtained consent for the general meeting so to act and had received their consent, he would have been entitled to take the commissions. He had not and therefore must account for them.

Thus there are two reasons why Heathorn was accountable. Firstly, he was under a duty to act for the company - to take part in the deliberations of the board - and therefore he could not contract with the board. The company had a right to his participation as a director on its behalf in the consideration of all its contracts. Secondly, he could not take any profit as a result of his position and, as a director must act gratuitously unless otherwise agreed, his remuneration amounted to such a profit. If he wished to transact with his company and if he wished to keep his remuneration he should have obtained the consent of the shareholders in general meeting.

As we have seen, a director cannot contract on behalf of his company in a matter in which he has an interest. Now it is said that he cannot enter into a contract with his fellow directors because he is bound to act for the company in all its affairs. The only way he may so contract is to contract with the company in general meeting or to obtain its permission to contract with the board. Heathorn's Case contains a further point of great interest. Because the court did not, and indeed in terms of the articles of the company could not, find that the defendant was a necessary party to the company's contracts it was forced to find a positive duty to act on behalf of the company. In other words the court abandoned its traditional approach of imposing a duty upon the fiduciary to act in the interests of his beneficiary if he acted at all.

This principle received considerable discussion in the case of Imperial Mercantile Credit v. Coleman.[4] As well known as this case is, the facts will, unfortunately, have to be repeated. The articles of association of a finance company provided that a director should vacate his office if he participated in the profits of any work done for the company without declaring his interest at a meeting for the board. One of its directors, having undertaken to obtain money for certain railway debentures at 5% commission, offered them to the company at 1½% commission. The offer came before a committee of directors, of which he was not a member, and they recommended the board to accept the offer. The recommendation then came before a board meeting of the directors, at which the director making the offer was present. He stated that he was interested in the matter and proposed to retire but was told by the chairman that it was unnecessary and the offer was accepted by the board. The director appeared to have previously given full information to the two managers of the company as to his interest in the debentures.

The Vice-Chancellor, Malins, held that whether his co-directors knew of all the facts or not, "no such knowledge on their part could absolve him from his duty to the shareholders, as expressly decided by Knight-Bruce V-C

in Benson v. Heathorn."[5] On appeal Lord Hatherley held that as the articles had provided for disclosure to the board "(t)herefore Mr. Coleman was not in the position contemplated by Knight-Bruce V-C, of being able to give advice."[6] It was, he said, "open to contract between the parties, for it is not a principle the benefit of which parties cannot waive by express and direct contract for the sake of other advantages which they suppose they derive."[7] Of the position where no such provisions are made he had this to say:

> "... no director of a company can, in the absence of any stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of the board of which he is a member. The reasons were given by Knight-Bruce V-C in Benson v. Heathorn... that the company have a right to the services of their directors, whom they remunerate by considerable payments, they have a right to their entire services, they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration: and the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interests of the trustee deprives the company of the benefit of his advice and assistance."(8)

Here we have a case, unlike Heathorn's Case, where the director neither acted on behalf of his company nor contracted with it. The principle as stated by Knight-Bruce nevertheless applies. In Lord Hatherley's judgment we see that his lordship is well aware that there are two principles involved here. The company has the right to the opinion of each director on matters that come before its board and, secondly, a director cannot make a profit without the sanction of the company.

Today a director is not thought to be under a duty to take a full part in all his company's affairs.[9] His fiduciary duties merely prevent him from acting in his own interests when he does in fact act. Apart from these duties the only other liability which attaches to him as such arises from his duty to exercise due care and skill and once it was held that this duty neither requires him to give continuous attention to the affairs of his company nor requires him to attend all its board meetings, it therefore might be thought to follow that the positive duty as stated by Knight-Bruce has, for all practical purposes, ceased to exist. This being the position it would appear to follow that there is no reason why the directors of a company cannot transact on behalf of the company in a matter in which one of their number has an interest provided that the director takes no part in the proceedings and does not make a profit as a result of the transaction. Sealy[10] takes this even further. He considers that the reason

why the director had to obtain the consent of the general meeting if he wished to retain a profit was that the board could not function without him. Once the view that directors must play a full part in their company's affairs was abandoned, the courts were therfore free to hold that such consent could be given by a disinterested quorum of the board. The fact that the courts do not so hold is "out of accord with modern theory (i.e. the modern organic theory of corporate acts...)" It is submitted, however, that this is unacceptable. It does not follow that, because all a company's directors are not bound to participate in all the proceedings of its board, they therefore have the power to release one of their number from his duties towards the company. In Heathorn's Case Knight-Bruce said:

> "I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in their engagement, that they should not make any other profit to themselves of that trust or employment and should not acquire to themselves, while they remain directors, an interest adverse to their duty."(12)

Surely this duty cannot be affected in any way by the fact that the board may function without all its members. The question as to the director's liability for profits will be considered later. Nevertheless, even excluding this question, it would appear that the rule that a director is not a necessary party to the actions of the board might have one important consequence.

A director is not permitted to act on behalf of his company in a matter in which he has an interest regardless as to whether or not a profit will accrue to him as a result of so acting. As long as it is held that he must act for the company he will be bound to obtain the consent of the general meeting when ever he has such an interest. If, however, he is no longer under such a duty may he not simply stand aside provided he will make no profit? It is submitted that in such a case he is either contracting with the company per interpositam personam in the sense that he is in truth the other contracting party or he merely has an interest in the affairs of the other contracting party. In the former case he should be treated as if he were in fact the other contracting party. In the latter case, it is submitted, he is in a position analogous to a person contracting per interpositam personam. In fact as far as the company is concerned there is little difference. Therefore he should be under the same duties, namely, to disclose his interest which, in this case, would not be that of the other contracting party but as a person interested in the affairs of the other contracting party. Secondly, he should be under the same duty to disclose any material facts concerning the contract which he would or should

have disclosed had he not had such an interest and acted for the company. He, after all, stands in the same position as the fiduciary or administrator who actually contracts with his beneficiary as far as this duty to disclose is concerned. If he is in possession of information relevant to the contract he surely cannot absolve himself from his duty to disclose it by simply standing aside any more than he can do so by actually becoming the other contracting party. Thus the same duties imposed upon the trustee transacting with his cestui que trust or the administrator in civil law contracting with his beneficiary (palam et bona fide) are placed upon the director in such a situation.

Finally, there remains the question as to what remedies the company has in the event of a director failing to make such disclosure. Where the other transacting party was unaware of the directors breach of duty the contract, in principle, is not voidable at the instance of the company. As there is no question of profits here, it would seem that in English Law the company would have no remedy. In our law, it is submitted, if the company had suffered damage as the result of such a failure to disclose it would have an action.

Contracts between a Director and his Company

It is frequently said that a director cannot contract with his company. This is, in principle, incorrect. There appears to be two reasons why the rule is so frequently stated in these absolute terms. These may be illustrated by considering the statement of this rule contained in three well known books on company law. Firstly, Palmer states the rule thus:

> "... the position of a director, vis-a-vis the company, is that of an agent who may not himself contract with his principal, and... further is similar to that of a trustee who, however fair a proposal may be, is not allowed to let the position arise where his interest and that of the trust may conflict."(1)

In support of this he cites Aberdeen Railway Company v. Blackie[2] in Re Transplanters (Holding Company) Limited[3] Gower states the rule as follows:

> "By the middle of the last century it had been clearly established that the trustee-like position of directors vitiated any contract which the board entered into on behalf of the company with one of their number. This principle receives its clearest expression in Aberdeen Railway Company v. Blackie in which a contract between the company and a partnership of which one of the directors was a partner was avoided at the instance of the company notwithstanding that its terms were perfectly fair."(4)

Hahlo similarly states the rule:

> "As to the rule that, unless otherwise provided in the articles, a director cannot contract with his company unless a general meeting after full disclosure, approves the contract see further Aberdeen Railway Company v. Blackie Bros."(5)

The Aberdeen Railway Case is, as we have seen, a case where a director purported to act both for his own company and for the partnership of which he was a member. In Re Transplanters it was held that it was not possible for the director of a company to acknowledge on behalf of that company a debt owed to himself. In other words neither of these cases are authority for a rule that a director cannot contract with his company. What is more Palmer's statement as to trustees and agents is in fact totally wrong. The rule with regard to such persons is that when contracting with their beneficiary they are under a duty to do so openly and to disclose any information which they may have acquired during the course of the administration relevant to the transaction. If they fail to do this the contract is voidable. Palmer, however, advances another reason, he says:

> "... unless the articles confer on a director express powers of contracting with the company, a director's powers of so contracting are extremely limited. He may take up shares or debentures, including convertible debentures, of the company (though he cannot vote in respect of allotments to himself), and he may buy the right to subscribe for shares or debentures, although he is prohibited from buying options in quoted shares or debentures. In any other respects he is, like a trustee, disqualified from contracting with the company, and for good reason: the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising."(6)

This is the reason of Heathorn's Case and it was used to explain not why a director could not contract with his company but why he could not contract with his fellow directors.

If we exclude the position where the fiduciary sells property to his beneficiary which he ought to have, in the first place, purchased for his beneficiary (a case which clearly must be dealt with on different principles) the rule of equity may be stated as follows. The fiduciary must stand at arms length, act openly and disclose information he has ascertained concerning the transaction as the result of his position as a fiduciary. The position in Roman Dutch Law is, it is submitted, the same for the administrator is under a duty when so transacting to act palam et bona fide.

In Hely-Hutchinson v. Brayhead Limited[7] the facts were as follows: R and P were directors of B company, R being also chairman and de facto managing director. P agreed to advance money to company X if B company secured his position both in regard to the sums he would advance and in regard to sums he had already advanced to the company. In the past R had invariably acted on his own, without knowledge of the board, in entering into contracts on behalf of B company, the usual practice being for him to report the contracts later to the board. Acting on behalf of B company he secured P against loss. Article 99 of B company's articles of association provided that "a director may contract with and be interested in any contract... with the company... and shall not be liable to account for any profit made by him be reason of such contract... provided that the nature of the interest of the director in such contract... be declared at a meeting of the directors as required by Section 199 of the Companies Act 1948". No disclosure was made. The company to which these advances were made subsequently went into liquidation and B company denied liability to P on the grounds, inter alia, that there had been no disclosure and that the contract was therefore unenforceable. Roskill J. in the course of his judgment said:

> "The true principle is this - although I accept that there is little or no authority to support it; there is no rule of company law that a director could not validly contract with a company of which he is a director. But equity ensured that the company could, when appropriate, recover any profit made by the director as a result of his making such a contract with the company by reason of his fiduciary position, unless he was relieved from the obligation so to account by compliance with the relevant article or statutory provision. Further, in certain cases equity would permit the company to void the contract."(8)

It is submitted that this is a correct statement of the rule.[9] Roskill J. held that the company had not sought to void the contract and it was now too late. It is not clear whether he was of the opinion that this contract was in fact voidable for, having decided that it could not now be voided, it was unnecessary for him to go into the question. He did, nevertheless, point out that failure to comply with the relevant article did not affect the validity of the contract it merely brought the common law rule into operation. In the Court of Appeal it was accepted that the contract was voidable. Denning M.R. stated the rule thus:

> "It seems to me that when a director fails to disclose his interest, the effect is the same as non-disclosure in a contract uberrimae fidei, or non-disclosure by a promoter who sells to the company property in which

> he is interested... Non-disclosure does not render the contract void or a nullity. It renders the contract voidable at the instance of the company and makes the director accountable for any secret profit which he has made."(10)

Lord Wilberforce said

> "(Article 99) says first that a director may take an interest in a contract, and then says he shall not be liable for the profit provided he has made the statutory disclosure. It seems to me that what it means is this, that if the statutory disclosure is made, then directors contracts with the company are exempted from the normal consequences which would follow under the general law where one person in a fiduciary position enters into a contract with a person to whom he owes the fiduciary duty; and there is also the second consequence, that the person in the fiduciary position does not have to account for any profit. There is nothing in this article which positively attaches any consequence to a failure to disclose. All that it does is to relieve a contracting director from the consequences which would attach under the general law, and these consequences as regards the validity of a contract are in my opinion that the contract is voidable at the option of the company."(11)

This case would, it is submitted, fall within the case of a director making a profit from such a transaction and would therefore require the consent of the company in general meeting or compliance with any article in the company's articles of association. Therefore, the contract was voidable. What is the position where the director does not stand to make a profit? The rules of both equity and civil law are to the effect that he must act openly and must disclose any information relevant to the contract. What exactly must be disclosed in the circumstances is difficult to say. We have seen that in equity the fiduciary's disclosure was formerly limited to the disclosure of facts ascertained by him during the course of his administration but that this duty appears now to be more extensive. In civil law he must act bona fide and, it has been submitted, this requires the disclosure of information but, again, it is difficult to say exactly what information must be disclosed. It is submitted that this duty to disclose is based upon the fiduciary's duty to act in the interests of his beneficiary and therefore he should be under a duty to disclose all information which he has obtained which he would have been under a duty to disclose had he not been contracting with himself but merely acting on behalf of the company. In other words he must disclose all information in his possession which would affect in any way the company's decision as to whether or not it should enter into the contract and, if so, on what terms.

Parsons says, and this is undoubtedly the accepted rule, "so long as a director remains a director the general law insists that the board cannot act

for the company in contracting with him". Today this rule appears to be somewhat anomalous for as a director may, without the consent of the general meeting, not take part in the deliberations of the board as to a certain contract there seems to be no reason why he should not make disclosure to the board. After all there can be no question here of the board relieving him of his duty. He must disclose to the company and surely he does this if he discloses to the board. There can be no question of permitting him to have an interest in the contract for he does not act for the company and the decision of the company is whether or not to enter into the contract. If the directors consider, in good faith, that such a contract will be in the interests of the company they should be able to enter into it on behalf of the company. In any event, in Roman Dutch Law, the position may well be that directors may do so upon the analogy of the tutor transacting with co-tutors.

PROFITS

As we have seen, the concept of profits in equity covers three situations. Firstly, property (properly so-called) which was entrusted to the fiduciary and which he has misappropriated.[1] This type of "profit" need not concern us here. It is obvious that in the case of the company this will either be theft or fraud and the director's liability is exactly the same as that of any third party. Secondly, those advantages obtained by a director as the result of his having done something for himself which he ought to have done for his company. This type of "profit" concerns, in principle, the breach of an undertaking. These will be dealt with after we have first considered the third type of profit, namely, those advantages obtained by the fiduciary in the course of his administration of the beneficiary's affairs but which he was under no obligation to obtain for him. There is, however, one exception to this arrangement. Those profits of the third type which arise out of transactions between the director and his company will be dealt with in conjunction with our consideration of the second type of "profit". This is because of the peculiar development of these rules in equity where, in any event, the above distinctions do not exist.

Parsons, clearly referring to the third type of profit, says:

> "In these situations what has been done by the director is so related to the functions of his office that there is clearly a duty on him to account for the benefit to the company."(2)

It is submitted that within this class we may include bribes for a director by taking a bribe does not as such breach his duty to act in the interests of the company, although he might well do so subsequently as the result of his having taken it.

The duty to account for these profits is said to be placed upon the director in order to prevent him from breaching his primary duty to act in the interests of his company and, as we have seen, it has been suggested that it was only developed into a general rule during the latter part of the nineteenth century. An early example of the application of this general rule is the case of Parker v. McKenna.[3] Here a new issue of shares of a bank was offered to the existing shareholders at a premium. The directors arranged with one, Stock, to take, at a large 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 of these shares. They did so and made a profit. The court held them accountable for this profit, Lord Cairns stating the rule thus:

"The court will not endure and is not in a position to ascertain, whether the bank has or has not lost by the acts of the directors. All 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."(4)

James L.J. said:

"... 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 a matter of his agency, can be allowed to make any profit without the knowledge of his principal; that the 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 be able to put his principal to the danger of such an enquiry as that."(5)

The leading case in English Law on this subject is that of Regal (Hastings) v. Gulliver.[6] As this case is usually considered to be "an extreme case" a consideration of it and the authorities cited in it gives a very clear picture as to the rule and its development. The facts of this case are well known. Briefly, they were as follows: the appellant company (the plaintiffs in the action) owned a cinema. Its directors, with a view to the future development or sale of their company, were anxious to extend this sphere of its operations by the acquisition of other cinemas. They accordingly formed a subsidiary company to take a lease of two other cinemas, its directors being the same as those of Regal with the addition of that company's solicitor. 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. The owner of the two cinemas, however, would not grant the company a lease unless its directors were personally guaranteed the rent. This they were unwilling to do and it was then agreed that the leases would be granted to the company provided it had a paid up capital of at least £5,000. Regal was unable to subscribe for more than 2,000 shares and the remaining 3,000 were therefore taken up by its directors and their friends. Subsequently all the shares in both companies were sold and the directors made a profit of £7000 on their shares in the subsidiary. The new owners of the company then brought an action to recover this sum. The action was based upon the allegation that the directors had used their position as such to acquire the shares for themselves with a view to enabling them at once to sell them at a very substantial profit, and that they obtained

the profit by using their offices as directors and were therefore accountable for it to Regal. Furthermore, 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.

In the Court of Appeal Lord Greene M.R. said:

> "... once they have admittedly bona fide come to the decision (that the company could not put up the money), it seems to me that their obligation to refrain from acquiring these shares came to an end. In fact, looking at it as a matter of business, if that was the conclusion they came to, a conclusion which, in my judgment, was amply justified by the evidence frc a 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 the company w 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 on one conclusion, namely, that the appeal must be dismissed with costs."(

The House of Lords, however, held that the defendant's liability to account di not depend "upon proof of mala fides" - which clearly means, in this context, proof of their failure to act in the interests of the company. Thus Viscount Sankey said:

> "In my view, the respondents were in a fiduciary position and their liabili to account does not depend upon proof of mala fides. The general rule 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 persona interest conflicting with the interests of those whom he is bound to prote If he holds any property so acquired as trustee, he is bound to account f it to his cestui que trust."(8)

Lord Russell of Killowen came to the conclusion that:

> "In the result, I am of the opinion that the directors standing in a fiducia relationship to Regal in regard to the exercise of their powers as direct and having obtained these shares by reason and only by reason of the fac that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they made out of them.

With this Lord Macmillan, Lord Wright and Lord Porter concurred.

The earliest case which the courts cited as authority for this propositio was that of Keech v. Sandford.[10] It was cited not only as authority for the rule that all profits must be accounted for but also for the fact that it was immaterial whether or not it was impossible for the directors to have obtained the profit for Regal. We have already considered this case and it is clear th it is not authority for a general rule as to profits. What is more, if it were to

be followed, the directors should not have taken the opportunity at all and therefore one would be compelled to come to the rather ridiculous conclusion that the directors should have not entered into the transaction although, in doing so, they certainly benefited their company. The next case that was cited was that of Ex parte James.[11] We have seen that this was a case in which a trustee had himself purchased the trust assets and, although the court was probably correct in holding this case to be authority here because the English Courts have always looked upon the rule as one, it is nevertheless clear that the rule governing such transactions should be, in principle, quite different from the rule relating to profits. Then the court cited Hamilton v. Wright[12] Here a trustee purchased an annuity from the trust acting both on behalf of it and for himself. Lord Brougham said that:

> "There cannot be a greater mistake than to suppose as seems to have been done below, that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty."[13]

He referred to Ex parte Lacey[14] where much of what Lord Eldon said related to the case of the trustee selling to himself which was, of course, clearly in point in Hamilton's Case but not in Regal's.

A case upon which much stress was laid was that of Ex parte James[15] which was, as we have seen, also a case of a fiduciary selling to himself; in fact the court cited Lord Eldon here to the effect that "the purchase is not permitted in any case however honest the circumstances; the general interest 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". This was also the position in the next case cited, namely, Aberdeen Railway Company v. Blackie.[16] Then the case of Parker v. McKenna was referred to wherein the general rule was stated, it being said that an agent is liable for all profits made "in the course of his agency". It would therefore appear to be good authority for the judgment in Regal's Case provided it is agreed that there the profit was made by the directors during the course of their administration of the company's affairs. Then the case of Imperial Mercantile Credit v. Coleman[17] was cited where, it will be recalled, a director was made to account for a commission he had received as the result of a contract which he had brought about between his company and a third party. Here Malins V-C said that:

> "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 they are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such a duty."(18)

In other words Malins V-C was of the opinion that Coleman could have obtained this profit for his company. Deciding that the only way the defendant could have retained such a profit was by obtaining the consent of the company in general meeting, he held that Coleman was accountable for the profit. His decision was reversed on appeal upon the ground that the articles had provided for disclosure to the board. This decision was in turn reversed by the House of Lords on the ground that the defendant had not made full disclosure to the board. In Regal's Case it was said that liability arose on the ground 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." It is doubtful whether Coleman's Case goes as far as this and its reasoning can only be extended to cover the circumstances of Regal's Case if one introduces some sort of irrebuttable presumption to the effect that whenever a director makes a profit he has done so by disregarding his duty to his company -even although the court in fact finds that he did not do so.

The next case cited was that of Huntington Copper Company v. Henderson[19] wherein it was stated that a trustee was liable for all profits made "through the execution of his trust". The rule in that case was therefore the same as in Parker v. McKenna. Then the case of North Australian Territory Company v. Archer's Case[20] was referred to. Here A, on being requested to become a director of a company by its promoter, agreed to do so upon the terms that, if he should at any time desire to part with his qualification shares, the promoter would purchase them from him at the price he paid for them. A never disclosed this to his co-directors or to the company. Later he resigned and at his request the promoter bought the shares as agreed. At that time, however, the shares were valueless and the company was subsequently wound-up. Its liquidators sued him for the sum he had received from the promoter. In holding that the company's claim was good, Lindley L.J. said:

> "Unquestionably the company can, and the principle upon which I rely in support of that opinion cannot be better stated than it was by Lord Justice Mellish in Hay's Case.(21) He says 'There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter

> of his agency beyond his proper remuneration as agent. It is perfectly settled that the rule applies with peculiar stringency to the directors of joint-stock companies who are agents of the company for effecting the sales or purchases made by the company.'"(22)

It was argued in Archer's Case that the defendant had received nothing from the company but Lindley L.J. rejected this. The defendant had, by this arrangement, put himself in a position in which the articles had never intended him to stand. Then, displaying a rather curious logic, he said:

> "... when it is said that there is no loss to the company, that is really begging the question. If the money which Mr. Archer got from Mr. Murray Smith ought to be accounted for to the company, the company loses if they do not get it."(23)

Although Lindley held that the bargain was "fraudulent" in that its object had been to release the director from an obligation which he was required to undertake in terms of the company's articles, the latter reasoning quoted above is clearly not based upon conflict of interest but solely upon the duty to account for all profits made. Hay's Case[24] referred to by Lindley L.J. was not referred to in Regal's Case. The use of it as authority, however, in the North Australian Territory Case is instructive. In this case, before the formation of a company for the purpose of purchasing certain property, the vendors agreed with H that he should become a director and they provided him with the one hundred shares necessary to qualify for that position. At a meeting of directors cheques were then drawn on the bankers of the company and given to the vendors in payment of part of the purchase money. One of these cheques being for the same amount as that due by H for his shares. This cheque was then endorsed in H's favour and paid by him into his bank. He then drew a cheque for the same amount and gave it in payment for his shares. Here Mellish L.J. said:

> "It is idle to say that if there is a rule in a Court of Equity that a director is a trustee - that he is an agent, and that he cannot make a profit out of his agency unknown to the company - such a transaction should stand. As in Parker v. McKenna he was an agent at the time when this profit was bargained for, and at the time which the profit was received, therefore the result is, that it was received for the benefit of the company."(25)

Thus the "profit" which Hay had made was not that type of profit with which we are dealing here. What is more it could only be a "profit" in the sense in which that word is used in equity. Nevertheless it is said to be an application

of the same principle.

Finally the case of Boston Deep Sea Fishing & Ice Company v. Ansell[26] was referred to here the defendant was the managing director of the plaintiff company. He contracted on behalf of the company for the construction of certain fishing-smacks and, unknown to the company, took a commission from the ship builders. He was also a shareholder in an ice company and in a fishing company which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing-smacks and employed the companies. This the defendant did and accordingly received the bonuses. Here Bowen L.J. said:

> "There can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or receive it without bargain, unless his master knows it..."(27)

It is therefore clear that both the North Australian Territory Case and Ansell's Case relate to profits made contrary to the interests of the company although, of course, they could not have been made for the company.

The decision in Regal's Case has been much criticised. To Gower the claim was "wholly unmeritorious".

> "Recovery by the company would only benefit the purchasers, who, if the action was successful, would recover an undeserved windfall resulting in a reduction in the price which they had freely agreed to pay. It also appears that the directors held a majority of the shares in the company so there would have been no difficulty in obtaining ratification of their action by the company in general meeting; but acting, as it was conceded they had, in good faith and in full belief in the legality and propriety of their action it had not occurred to them to go through this formality. It was also clear that the directors had not deprived the company of any of its property (unless information be regarded as property), or robbed it of an opportunity which it might have exercised for its own advantage; the 3,000 shares in the subsidiary had never been the company's property and, on the facts as found, the company could not have availed itself of the opportunity to acquire them... This may well be thought to be carrying equitable principles to an inequitable conclusion."(28)

Parsons considers that the decision is one which "the lawyer will no doubt cherish as a legal curiosity, but which the layman will tolerate only if he has a taste for the ironic."(29)

I think we may safely ignore that part of this criticism which relates to the fact that the purchasers of Regal obtained a "windfall" profit. After all, this must inevitably occur in the case of a take-over and the answer must lie either in the fact that the company should have sued for the profit before the sale or in a possible action by the former shareholders against the former directors. The question, however remains whether the directors should have been held accountable. It is submitted that in South African Law they would have been liable on the ground that it was a profit made in the course of their administration. In our law the question of bona fides is irrelevant. In fact incidental profits are usually made because the administrator did act bona fide in the interests of his beneficiary. In English Law the question is by no means so simple. As we have seen, it is frequently said that a director is liable for all profits made from his position as such. (e.g. Lord Russellof Killowen in Regal's Case) Nevertheless, it is always maintained that the rule arises from the conflict of interest and duty principle. Although their Lordships were of the opinion that there was such a conflict their reasoning is unacceptable for it in fact amounts to this. The directors would, it is true, have purchased the shares for their company if this had been possible. They were, however not able to do so and therefore, acting in the interests of their company, purchased the shares themselves. In so doing they placed themselves in a position where their interests may have conflicted with their duty.

This sort of anomalous reasoning is bound to occur whenever the conflict of interest and duty principle is extended so as to mean that a fiduciary may not place himself in a postion where he may conceivably breach his undertaking to act in the interests of his beneficiary.

Gower, as we have seen, suggests an alternative reason why the directors may have been accountable, namely , that the opportunity was the "property" of the company. Sealy in fact maintains that the court should have adopted this approach.(30) If this reasoning is correct, and we shall see that strong authority for it can be found, it would, of course, mean that a director would be accountable where, acting in his own interests, he takes for himself an opportunity which his company was unable to use. It is submitted that in our law a director would not be accountable in such a situation for, in so doing, he would not be administering the company's affairs. (He may, however, be

liable in damages if, although the company was unable to take the opportunity, the fact that the director took it resulted in damage to it.)

This question came before the Canadian courts in the recent case of Peso Silver Mines Limited v. Cropper.[31] An offer had been made to the plaintiff company to purchase certain mining claims which were contiguous to the claims already owned by it. At the time, however, the company had been undergoing a process of rapid development and its financial resources were somewhat strained. Its board of directors rejected the offer and the trial judge found that this decision was made "in the best of faith and solely in the interest of the appellant, and not for any personal or ulterior motive on the part of any director, including the respondent." It is evident that the major reason for rejecting the offer was the financial position of the company although there was also some evidence to the effect that the directors considered the claims to be a doubtful business risk. The respondent, Cropper, was at the time the managing director of the company. Subsequently, he together with two other directors and the company's geologist, formed a company to exploit these claims. The following year the company, needing fresh capital, sold one million shares to Charter Oil Company Ltd. which resulted in the latter company gaining control of Peso. The new controllers requested the defendant to hand over his interest in the company he had formed to exploit these claims and on his failure to do so dismissed him and instituted proceedings. The action failed and the trial court's decision was confirmed by the Court of Appeal and, on further appeal, by the Supreme Court of Canada. The majority of the Court of Appeal considered that before the principles in Regal's Case could apply there had to be evidence that the transaction was entered into "by reason of the fact, and only by reason of the fact, that they were directors and in the course of the execution of that office." Norris J.A. dissented. He considered that the defendant should be made to account upon the ground that he had acquired the information relating to the claims in the course of the execution of his duties as a director. He considered that the company had to prove that Cropper could have acquired the information as a result of his office and not that it was necessary for them to prove that he could only have so acquired it. It was argued for the respondent that the following statement of the trial judge was correct.

> "... I find as a fact that the defendant was not only able to acquire the property without... making... use of confidential information he acquired in the course of the exercise of his office as director... but that there was no evidence to suggest that D made his offer only to the plaintiff's

directors or that he made his offer to them first."(32)

Norris J.A. rejected this approach. "In my opinion the onus was on the respondent to show that the transaction was one into which he could properly enter". The defendant had not, he held, met this onus. He considered that the question here involved a matter of basic policy and in rejecting counsel's contention that "because of the complexity of modern business, modern practice and modern way of life, the strict rule laid down in Regal and other cases should not be applied". Norris J.A. said:

> "With the greatest respect it seems to me that the complexities of modern business are a very good reason why the rule should be forced strictly in order that such complexities may not be used as a smoke screen or shield behind which fraud might be perpetrated. The argument is purely and simply an irrelevant argument of expediency as to what the law should be, not what it is. It might as well be said that such an argument if given effect to would open the door to fraud, and weaken the confidence which ordinary people should have in dealing with corporate bodies. In order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits. No great hardship is imposed on directors by the enforcement of the rule, as a very simple course is available to them which they may follow. As Lord Russell of Killowen said in the Regal case '(The directors) 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'.
>
> It is not necessary that there be proof of actual conflict in interest. It is sufficient that the interests 'may possibly conflict' as Lord Cranworth said in Aberdeen Railway Company v. Blackie Bros. That case shows that it is not of importance that the company should avail itself of the opportunity to take the claims..."(33)

Cartwright J. delivering the judgment of the Supreme Court of Canada said that there was no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any such information by reason of his office. He then went on to quote Lord Greene M.R. in Regal's Case where he said:

> "To say that the company was entitled to claim the benefit of those shares we involve this proposition: Where a board of directors considers an investment which is offered to the company and bona fide comes to the conclusion that it is not an investment which their company ought to make any director, after that resolution is come to and bona fide come to, who chooses to put up the money for that investment himself must be treated as having done so on behalf of the company, so that the company can claim any profit that results to him from it. That is a proposition for which no

particle of authority was cited; and goes, as it seems to me, far beyond anything that has ever been suggested as to the duty of directors, agents, or persons in a position of that kind."(34)

He then went on to cite the remarks of Lord Russell of Killowen upon this statement by Lord Greene:

"One final observation I desire to make. In his judgment Lord Greene M.R 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 compa funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive there from. As to this, I can only say that to my mind the facts of his hypothetic case bear little resemblance to the story with which we have had to deal... (35)

Cartwright J. then went on to say that if the House of Lords in Regal's Case had considered that in the hypothetical case as stated by Lord Greene the director would have been liable to the company "the elaborate examination of the facts contained in the speech of Lord Russell of Killowen would have been unnecessary". The facts in the present case, he considered, were "in all material respects identical to those in the hypothetical case stated by Lord Greene and I share the view which he expressed that in such circumstances the director is under no liability."(36)

Commenting on this case Prentice says that the rejection of the opportunity by the company could be analysed as having the consequence of either "(i) removing the conflict-of-interest problem and operating in the same way as disclosure does with respect to directors' contracts with the company, or (ii) it could be interpreted as being tantamount to condonation or authorisation of the directors' conduct". He says that it is difficult to assess which approach the courts in fact followed but is of the opinion that "a close reading of both judgments" suggests that the court followed the first mentioned. Thus the Court of Appeal was of the opinion that a "bona fide rejection would be the best evidence that... it would not be against its (i.e. the company's) interest". He then goes on to say that:

"Admittedly Peso does differ from Regal in the important respect that in the latter case the directors had considered the leasehold of the cinemas as a sound business investment for the company. But surely the rejection of the business opportunity in Peso did not eliminate the conflict-of-interest problem, as the decision to reject had the dual characteristic of not only depriving the company of the business opportunity, but also of facilitating its subsequent exploitation by the directors, the very persons who had made the cession to reject on behalf of the company."(38)

This is a curious criticism. Admittedly, if the directors wished to purchase the claims for themselves and then made a decision on behalf of the company rejecting the offer, they were acting in a matter in which they had an interest. But there was no evidence that this was the case. It is submitted that in both Norris J.A's. judgment and Prentice's criticism we have the same anomalous idea that a director has breached a duty towards his company if he places himself in a position which might conceivably have caused him to fail to act in the interests of the company - even although it is found on the facts that it did not. It must be admitted, however, that whilst the reasoning in Keech's Case would, if applied to Regal's Case, have led to the strange conclusion that the directors could not have acted in the interests of their company, this would not have been so in Peso's Case. In any event, it is clear that the alternative reasoning, namely that the opportunity was the "property" of the company, was not accepted.

Profits made from contracts with the company and "corporate opportunities"

It is, admittedly, somewhat anomalous to treat these two matters together for they are, in principle, quite distinct from each other. The one concerns the question as to whether or not a director is liable for a profit made as the result of a transaction between himself and his company whilst the other is a question of his liability for acting on his own behalf when he ought to have acted for his company. The rules relating to them are, however, so interwoven in English Law that it is impossible to deal with them separately.

There are probably two reasons for this. Firstly, in practice, the sort of opportunity which a company can exploit very frequently cannot be exploited by an individual. He can, however, if he is dishonest, acquire rights to it and then sell or cede these to his company at a profit. Furthermore, where this has happened the director's breach of duty in taking the opportunity for himself is more likely to come to the attention of the company.

But if these factors are relevant, it is nevertheless true that by far the most important reason for the fact that these two questions were developed together lies in the nature of the Chancellor's jurisdiction itself. He was never able to compel the fiduciary to carry out his undertaking but merely acted to prevent him from doing something contrary to it which would be injurious to his beneficiary in respect of property which is his in equity. It is the latter part of the nineteenth century, after the rules relating to companies have already begun their development, that this proprietary emphasis is weakened by the introduction of the general liability for profits. Even then

equity never purports to be enforcing the fiduciary's undertaking but merely to be preventing him from taking some advantage when carrying out that undertaking and, by so doing, compelling him - if he acts at all - to act only according to it.

The first question that arises, both in principle and in practice, is therefore how to protect a company from a director who, knowing the company requires certain property, purchases it himself and then resells it to his company at a profit. The rules relating to trustees are silent here.

Drawing an analogy between the director and the trustee, the Chancellor proceeded to apply the rules evolved for the latter to the former. As far as transactions between the director and his company are concerned there is but one rule that is in truth analogous and that is the rule to the effect that when purchasing the trust property from his cestui que trust the trustee must do so openly and he must disclose any information which he has obtained during the course of his administration. If this is not done the transaction is voidable. This provides the cestui que trust with very effective protection for, if he wishes to void the contract, his beneficial interest in the property is recognised and he may either trace it or obtain compensation (not damages) from the trustee.

Other rules relating to trustees which are not directly analogous to this particular question are those requiring him to account for profits made during the course of his administration and the rule preventing him from acting in matters in which he has an interest. Eventually a rather curious set of rules are evolved for such a situation by combining all three of these rules.

The questions that arise here are therfore; "When and why are such contracts voidable?"; "When is the director liable for the profit made from such a transaction?" and "How appropriate are equitable remedies in this situation?"

It is evident that the director may either sell property to his company which he should have, in the first place, acquired for it or he may sell property which he acquired when under no such duty and he may do so openly or he may do so secretly - e.g. via a third party or by not disclosing the fact that he is the owner of it or has an interest in it. It would seem that where the transaction is carried out secretly it should be voidable regardless of the question of profit. This would follow from both Equitable and Roman Dutch principles. One would think that where he sells property to the company which he was under no duty to acquire for it, no duty would be imposed upon him to disclose what profit he will make from such a transaction. After all the property is his - he may have even acquired it by way of inheritance. What might, however,

be relevant here is the actual market price at the time of the sale to the company. In other words, if the director knows that he is obtaining more for his property than he could otherwise obtain, it might well be that he will have to point this fact out to his company in order to ensure that he is not taking advantage of the ignorance of his fellow directors or the members of the company. Furthermore, if he has any information which he has acquired as director, relating to the advisability of the company's purchase of the property he would, one would think, have to disclose this. Where disclosure was required and was not made, the contract should be voidable and, if not voided, the company should have a right of action for damages or, at least, although this is hardly the most appropriate remedy, an action for any profit the director might have made. If, however, the "profit" is calculated as the difference between the market value of the article when sold and the price paid by the company it will amount to the same things as damages.

On the other hand, where the director has purchased for himself what he should have purchased for his company there appear to be two possible grounds for his liability. In the first place, it could be said that his act was an act of administration for he purchased the property with the intention of selling it to the company. Therefore he should be liable for all profit made on the transaction. Furthermore, he should be liable for damages if the company suffers any damage over and above the amount of the profit. Secondly, and this appears to be the better approach, he should simply be liable for damages for in truth there was no act of administration.

It is clear that Chancery is severely handicapped when treating with this question. Firstly, it does not grant damages and clearly in many cases it will be damages the company has suffered. Furthermore, it does not enforce the director's undertaking as such. Because the undertaking is not enforced the question therefore rises why, on what ground, is the director to be held liable for the "profit"? The question can only be decided by answering the further question as to why he was not entitled to purchase such property for himself. If it were held that there is nothing preventing him from doing so, there appears to be no reason why the company should be permitted to retain the property and claim the profit. If, however, he was not entitled to purchase the property for himself then clearly the profit can be claimed. There is only one course open to equity in such a situation and that is to hold that the director will be deemed to have purchased the property for the company and, regardless of his intention, will be held to be a trustee of that property for the company the moment he purchases it. It therefore follows that when he "resells" the

property to the company the property in fact already belonged to it.

Why must this approach be adopted? The true reason for his liability is, of course, because he was under a duty to take it for the company and having taken it for himself he has breached this duty and is therefore liable to the company in damages regardless of whether or not he resells it to the company. But Chancery cannot enforce the undertaking. It therefore looks upon the "opportunity" as "belonging" to the company. There is a proprietary connection between the opportunity and the company and therefore the director, when he purchases the property, takes for himself what is in fact, in equity, property of the company.

It was therefore in deciding when a director was liable for the profits he had made in such a transaction that the court first developed the law relating to what has become known as corporate "opportunity".

Sealy criticises Regal's Case as follows:

> "It is disappointing that Regal (Hastings) was argued only as a claim for profits owed to the company based on quasi-contract. If the plaintiff company relied on Cook v. Deeks and alleged that the profits belong to it, it is submitted that the plea would have been unanswerable."(1)

Whether or not this criticism is justified, it does point to the difference between the manner in which profits properly so-called (i.e. those made by a director during the course of his administration) are claimed and "profits" in the sense of "corporate opportunities" are claimed. In the latter case he is treated as having appropriated corporate property to himself whilst in the former, as he was under no prior duty to acquire the profit for the company, he is simply made accountable for it on the basis of an equitable "right" arising from the equitable wrong of placing himself in a position where his interests and duty may or did conflict. In such a case he is not a trustee of the profit until the court declares him to be so and this declaration is merely a remedial device. Thus equity distinguishes between what is in fact a breach of mandate and the administrator's duty to account for profits made during the course of his administration.

Finally, it must be noted that although, in holding the director liable for "corporate opportunities" taken by him, the court appears to be coming very close to enforcing the director's undertaking as such, it does not go quite so far. If the remedy still sounds in "profit" the liability is still basically delictual. The director's duty here has been described as follows:

"The fiduciary duty of loyalty which a director or officer owes to his corporation broadly forbids him to pursue his own interests in a manner injurious to the corporation. One of the refinements of this basic rule is the corporate opportunity doctrine, which prohibits an 'executive' - here defined to include either a director or an officer - from appropriating to himself a business opportunity which in fairness should belong to the corporation, and subjects any property or profit he so acquires to a constructive trust in favour of the corporation. Like other facets of the general duty of loyalty, this doctrine derives from a judicially drawn analogy between the position of a director or officer and that of a trustee."(2)

The Development of the Rules

The earliest case here is a case of Benson v. Heathorn[1] We have already noted some of the facts of this case. It was said that the company claimed profits from H in respect of two matters: firstly, the profits from the sale by H of a ship to the company, and secondly, the commission earned by him while acting as its agent. As regards the former transaction the facts were these: H purchased a vessel for the sum of £1,340. It appears from the judgment that only after he had done so the company required to purchase a vessel of the same type as the vessel H had bought. In any event, the Vice-Chancellor assumed in H's favour that this had been the position. H sold the vessel to the company for £1,500 not disclosing the fact of his profit and the company subsequently sued for this profit. Here Knight-Bruce V-C held that:

"Under these circumstances, it is impossible for me, whatever may have been the strict intentions of Mr. Heathorn's mind when he bought the vessel - is it possible for me a Judge in a Court of Equity to hear him say that he bought it otherwise than as agent?... The declaration, there, in that respect, must be that the defendant Heathorn ought to be considered to have purchased the ship Nourmahal for £1,340 as the agent and on behalf of the directors."(2)

Thus H had to account for the difference between what he had paid for the vessel and what he sold it to the company for. On this reasoning, however, he did not actually account for profits properly so-called. The ship became the company's in equity when he bought it and what he in fact had to account for was the overpayment to him of his expenses.

Why did the court consider that the defendant must have purchased the vessel as agent for the plaintiffs? Knight-Bruce V-C does not actually state his reasons for so holding. It would seem from the fact that he assumed in the defendants favour that the company did not require the vessel when the defendant purchased it for himself, that it was the subsequent resale at

at the advanced price which was the wrong. The defendant ought to have sold it to the company at the price he purchased it at. If he wished to obtain more, then he should have disclosed this fact. Why ought he to have sold it to the company at the original purchase price? It would seem that the reasoning here is that if he did not he would be obtaining an advantage at the expense of the company to whom he stood in a fiduciary relation. In other words this is the traditional reasoning of the Chancery when dealing with transactions between persons standing in a fiduciary relationship to one another. Heathorn is only presumed to have purchased the vessel for the company in order to give the company a right to the profit. Heathorn's profit was the company's money for it had purchased its own ship.

In In re Cape Breton Ltd,[3] Cotton L.J. said that Heathorn was accountable because he had a mandate to purchase for the company but this was not so. Sealy[4] cites Heathorn's Case in support of the proposition that:

> "There is ordinarily a presumption of law that the fiduciary's original purchase was made as fiduciary. He is estopped from showing that he bought bona fide for himself. It would be entirely in accordance with principle for the courts to have applied this rule to the director, for this conduct deprives the company of the collective judgment of all its directors which equity in other contexts has declared that it is entitled to have. Indeed this was done in some early cases."(5)

Here he cites Heathorn's Case. Although it is true that the Vice-Chancellor speaks of the company being deprived of the collective judgment of all its directors, he did so only in connection with the company's claim for the commissions Heathorn had earned whilst acting as its agent.

A case not in fact concerning a director but nevertheless thought to relate to this principle and considered to be an authority for the rule relating to directors is that of Bentley v. Craven.[6] Craven was a partner in a firm which carried on business as sugar refiners. He was also, on his own account, a dealer in sugar and was employed by the firm to purchase sugar for them. In his capacity as a dealer in sugar he was in the habit of speculating and in fact did so with considerable success. Without acquainting his partners of the fact, he sold certain quantities of his own sugar at the market price of the day but at a considerable profit. It would seem from the judgment of the Master of the Rolls that his partners had specifically stated that they wanted no part in his dealings as they were a firm of sugar refiners and not speculators. They, nevertheless, on learning of these transactions, sued him for the profits.

This was a case where the agent had in fact purchased from himself and therefore the transaction was voidable. Nevertheless his partners did not seek to void the contract. The Master of the Rolls held that:

> "Two principles with relation to the doctrine of principal and agent have been recognised from the earliest times. One is that an agent employed to purchase cannot legally buy his own goods for his principal, neither can an agent employed to sell, himself purchase the goods of his principal. If he should do so, and thereby make a profit, his principal may either repudiate the transaction altogether, or adopting it, may claim for himself the benefit made by the agent... (I)t is founded on this principle, that an agent will not be called to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal... He (Craven) being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at a time when he thinks most beneficial... the only way in which a sale of (this) sort could be made valid and effectual would be by communication of the fact. The agent should say to his principal 'I have certain sugars of my own which I do not choose to sell to you, unless you give a particular price for them; you have the option to do it or not, as you think fit'. If he had said that, the relation of principal and agent between them would, so far as the transaction was concerned, have been determined."(7)

Craven had acted both for the partnership and for himself. It was a case of an agent to purchase who had purchased his own goods. The rule here is, of course, that such transactions are voidable. On what basis can the beneficiary maintain the contract and sue for the profit? The Master cited Massey v. Davies[8] and Gillet v. Peppercorne[9] as authority. The latter case concerns a claim for rescission and therefore it is only Massey's Case which is authority for this aspect of the judgment. There the reasoning was that an agent to purchase is under a duty to purchase in the most beneficial manner and to obtain a profit in so doing is a "breach of trust". From this and from the extract from the Master's judgment it is evident that the court is here, too, not concerned with the original purchase. Chancery does not enforce undertakings as such. Craven was perfectly entitled to sell his sugars to a third party or even to the company provided he did so openly. It was a breach of trust in such circumstances to have charged more than he purchased the sugar for and the profit therefore remained in equity the property of the partnership and Craven was accountable for it.

Sealy considers that this case is also authority for the rule that a fiduciary in such a position is estopped from denying that he made the original purchase for his beneficiary.[10] This is probably correct although it must be admitted that there is no mention of such a presumption.

The case of Tyrrell v. Bank of London[11] concerned the purchase of property by a company in which its solicitor, who had advised its directors as to the purchase, had an interest. The facts were as follows. T, the solicitor, entered into an agreement with R in terms of which he was to receive a share of the profit made on the sale of a portion of certain property owned by R and a share in the remaining portion. The idea was that T would use his position to induce the Bank to purchase the property. This he did and in his character as solicitor he acted for the Bank in the purchase of the property without informing it of his interest in the transaction.

Perhaps the most interesting aspect of this case was that the court could not simply estop Tyrrell from denying that he had entered into the agreement on behalf of the company for he clearly never had any express authority to enter into transactions on its behalf. The Lord Chancellor, Lord Westbury, found it unnecessary to do so and in this he was undoubtedly correct. As we have seen, the rule appears to have been that it was sufficient that the defendant stood in a fiduciary position to his beneficary at the time he purchased the property. Heathorne certainly never had a mandate to purchase. The Chancellor held that:

> "In my view of the case, it is only necessary to ascertain, that, at the time when the appellant agreed to take from Mr. Reed one-half of his purchase, he, the appellant, was acting in the capacity of solicitor to the respondents, and that he had advised or intended to advise, his clients to purchase that part of the property which was ultimately bought by his clients. It is, I think, immaterial whether a solicitor had, before his own contract, advised his client to buy and the client had agreed to act under such advice, or whether the solicitor intended only to give the client such recommendation if, in the result, we find the client buying the property whilst acting under the advice of the solicitor." (12)

Thus to his Lordship the relevant fact was that Tyrrell had entered into the agreement while the company's solicitor and with the intention of advising his clients to purchase the property. His Lordship continued:

> "The principle is that the solicitor shall not be permitted to make a gain for himself at the expense of his client. The client is entitled to the full benefit of the best exertions of the solicitor... It is abundantly clear that two of the most important principles to be ever most sedulously preserved in considering the cases in which there is any breach of the high duties that are incident to the relation of solicitor and client, have plainly been violated by Tyrrell. It was his bounden duty to tell his clients what he had done. It was his bounden duty to give his clients the benefit of these exertions which he had employed for his own advantage. He forgot the first duty of a solicitor in the concealment and falsehood which were practised." (13)

Thus we see that it was not that Tyrrell should have obtained the agreement for the Bank. He had failed to give his clients the benefit of his "exertions" and, having done so, had failed to inform them. By so conducting himself he had obtained an advantage at their expense.

But, if his Lordship did not consider it necessary to presume that Tyrrell acted on behalf of the company in entering into the agreement, how was he to be held accountable?

> "Therefore, My Lords, that in respect of the subject matter of the transaction carried on in this relation (the relation of solicitor and client), Tyrrell the appellant must be converted into a trustee for the respondents ... the foundation of the decree is the relation of solicitor and client, but that is constituted retrospectively by considering, first, what it was that the client took, and then, with respect to the subject matter of the transaction, the duties of th relation of trust and the obligation to account necessarily arise.
>
> You cannot, My Lords, I think, with propriety do more than declare Tyrrell to be a trustee for his client of the particular property included in the contract. He shall make no gain from his clients in respect of that property, but beyond that, I humbly submit to your Lordships that it would be impossible safely to carry the principle... For the limit of the agency of Tyrrell, the extent of the obligation of Tyrrell, the bonds of the relation of solicitor and client between Tyrrell and the Bank, are all to be ascertained by the extent of the property sold by Tyrrell to the Bank. As to that property, the obligation arises, with regard to other property there is no privity, nor any obligation."(14)

It is therefore evident that we are concerned with the old concept of advantage taken by a fiduciary from his beneficiary. The company having bought the particular property it followed that Tyrrell stood in the position of trustee in regard to it and therefore had to account for any advantage he took.

Lord Chelmsford, while purporting to agree with the Chancellor, took a rather different line:

> "But, I think it clearly appears from the nature of the dealings between Tyrrell and Reed, and afterwards between Reed and the company, that Tyrrell's object from the first was to obtain an interest in the property that it might afterwards be transferred to the company in a manner which would enable him secretly to secure himself a considerable pecuniary benefit out of the transaction."(15)

For this reason, his Lordship held, Tyrrell was under the circumstances presumed to have been the agent of the company in purchasing the property. Therefore, he said the contention by the defendant that he had purchased on his own account and therefore the company could rescind but could not take the profit, could not stand. He went on to make the following interesting

observations:

> "Whether if Tyrrell without previous authority from the respondents to procure premises for them, had joined Reed in his speculation, knowing that the property was likely to be eligible for the purpose of the respondents, but had not afterwards attempted to have the property transferred to them, they could have been entitled to lay claim to the benefit of his purchase, is a question which it is unnecessary for us to consider. In such a supposed case there would have been wanting the circumstances which exist in the present, to warrant the presumption that he acted as the agent for the respondents in obtaining the property."(16)

He then went on to suggest another hypothetical case:

> "Again, if T, without authority from them, but knowing the property to be eligible for them, and with the expectation that they would be desirous of purchasing it, had acquired it for himself, and, concealing his own interest, had sold it to them through a stranger, the only equitable relief to which they would have been entitled up to discovering the true circumstances, would have been to set aside the whole transaction."(17)

The present case, he said, went far beyond the above supposed situations for it was clear that the whole object of T was to obtain an interest in property which was about to be sold to his clients. That the acquisition of his interest was merely the first step in a scheme of securing to himself "an improper advantage from dealings with them, which his confidential relation of solicitor strictly prohibited". As far as the other property was concerned he said that he agreed with the Lord Chancellor that this property could not be decreed to be held in trust by Tyrrell for the bank. His reason was that:

> "... if Tyrrell had been authorised to buy the whole of the property which belonged to Reed, and had purchased it for himself, the company would have been entitled to the benefit of the entire purchase."(18)

This is a most interesting judgment. Tyrrell is presumed to be the agent of the company because he obtained his interest in the property as the first step in a scheme in order to obtain an improper advantage. The presumption is once again a remedial device but with one very important difference. His Lordship considered that, although an advantage may be taken by a fiduciary from his beneficiary so as to render the contract voidable, if the beneficiary is to be permitted to confirm the contract and sue for profits, the court must look to the original acquisition. Until now the emphasis has been upon the transaction between the fiduciary and his beneficiary. If the fiduciary took an unfair advantage then he was deemed to have purchased originally for his beneficiary or, even where this was not done, the courts nevertheless worked,

as Lord Westbury put it, "retrospectively". This change of emphasis is important. Although Lord Chelmsford uses it in order to found liability for what he clearly saw as a type of wrong in the traditional sense of an unfair advantage taken by a person standing in a relation of confidence to another, it opens the door for a greater emphasis upon the enforcement of the fiduciary's undertaking itself. If A has a mandate to purchase for B and instead purchases for himself, this "wrong" begins at the moment of his acquisition of the property and not merely when he comes to resell it to B. It is not so much the taking of an advantage from B as failing to do something for him which he undertook to do.

The change of emphasis must not, however, be exaggerated. Even today it has progressed but little. Nevertheless here are a few important decisions in which this reasoning has been used so as to enforce the undertaking as such regardless of the fact that there was no subsequent "resale". In Lord Chelmsford's second example we see the reasoning which will provide the basis for such a decision, namely, if A holds in trust for B at the moment of his acquisition of the property then, surely, B can immediately claim delivery. What is more it marks the beginning of a general tendency to look to what the fiduciary actually undertook to do.

Erlanger v. New Sombrero Phosphate Company[19] is the first of the modern authorities on the rule. Here a syndicate or partnership purchased the lease of an island in the West Indies for £55,000. The sale took place on the 30th August, 1871. On the 20th September that year they determined to form a joint-stock company and to sell the island to it for £110,000. The company was formed and the property sold to it at that price. In June the following year the shareholders appointed a committee to investigate the circumstances of the sale and the facts of its original purchase were revealed for the first time. The company then filed a bill to have the contract rescinded and this was granted. In the course of his judgment, however, Lord Cairns had the following to say of the possibility of a claim for the profits:

> "... I think it clear that the syndicate in entering into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was not to retain or work the island, but to sell it again at an increase of price, and very possibly, to promote or get up a company to purchase the island from them; but they were as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they like, and to sell it how, and to whom, and for what price they liked. The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit

> which they made on the re-sale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th August, 1871, is not, as I think, capable of being supported."(20)

This decision can probably be reconciled with the older cases but it must be admitted that this requires some very fine distinctions. The difference between the facts here and those in Craven's Case appears to be that Craven was an agent for the partnership at the time he purchased, even although he was undoubtedly purchasing on his own account and was in fact instructed not to purchase for it. On the other hand the promoters in this case did not stand in a fiduciary position at the time they purchased the island. Thus Craven was estopped from denying that he had purchased for the partnership whilst the promoters here were not. What is so hard to accept is the decision that Craven was in such a position and that the promoters were not.

The contracts in both cases were, however, voidable on the same grounds for here the promoters had not appointed an independent board.

> "(The promoters) stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts life, become, through its managing directors the purchaser of the property of themselves, the promoters, it is in my opinion incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made."(21)

In Re Ambrose Lake Tin Company[22] the shareholders of a cost-book mine had formed a limited company and sold a mine to it for £24,000 which in fact was worth £6,000. The agreement was sanctioned by them in their capacity as directors and the purchase price was paid for by the company in its shares. Afterwards the company was wound up. It was clear that this scheme was entered into so that the owners of the mine could sell their shares at an inflated value. The official liqudator claimed that the owners should pay the difference between the value of the mine and the price paid for it by the company to the company on its liquidation. This claim was rejected by the court. There was no fraud on the company all the members of which were parties to the agreement and, in any event, the vendors did not obtain their profit from the company as they were paid in shares. James J. had the

following to say:

> "Now what we have got here to consider is a sale in substance made by the vendors for themselves as beneficially interested, to themselves as directors of the company, being in that sense in a fiduciary character towards the company, and the sale is a sale by themselves in the one character to themselves in the other character. Of course such a sale is a thing that cannot stand, if it is questioned in time, and proper offers made to restore the thing purchased. And if there is any difficulty in the way of restoration, if it is made out that they had received something beyond the proper price of the property, there ought to be no difficulty in making them pay that extra value."(23)

Thus to James J., had the profit been obtained from the company, the directors would have had to account. Cotton L.J., however, took a different view:

> "The principle of that order (the order of the court of first instance which directed the directors to pay to the liquidator) must be this, that the company are at liberty to treat these persons as trustees of the property for the company, and treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company, to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time when the so-called vendor acquired the property he either acquired it for the company, or was in such a position of fiduciary relation to the company that any purchase made by him of the property available for the company must be considered as a purchase made by him as a trustee for the company. In that case what the court does is to go back to the original purchase made by the person who afterwards purports to sell it to the company at an advanced price, and to say that this was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing, which you are not entitled to retain."(24)

What is interesting here is the statement that the purchaser must have been in "such a fiduciary relation" that any purchase made by him is to be presumed to be made for the company. This seems to suggest that something more than a fiduciary relation is required and points to the undertaking itself.

His Lordship went on to say that, although he accepted that the contract was voidable as it had been made between themselves as promoters on the one side and directors on the other, he could see no ground upon which the company could, instead of setting it aside, claim the profits.

> "I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract, 'we will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company which is not binding and therefore we make another contract to take it from you for what is originally cost you...'"(25)

This argument is, of course, irrefutable. If an agent purchases his own goods the contract is voidable and there can be no reason why the principal should be permitted to retain the goods at the price at which the agent originally purchased it. But this, it would seem, is beside the point. The question is rather whether a principal can claim the difference between the price he paid and the market value at the time of the sale, if the agent sold at a higher price. The suggestion has, unfortunately, been taken to mean that an agent must, if he wishes to sell to his principle, declare the price at which he purchased the goods in order to ensure that the contract is, not voidable. To this point we will return. For the moment it should be stressed that the reason why the contract was voidable in this case was not this.

The next case to be considered is that of Re Cape Breton.[26] Here the facts were as follows: F and five others bought certain coal areas for £5,500. Two years later a company was formed of which F was a director. The company then purchased these areas for £12,000 cash and £30,000 fully paid-up shares, F having not disclosed his interest. Not altogether surprisingly the company went into liquidation. It was held that F was not accountable for the profits because he had bought the coal areas at a time when he was neither trustee, agent, nor in a fiduciary position to the company. He was therefore not obliged to sell the property to the company at the price he gave for it. Cotton L.J. stated that the plaintiff's claim for the profits could not be substantiated by any authority. He said:

> "Numerous cases have been brought before the court, but none are like the present, because, in all cases where relief was given, the case was that of a trustee of a director who had sold to his cestui que trust, the company, at an enhanced price, property he had acquired when he was trustee or director, and he was held to be liable for the difference on the ground that at the time he acquired his interest in the property he was in the position of a trustee. The principle in those cases is very clear. It is this, that having bought the property while he was a director, and so in the position of a trustee for the company, and having afterwards made it over to the company without disclosing his interest, he was estopped from saying that he originally bought the property on his own behalf, or otherwise than on behalf of the company. When therefore he pays a large additional sum of money out of the coffers of the company for the property, he is putting into his own pocket a sum of money by way of purchase-money paid by the company for that which was already their own."(27)

This is the traditional reasoning of equity, the transaction with the company being emphasised. F, having purchased when standing in a fiduciary relation to his company, is estopped from denying that he purchased it as trustee. He

is estopped because he "made it over to his company without disclosing his interest".

Cotton L.J. then went on to consider the cases which were cited to him as authority for the proposition that the defendant was liable for the profit. These cases we have all seen above. It is nevertheless interesting to note Cotton L.J's. view of them. He states that in Tyrrell's Case Tyrrell had acquired "(n)ot only with the expectation but with the intention, that the company should be induced by him and others to buy the property, he knowing that it was what they wanted and what was necessary for the purpose of their business". Of Erlanger's Case he says: "That is to say, if it had been made out as a fact that at the time Erlanger & Company bought they were buying as trustee for the company, then, of course, the difference on the sale to the company would be something paid by the company for nothing."(28) Of Re Ambrose Lake he says that Lord Justice James "said that if the property could not be given back, and if therefore the contract could not be rescinded, the court would somehow or other make the trustee responsible, but he did not explain how or in what way". (29) Of Benson's Case he says that Heathorn "was agent for the company engaged in the business of buying and hiring ships... Of course that came within the obvious principle that he was getting that increased price out of the company for nothing at all".(30) Of Bentley's Case he says that as the defendant was employed by the company to purchase sugar for them he could not buy for himself and then sell that sugar to the company for "If he wished the sugars to be treated as the sugars of the partnership, he must be treated as having bought them as agent of and on behalf of the partnership."(31)

From this it can be seen that Cotton L.J. very definitely takes the view that we are concerned with the abuse of a relationship in the traditional sense. A specific mandate to purchase is only one factor which will bring the rule into operation.

Another interesting aspect of this case is the view expressed by Bowen L.J. in his dissenting judgment.

> "I am perfectly aware that it would be invidious for me to pretend to be wiser than the great masters of the Science of Equity into whose mysteries I have only recently been initiated, and I do not claim to be so, but the right of the principle or cestui que trust to claim a profit made by an agent or trustee, seems to me wholly independent of the right to rescind the contract."(32)

Bowen L.J. considered that the profit here was the difference between the value of the thing sold and the price paid. He thought that it was only confusing

ıe issue to bring into account the original price paid by the defendant. It ight be thought that this is the correct rule. A director is under a duty to urchase for the company at the lowest possible price or to assist the company ı so purchasing. If he severs his relationship with his company and sells to as a third party at a price higher than the market value, he is clearly in the ame position as the trustee who, on learning of a valuable mine on the trust roperty, terminates his trusteeship and purchases without disclosing this act. The case will, of course, be very much stronger where the director lso purchased on behalf of his company. It must, however, be borne in mind hat it was only at this time that the courts had come to recognise a claim for profits" arising out of an equitable obligation. This would have rendered uch a claim possible for it meant that the beneficiary no longer had to prove hat the property which he was claiming was his "own". The general action or profits therefore developed too late as far as this situation was concerned nd it is today an exception to the general rule.

The courts have given different reasons for this exception. We have seen hat in Re Ambrose Lake Tin Company Cotton L.J. said that if the rule did not xist it would mean that the court would have to make a new contract between he parties. In the case of Ladywell Mining Company v. Brookes[33] this is again stated together with the further reason that it would be difficult or impossible o assess the profit. Finally, it should be noted that the contract was voidable ecause F had acted on behalf of the company in a matter in which he had an nterest.

In Ladywell Mining Company v. Brookes the facts were as follows. Five ersons purchased a leasehold mine for £5,000 with the view to selling it to a ompany to be formed; but they had at the time taken no steps to form the ompany. Two months later, after the completion of the purchase, they ntered into a provisional contract with a trustee for an intended company for he sale of the mine to the company for £18,000. The company was registered, ts principle object being, as stated in the memorandum of association, the urchase of the mine. Four of the vendors were appointed directors. The ontract was confirmed by the company but the original contract of purchase as not disclosed. The vendors received the purchase price of £18,000 in ash. Some ten years later the company was wound up and commenced actions or the recovery of the secret profits made by the vendors. The plaintiffs put p two arguments. Firstly, they claimed that at the time when the contract or the purchase of the mine was entered into the promoters stood in such a osition that they could not claim to have bought the mine for themselves.

Here it was held that it was not sufficient that it be shown that the promoters contemplated that a company would be formed to purchase the mine. Erlanger's Case was cited as authority for this. It was argued that they must be presumed to have been promoters but this was rejected.

Secondly, it was argued that if the above contention were not accepted, then the directors had made a large profit which they must account for. The plaintiffs argued that the directors were accountable here because either (a) they were authorised to purchase the mine, but not from themselves. To this Cotton L.J. said that the memorandum did not bear this out. Their other ground, (b) was that the directors could not, being directors, receive and retain a profit which it was not known that they were making. Here Cotton L.J. said that he assumed for the purpose of argument that the company could have avoided the contract on this ground. Referring to the judgment in Re Cape Breton he said:

> "... our judgment (there) depended upon this - that it was impossible under the circumstances for the company to set aside the contract, and that this was so even although there might have been, and, in my opinion, would have been, a good ground for setting aside the contract, if impeached, while the property was still capable of being dealt with: but as it could not be, the directors could not be held liable for the profit, whatever it was. One of the grounds was that it was difficult or impossible to ascertain the profit, and the company keeping the mine could not make a new contract and, say, we will keep it not at the price out trustee contracted to get for it, but at a different price."(34)

In Burland v. Earle[35] the court appears to have almost completely abandoned the traditional approach of equity. Attention is focused solely upon the question whether the director had a mandate to purchase. In other words, following the reasoning that the circumstances of the purchase determine whether or not the company can claim the profit, the court now simply asks if the defendant was under a duty to purchase.

In this case a director of a company purchased a lithographic plant for £21,564 and shortly afterwards sold it to his company for £60,000. In holding that the company had no right to the profit Lord Davey said:

> "there is no evidence whatever of any commission of a mandate or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention to resell it to the company, but it was an intention which he was at liberty to carry out or abandon at his own will." (36)

It might be thought that we are very near to the actual enforcement of the director's undertaking. Of course it is done very cumbrously by means of

property rather than damages but this is the only remedy which equity can grant. On closer examination, however, it will be seen that the court is as yet very far from doing so. The rule is only brought into operation by the subsequent transaction between the director and his company. There is no suggestion that the director is accountable where he does not resell to his company. And then, like all fiduciary duties, it only applies if the director does in fact act. Finally, and perhaps most important, the court looks for a specific mandate to purchase. The director's general duty to act in the interests of his company is ignored. It is submitted that this cannot be accepted. If a director does not have a specific mandate to purchase, he nevertheless has a duty to act in the interests of his company. In such a case his duty is to bring the matter before the board. After all, if a company had only one director, it is obvious that he would have a mandate to purchase. The reasoning of Burland's Case suggests that, if a second director were appointed, empowered to act jointly with the first director, neither would be under a duty to act for the company.

In Jacobus Marler Estates Ltd. v. Marler and Ano.[37] the reasoning in Burland's Case was confirmed. Here A and B purchased a lease as a joint adventure. Later, however, they decided to form a company to take it over. The lease was sold to P as trustee for the company, the company was formed and a resolution passed adopting the agreement. The directors who passed the resolution were C, and estate agent who obtained £1,000 commission on the sale, a nominee of C and D. As there was no independent board the agreement was thought to be voidable. This however the company did not seek to do. In fact they sued C for negligently allowing the company to purchase the lease. In the course of his judgment Lord Parker had the following to say.

> "It is no doubt well settled that in equity an agent cannot, without the consent of his principal, given with full knowledge of the material fact and under circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transaction within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf, and insist on its being accounted for to him. For the same reason an agent, whose duty it is to acquire property on behalf of his principal cannot, without the like consent, acquire it on his own behalf and subsequently resell it to his principal at an enhanced price. In such a case the principal can treat the property as originally acquired for him and the resale as nugatory, and may, therefore, recover from the agent the money paid on such resale less the original price and the expenses incurred by the agent in acquiring the property. This, however, only applies where the relationship of principal and agent existed at the time when the agent acquired the property. If it did not then exist, the property acquired was, at the

outset, the agents own property for all purposes, and the subsequent constitution of the relationship of principal and agent cannot deprive him of property already his own..."(38)

Here we have the statement that the principal may "treat the property as originally acquired for him". It is not suggested that the property actually "belongs" to the principal the moment the agent acquires it.

In Cook v. Deeks[39] the final deduction is made. Here three directors of the Toronto Construction Company, a railway construction company, which had carried out several large contracts for the Canadian Pacific Railway Company, on hearing that a new contract was coming up from that company, obtained the contract in their own names. The fourth director brought an action against them and the Privy Council held that the benefit of the contract belonged to the Toronto Company. Lord Buckmaster L.C. distinguished between:

"... two classes of case... the case of a director selling to his company property which was in equity as well as at law his own,... (and) the case of a director dealing with property which, though his own at law, in equity belonged to his company".(40)

In this former class only rescission can be claimed for to allow the company to keep the contract and to claim profits would be making "a new contract". He then went on to say:

"It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly recognised by Lord Davey in Burland v. Earle and this is the foundation of the judgment in North West Transportation v. Beatty and is clearly explained in Jacobus Marler Estates Limited v. Marler...

If as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company." (41)

As to when the directors are in such a position that they acquire for their company and not for themselves, his Lordship had the following to say:

"There is nothing to compel (these directors) to work with or for the plaintiff and it is impossible to see that they were bound to continue their relationship with him by any legal or moral consideration. They were, however, involved with him in different reciprocal duties, by reason of their relationship in connection with the Toronto Construction Company, and if they desired freedom to act, without regard to the restrictions that those relationships imposed, it was necessary that they

> should terminate their position as directors and shareholders in the company and place it in dissolution... But this step was not taken. Whilse retaining their position as directors, while still actually acting as managers of the company, with their duties to the company of which the plaintiff was a shareholder entirely unchanged, they proceeded to negotiate with Mr. Leonard for the Shore Line contract, in reality on their own behalf but in exactly the same manner as they had always acted for the company, and doubtless with their claims enforced by the expeditious manner in which they, while acting for the company, had caused the last contract to be carried through... It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which would properly belong to the company they represent."(42)

The directors, as has been said above, were the majority shareholders in the company, and therefore the question arose whether they could vote in the general meeting of the company to the effect that they could take this contract. Of this Lord Buckmaster had the following to say:

> "Even supposing it be not ultra vires of the company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the case of North West Transportation v. Beatty and Burland v. Earle had no application."(43)

He accordingly held that the defendants must account to the Toronto Company for the "profits which they had made out of the transaction". He went on further to hold that as the defendants had formed a company with which to exploit the contract the company must have notice of their breach and must similarly account. Finally, it should be noted that his Lordship found no specific mandate. Nevertheless, the directors general duty is again ignored and special circumstances are found. They are said to have held themselves out to be acting for the company and to have "assumed complete control of the company's business."

This then is the "corporate opportunity" doctrine. The doctrine that is, apart from one very curious piece of reasoning. It might be thought that equity would be forced to acknowledge that it is now, at least to a certain extent, enforcing a positive duty. Admittedly, this is only done where the director does in fact act and only when he is under a specific mandate to purchase or the circumstances are such as either to imply a mandate or to

estop him for denying that there was one. Nevertheless, the director is accountable even although he did not subsequently transact with his beneficiary. The decision as to whether he holds the property in trust therefore depends upon whether he was under a duty to obtain the property for his company. These are, however, not the principles of equity. Instead it is said that the "opportunity" is the "property" of the company. Therefore the director took what in equity belonged to his company - he has taken trust property. Of course, the moment one asks "When does an opportunity belong in equity to a company?" it is evident that the answer can only be found in the scope of the directors mandate.

Just how far the English courts are prepared to take this doctrine is very hard to say. It would seem, not altogether surprisingly, that it is avoided wherever possible. In Fine Industrial Commodities v. Powling[44] the defendant was engaged on behalf of his company (the plaintiffs) in experiments on a process which was outside the terms of its articles. At this time, however, he was the managing director for the company. He knew that the company was looking about desperately for some other commodity to which the company's factories could be applied and by which its business could be kept in existence. Later the memorandum was changed to cover the subject matter of his experiments and later still he and an employee of the firm who had been working with him, took out a patent for them in their own names. They formed a company and sold the patent to it in exchange for its shares which they then sold to the plaintiff company. Danckwerts J. held that the fact that the defendant knew that the company was seeking a new process, coupled with the fact that it was his duty to exercise all his endeavours for the purpose of forwarding its interests, disposed of the objection that the company had no claim because the experiment was ultra vires. He held that the shares were held in trust for the company from the date that it took over the patent from them. Counsel for the plaintiff argued that "... the defendant had nothing to sell, and so far as the contract was concerned, the company (had) bought its own property." One would think this would follow from the fact that Danckwerts J. held that they were already holding the shares in trust for the company at the date of the sale. Sealy in fact cites this case as a case where a fiduciary "diverted trust property or its product" into his product.[45] This was, however, not the reasoning of Danckwerts J. He found that the defendant had grossly overvalued the patent and hence also the shares. As he stood in a fiduciary relation to the company it was incumbent on him to prove (a) that he stood at arms length from the company, and that no confidence was reposed in him by

it, (b) that the transaction was to its advantage, (c) that full information was given to it of the value of the property, and (d) that the transaction was fair.

In America the tendency to recognise the undertaking of the director as such is becoming increasingly evident. In the early cases a constructive trust was imposed only under relatively restricted circumstances. The leading case here was that of Lagarde v. Anniston Lime & Stone Company.[46] The company had purchased a one-third interest in a lime stone quarry and was attempting to acquire the two other one-third interests and had in fact contracted to purchase one of them. The defendants, on becoming directors of the company, purchased both interests for themselves. It was held that they were constructive trustees of the one-third interest in which the company had had contractual rights but had not breached their duty in regard to their purchase of the other one-third interest. There it was said:

> "(The) legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing or in which it has an expectancy growing out of some existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation."(47)

Of these earlier cases it has been said:

> "In all these cases the imposition of liability seems not to have required a distinct corporate opportunity doctrine, although the courts spoke in terms of such a theory; appropriation of opportunities so intimately related to the corporation's activities would seem to constitute a sufficiently direct interference with the corporate enterprise to come within the general prohibition against injuring the corporation. The refusal of the courts to extend the doctrine further, leaving executives free to pursue their own interests in many situations of potentially great importance to their corporations, may have resulted from the severity of the constructive-trust remedy."(48)

During the 1950's, however, the courts began to adopt a more estensive approach. In Rosenblum v. Judson Eng'r Corporation[49] the company manufactured devices used for the alignment of motor car wheels. The directors formed a partnership to manufacture a wheel-balancing machine and other equipment for use in the alignment of wheels. The court held that although the company had neither a present interest nor an expectancy in the acquisition of the new business and although it did not prevent the company from effecting its present purposes, the partnership was to be held in trust.

> "The opinions in Lagarde v. Anniston Lime & Stone Company... relied on by the defendants, appeared to us to adopt too lax a conception of

> the requirements of fiduciary loyalty... The issue to be determined... is whether... the manufacture and sale of wheel balancers and other devices as undertaken by (the partnership)... was so closely associated with the existing and prospective activities of the corporation that the defendants should fairly have acquired that business for or made it available to the corporation."(50)

Of these decisions it has been said:

> "The general duty of an executive not to injure his corporation would not seem of itself sufficient to support the holding of Rosenblum and other similar cases... The recent case law can probably be explained adequately only as a judicial recognition of an affirmative duty on the executive's part to advance the interests of his corporation. This expansion of the legal duty of an executive to his corporation seems to reflect the increasing dominance of corporate enterprises in the American economy, the transition from the pragmatic morality of a period of rapid industrialisation to the ethics of a society more concerned with consolidation and preservation of its gains and the concomitant changes in corporate structure. At a time when corporate ownership and management were typically fused in the same individuals, self-interest encouraged a loyalty to the corporation which may have to be generated by judicial sanctions when public stock-holders are at the mercy of managers whose ownership interest is small."(51)

An opportunity is now generally considered to "belong" to a company if it is "closely associated with the existing and prospective activities of the corporation". This is known as the "line of business" test. It would appear that the line of a company's business includes not only matters in connection with its present activities but also those into which it "might naturally or easily expand".

South African Law

It is obvious that these principles can find no place in our law. Indeed, it might fairly be said that nowhere are the principles of English Law less compatible with those of Roman Dutch Law. It has been submitted that the director in our law is, or is in a position analogous to, a mandatary. He is under a general duty to administer the company's affairs and this duty is in no way dependent upon whether or not he has a power of direct representation. In what follows I have spoken of the "director who has a duty to purchase on behalf of his company". This must be taken to include also the director who, although he does not have a power to purchase, nevertheless has a duty to advise the board to purchase. Bearing in mind that in our law a director must account for all profits made by him during the course of his administration, and that we are not here concerned with the question of

rescission, it is submitted that we may distinguish between the following situations.

(i) The director sells to his company, as an extraneus, property which he acquired without breach of his mandate,

A director is under a duty to advance the interests of his company. From this it follows that he cannot transact with it as an extraneus unless he places his fellow directors in as advantageous a position as he would have been in had he transacted for the company. To fail to do so would be to seek to obtain an advantage from the company by failing to carry out his undertaking to act in its interests. This does not mean that he must act for it. As an extraneus he is entitled to seek to obtain the best terms he can for himself. He is, however, under a duty to disclose all relevant information concerning the transaction. It is submitted that he will be liable in damages should the company transact on less advantageous terms as the result of his failure to disclose. No question of profits arises for the director transacts as an extraneus.

(ii) The director purchases for himself when he ought to have purchased for his company.

Here the company's remedy lies in damages. It is submitted that there can be no action for profits as the purchase was not made in the course of the directors administration of the company's affairs. It is damage which the company has suffered and any profit the director may have made (if he made any at all) upon resale of the property must, in principle, be irrelevant. Furthermore, there can be no question of the company having a right in the property.

(iii) The director purchases for himself when he ought to have purchased for his company and then resells to his company as an extraneus.

In this case the company's remedy is exactly the same as in (ii) above, namely an action for damages. If, before selling to the company, the director made full disclosure, the position is not the same as in (i) above. There the director's duty is to disclose and, once he has done so, there can be no question of liability. Here, if the director makes full disclosure this will not relieve him of liability. If the company nevertheless chooses to pay him a higher price than he paid for it, the transaction will only be valid if made in the interests of the company.

(iv) The director, acting on behalf of the company, purchases from himself property which he acquired without breach of his mandate.

This is an act of administration and the company should be entitled to

claim any profit he may have made as the result of the transaction. Furthermore, it will have an action for damages if the price paid was more than the market price. Usually, but not always, these claims will amount to the same thing for, it is submitted, the director's profit is the amount by which his patrimony was increased as the result of the transaction and the price at which he originally purchased (if he purchased at all) is irrelevant.

(v) The director, acting on behalf of his company, purchases property from himself which he ought to have originally purchased for his company.

This again is an act of administration and the company may claim profits and damages, should it have suffered any over and above the amount of the profits claimed.

That our company law is largely English Law bears no comment. It is therefore not surprising that, in the few cases in our law dealing with these situations, our courts have relied almost exclusively upon English authority.

In the early case of Cowling v. Stableford & Company[1] the managing director of a company, knowing that his company would require it, purchased a site adjoining the premises of the company for £2,500 and resold it to the company for £6,500. Although this transaction was not the subject matter of the case, Maasdorp J. had the following to say concerning it.

> "It is a case which falls under the many authorities which have been cited of an agent whose duty it was to secure for his principal upon terms properties required by his principal, and he himself, knowingly, and without divulging the facts to his principal makes a profit out of his principal... (t)he main point on which this part of the case turns was this: was the company aware that Stableford was making the profit?... On the only point on which he might have set himself right by declaring that he was the owner, and that he did make a profit, in which case the company would have considered their position, on that important point he concealed the truth from the company. This transaction was also a transaction in fraud of the company, and, as far as Stableford is concerned, the whole of these transactions could have been set aside by the company, or the company could have demanded from Stableford a return of all such profits as he made at the expense of the company."(2)

It is submitted that, as far as this judgment goes, it is fully in accordance with the principles of our law. There is no suggestion that the company was the "owner" of the property nor that it was necessary for Stableford to have had a mandate to purchase. Although Maasdorp J. speaks of the "profit" which Stableford made, it is the profit which he made "at the expense" of the

company. In other words the company's action is for damages.

Considered to be a leading case on the subject in English Law and to be one of the clearest statements of the rule (so clear in fact that Gower adapts a long quotation from it to explain the rule relating to promoters and says that here "the principle on which this rule is based has been most clearly expressed")[3] is our leading authority, namely, Robinson v. Randfontein Estates Gold Mining Company Ltd.[4] Here the company (the plaintiffs in the case) held a lease of mineral rights over a certain farm. Robinson, the company's chairman, through an agent, purchased an undivided share of the farm for £60,000 and sold is soon afterwards for £275,000 to a company formed for the purpose of acquiring the farm for the plaintiff company. All the shares in this company were in fact held by the plaintiffs and the price for the share in the farm was paid to the defendant by the plaintiff company. The purchase was therefore treated as being a purchase directly from the defendant to the plaintiffs. (Robinson also sold certain other claims to the company at a profit which were also subject to this action but these need not concern us here). The defendant subsequently disposed of practically his entire interest in the company and its new controllers instituted proceedings for the profits he had made as a result of the sale.

In Robinson's Case the case of African Claim and Land Company v. Langermann[5] is referred to. In his judgment in this case Innes C.J. set out to adapt the English rules to our law - he refers to it as the case where "the doctrine of the English decisions was adapted by the Transvaal Courts" - and we find that Innes' reasoning in Robinson's Case is largely based on his exposition of the law in this case.

In Robinson's Case the defendant was held to be accountable whilst in Langermann's Case he was not. Together therefore the cases present a fairly complete picture of our law in this field. I have accordingly treated them together.

The facts in Langermann's Case, as far as they are relevant, were as follows. Langermann was a director of the plaintiff company. He purchased a half interest in certain mining claims, the seller, a certain Caper, however, remaining the registered owner of them. Caper then sold these to the plaintiff company. The articles of that company did not prohibit a director from contracting with the company, nor did they require him to account for any profits realised by any such contract. He was, however, to abstain from voting in respect of any such contract and the nature of his interest in the contract was to be disclosed. The defendant was not present at the meeting

at which the purchase of the claims was ratified. When it became known that he had an interest in the claims he was sued by the company for an account of the transaction and for payment over of his share of the profits.

Innes C.J. in Robinson's Case stated that the rule here was a general one,

> "where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a profit at the others expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A Guardian to his ward, a Solicitor to his client, an Agent to his principal afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v. Blackie Bros., the doctrine is to be found in the Civil Law (D.18.1.34.7.), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his Agency save the agreed remuneration; all such profit belongs not to him, but to his principal."(6)

It is respectfully submitted that neither the Aberdeen Railway Case nor D.18.1.34.7. are in fact relevant here. Innes C.J. did not infact treat the contract as being one where Robinson had acted both as seller to the company and on behalf of the company in the same transaction. Actually there can be no doubt that the court could have so treated the case. It found in fact that Robinson had procured "the election of the board under circumstances which (made) it impossible for them to exercise an independent judgment" and had thus "deprived (the company) of independent advice" - the board were in fact merely his puppets "being content when asked, to register their approval of what he did". Solomon J.A. in his judgment in Robinson's Case considered that disclosure to an entirely subservient board could not be considered to be disclosure in terms of Article 74 of the company in order to validate the sale of the property. He, however, also treated the matter as though it were a sale by Robinson to the company, he having not acted for the company. In any event the plaintiffs did not seek to set the contract aside. Neither D.18.1.34.7. nor the Aberdeen Railway Case relate to the question of profits and, as we have seen, the administrator's liability for profits in Roman Dutch Law does not depend upon a rule requiring the administrator not to put himself in a position where his interests conflict with his duty.

Solomon J.A. showed far less certainty as to whether such a general doctrine existed in our law. He in fact found that the defendant was an agent of the company in regard to the transaction so that it was not necessary

for him to go into this question in any detail. He pointed out that in English Law the fiduciary relationship may arise "otherwise than from agency". He considered that it would be "most inequitable in the circumstances if the chairman could purchase for himself". And added "I feel satisfied in my own mind that on whatever ground it may be put a court of law should not allow a profit so made to be retained, but should compel the defendant to restore it to the company of which he was chairman".[7] Juta J.A. considered that "even if the relationship of principal and agent could not strictly be maintained in the present case, I am prepared to go further and hold that under the circumstances it was, apart from mandate, the duty of the defendant to have brought such interest for the plaintiff company..."[8]

All, however, in fact found that in the circumstances Robinson must be considered to have been the company's agent and therefore the only way that such a transaction could be validated was "... by the free consent of the principal following upon full disclosure by the Agent".[9]

In stating the rules applicable where no such disclosure was made Innes followed English Law and justified his so doing as follows in Langermann's Case:

> "As was pointed out in the case Transvaal Cold Storage v. Palmer the duties and liabilities of an agent to his principal had been very fully investigated by the English courts, upon principles recognised and approved by our law. And the position of a director who sells his own property to his company without disclosing his interest therein has been dealt with by decisions, the results of which we are fully justified in adopting."(10)

It is submitted, with respect, that the principles as stated in the Transvaal Cold Storage Case are the true principles of our law, and are there founded on the authority of our own writers. Where Innes C.J. in his judgment in that case referred to the principles of agency in English Law he was able to reconcile certain statements made in regard to them with our law without too much difficulty. This is because in English Law an agent is under a legal duty to act in the interests of his principal and, to a certain extent, the results but not the principles, of equity can be reached by working from this basis.

In any event, Innes C.J. in Langermann's Case, stated the rule in our law by following the decisions in In Re Cape Breton[11], Costa Rica Railway Company Ltd. v. Forwood[12] and Cavendish Bentinck v. Fenn[13] which rule or, rather rules, he succinctly stated as follows:

"(1) A director who acquires property while acting in a fiduciary capacity,

or under circumstances which make it his duty to aquire it for the company, and not for himself, and then sells that property to the company without declaring his interest, is liable to account for all profits accruing to him from the transaction...

(2) But a director who acquires property, not occupying a fiduciary capacity, and being under no obligation to obtain it for the company, and thereafter sells it to the company for a fair price, without disclosure, cannot be forced to account for profits. The company may, on discovering the facts, rescind the contract, but it cannot claim a refund of the profits even if rescission has not been possible.

The reason for the rule is that the property sold was the director's own, which he acquired by no breach of duty. And to allow him to demand a refund would be to entitled it to obtain the director's property at less than it bargained to pay him. At the same time, the non-disclosure of his interest in the property constitutes a breach of duty on his part, and renders him liable to the consequences of a rescission of the contract at the option of the company."(14)

In Robinson's Case following Erlanger v. New Sombrero Company,[15] Cavendish Bentinck v. Fenn[16] Burland v. Earle[17] and Cook v. Deeks,[18] Innes C.J. stated the same rule giving the same reason for the fact that the company can only claim rescission where the director sells property to it which he acquired when under no obligation to acquire it for the company.[19]

The reason why a mandate to purchase the property or some other special circumstance must exist for there to be a duty upon him to purchase the property for the company is explained thus.

"An ordinary director is a mandatary, entrusted, in conjunction with his co-directors, with the management of the company's affairs; bound to exercise the utmost good faith in transacting them. To give the company the benefit of his judgment and experience; and to render that amount of diligence which an ordinary prudent and careful man would display under the circumstances. These things are expected of a director when acting as the company's agent. But he is not always so acting. Save when a special or general authority is given to him to represent the company, he only acts in the management of its affairs jointly with his co-directors. It follows that a director is not bound to devote all his time to the service of the company. There may be cases in which the special conditions or circumstances of his appointment require him not to engage in any outside business and to acquire no rights which fall within the scope of its operations save for the benefit of the company ..."(20)

In Robinson's Case Solomon explained this requirement with more precision, thus:

"Now it is common cause that at the time when he made the purchase the defendant was the chairman of the board of directors of the plaintiff company. In itself, however, that fact is not sufficient to establish

the case against him. It is true that the board of directors is the agent of the company to manage its affairs. And accordingly stands in a fiduciary relationship to it. But each individual director is not such an agent of the company, and is therefore, as a rule free to transact business on his own account even in competition with the company of which he is a director."(21)

It has already been submitted that this reasoning cannot stand. It certainly explains why a director may not be bound to purchase a particular property for the company. But this is as far as it can be taken. What is more it is totally incorrect to treat the board a legal persona. It is not the agent of the company and does not stand in a fiduciary relationship to it. This curious reasoning leads to the conclusion that, once a company has more than one director, and they are empowered only to act jointly, they are all somehow or other relieved of the duty to act for it. This leads in turn for the need to find a mandate or some "special conditions or circumstances". If an ordinary director is a mandatary" surely this alone is sufficient to render him liable?

In Robinson's Case the court found such special circumstances. In Langermann's Case, although neither the existence of a special or general mandate or of such special circumstances was found, we are given a clear indication of what such circumstances may be. Here the defendant had entered into an agreement with his fellow directors before the incorporation of the company, to the effect inter alia, that he would not engage in competing business. This part of the agreement had not however been incorporated in the articles of the company and Innes C.J. referred to this omission when holding that no special circumstances existed. In Robinson's Case there too was no express special or general mandate given to Robinson for the purchase of the property. The trial court, however, found that as all the other directors held their directorships at the defendant's pleasure he therefore had complete control over what they did. Because of this, there existed an "implied mandate" for him to purchase the farm. The Appeal Court agreed with this finding. "The course of business was that the defendant... undertook the management and control of all matters outside the ordinary departmental administration of the company. His fellow directors acquiesced in this and left all such business in his hands, being content when asked, to register the approval of what he did."(22) Solomon J.A., in finding him to be an agent of the company, said: "At the time he was in my opinion, the agent of the company, having assumed with the acquiescence of the other directors the functions of the board in respect to transactions of this nature... And therefore he stood in a fiduciary relationship to the company in respect of the acquisition of this farm, so that it was his duty to

have bought... it (for the company)".[23]

Innes C.J., however, added that:

> "But even if the relationship between the defendant and the company could not be fitly described as one of agent and principal, I should still hold it was fiduciary... A man who procures the election of a board of directors under circumstances which make it impossible for them to exercise an independent judgment must, in my opinion, observe the utmost good faith in his dealings with the company, which he has, of set purpose, deprived of independent advice... And it is wholly inconsistent with the obligations of good faith that the defendant should have made for himself these profits by the method which the evidence discloses. That being so he ought not be allowed to retain them - whether he can accurately be described as an agent of the company or not."(24)

In other words, to him the special circumstances would be circumstances resulting in the director being a fiduciary, although not an agent. We have seen that Solomon J.A. would probably have held the same.

This, however, is not even English Law for there a director is always a fiduciary. It would seem that the court is confusing the position of the director with that of the promoter.

Why must he account? We have seen that in English Law, when the court finds that a director has purchased something for himself which he ought to have purchased for the company he is held to hold it in trust for the company. What is the position in our law?

Solomon J.A. quoted Lord Parker in Jacobus Marler Estates v. Marler[25] as authority for the legal basis upon which these profits are claimed. The extract from the judgment of Lord Parker quoted is the following:

> "It is no doubt well settled that in equity an agent cannot, without the consent of his principal given with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transactions within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf and insist on its being accounted to him..."(26)

Solomon J.A. said that this was a correct statement of our law. It is submitted that, as thus quoted, it is a very confused statement of English Law. He then quoted as authority for this Transvaal Cold Storage Ltd. v. Palmer. It will be recalled that in that case Innes C.J. did refer to English authorities but was able to select passages from them which were reconcilable with our law.

Innes C.J. however, does not appear to have been of the same opinion.

In Langermann's Case he said:

> "If the director was acting as agent or trustee, or if for any other reason it was his duty to acquire the property for the company, the law will not allow him to say that he obtained it for himself. He will not be heard to set up his breach of duty to found a title of his own. The property will be regarded as having been acquired by him for his principal; and as the company could not buy its own assets any difference between the price and the price obtained by the director must be refunded."(27)

In Robinson's Case he explained the rule thus:

> "When, however, the director's fault extends further than non-disclosure, when a breach of duty attended the original acquisition, then the company may, if it chooses, retain the property purchased and also demand the refund of the profits... The property was acquired under circumstances which constitute the director a trustee for the company, or which conferred equitable ownership on the company, or when the director at the time stood in a fiduciary relationship toward the company - by which I understand a fiduciary relationship directly affecting acquisition."(28)

Pointing out that this rule is expressed for the most part in terms of English Law, he went on to say that nevertheless "the principle which underlies it is not foreign to our law. For it rests on the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by the position, advance his own interests..." Which still sounds remarkably like English Law. He then explains how the rule of English Law is adapted to our law:

> "An examination of what is involved in the remedy explains its principle. The director in the case assumed, intends to acquire the property for himself alone; he has no idea of acquiring the equitable ownership for the company. No such animus enters into the transaction. His sole object is to secure the dominium in order to resell to the company at a profit. But the law refuses to give effect to that intention; it treats the acquisition as one made in the interests of the company. That can only be because it was a duty of the director to acquire the property for the company, if he acquired it at all."(29)

This is not easy to understand. It is no more than a statement of English Law using a few civil law terms. It would seem that although the director purports to act for himself the legal effect of the transaction is as if he had acted as agent for the company and the result is that he is deemed to hold the property as the company's agent. The company therefore becomes owner of the property the moment it is delivered to the director by the seller. This is undoubtedly what Innes C.J. meant in Langermann's Case. It is quite clear that he is attempting to achieve a result similar to that arrived

at in Chancery when, in these cases, the director is deemed to hold the property as trustee for the company. This approach is open to serious criticism. In the first place, contrary to the principles of our law, it means that ownership can be acquired, by a means of fictitious delivery, to a person who might not even know of the existence of the thing and who certainly has no intention of acquiring ownership. It might be said that this is not even a case of fictitious delivery for it is not the delivery that is fictitious but the entire transaction. Secondly, in English Law, bona fide third parties purchasing from the director are protected but in our law this would not be so. Thirdly, as already pointed out, the Chancellor's rule was a method to overcome the fact that he had not the power to grant damages - this applies not only to the case where he declares the director to be a constructive trustee (not relevant here) but also to the case where he holds the director to have taken the property as a trustee. It is quite clear that he would never have deemed the purchaser to be a trustee where the transaction was not to the advantage of the company. (In any event the maxim to the effect that "He who comes to equity must come with clean hands" would in most cases prevent the situation arising.) This, however, could hardly apply in our law. Fourthly, what would the effect be of a decision not to purchase the property from the director? Would this have the result of another fictitious delivery to the director, and what would the effect of a rescission of the sale be? Fifthly, if this interpretation is placed upon the transaction how can one speak of rescission of the contract between the director and the company? There can in fact have been no sale for the director was purporting to sell to the company its own property.

But, if one considers the statement of the rule in Langermann's Case, it may be that Innes C.J. never intended to go as far as this. After all, the rule he states there is that to be found in the earlier English cases, namely, that the director is estopped from denying that he did not purchase for his company. In any event, apart from these objections, Innes C.J.'s judgment itself appears, later, to deny the existence of such a rule. For if such were the rule then the payment made by the company to him of £275,000 was a payment of his expenses plus an additional amount paid in error. On ascertaining this overpayment, one would think the company's remedy would be the condictio indebiti. This certainly follows from what he said in Langermann's Case. In Robinson's Case he, however, held:

> "The full amount was paid in discharge of a contractual obligation... between him and the plaintiff. When his interest in the transaction was revealed, the plaintiff had its choice either to rescind by restitutio in

> integrum, or to treat the property as orginally purchased for itself. On electing to take the latter course, it became entitled to claim an account of profits and payment over. The amount received would depend on the result of the account. Such a form of action, whatever else it may be is not a condictio."(30)

He then adds, and this appears to settle the question,"... had the defendant resold the property to a third party at a profit he would also have had to account." Furthermore, it might be pointed out that throughout these passages Innes C.J. referred to "equitable ownership" being vested in the company. Which of course cannot be reconciled with our law.

Solomon J.A. however, in denying that the plaintiff's claim was a condictio in debiti stated that this is not so because ownership vested in Robinson and not the company and that the courts were acting to prevent him from retaining the "benefit of property which (he) acquired by breach of trust" and that they then put the plaintiff "... in the same position he would have been in had the defendant discharged his duty... if the defendant, instead of selling the property, had retained it for his own use, a similar action would have lain against him to hand over the property to the plaintiff on payment of the expense which he had incurred. Or if he had sold it to someone else, and had made a profit out of the transaction, the plaintiff company would have been entitled to claim from him such profit."(31)

ABUSE OF CONFIDENCE, COMPETITION AND UNFETTERED DISCRETION

Abuse of Confidence

Gower states that directors are under a duty not to use for their own purposes "anything entrusted to them for use on behalf of the company". This principle, he says, "is not restricted to property in the strict sense; it also includes trade secrets and confidential information". He considers that the principle is wide enough to cover cases where a company's directors have used confidential information to speculate "successfully in their company's shares". In such cases, he submits, it would be irrelevant whether or not the company had suffered damages.[1)]

It is undoubted that, in English Law, a fiduciary must account for profits made as a result of his use of property entrusted to him. As we have seen, the idea that information can be "property" arose for purely historical reasons concerning the nature of the Chancellor's jurisdiction and its limitations. Today this concept has become the subject of a certain amount of dispute and there can be little doubt that the better view is that information is not property. Most cases dealing with "confidential information" base the fiduciary's liability upon contract.[2)] Where this cannot be done because of the doctrine of consideration, the courts usually hold the "misuse" of such information to be a breach of "confidence" rather than wrongful use of "property". Nevertheless, the prime concern of equity has always been property and its influence remains strong. Nevertheless, it does appear to be unfortunate that most writers upon this branch of company law uncritically accept the old proprietary approach. What is more, a consideration of the cases cited by Gower reveals that far from being authority for this proposition they tend rather to avoid proprietary concepts.

In the case of Industrial Plastics Limited v. Ferguson[3)] the manager of a company had been informed as to certain secret methods of production. After the termination of his employment he offered his services to a competitor. It was agreed that the company would employ him on his obtaining a patent in his own name for this method of production. He did not inform the competitors of the secret process but full details naturally appeared in his patent application. His former employees succeeded in preventing him from obtaining the patent and the court awarded them £7,500 damages. In Measures Brothers Ltd. v. Measures[4)] the defendant had, before his employment was terminated, made a list of all the names and addresses of the company's clients and, after his

employment had been terminated, used this list to solicit them. The court held that this was not a breach of contract because the company had already breached its contract with the defendant by dismissing him. It was nevertheless held that he had committed a breach of faith in that "he had the copy made with a view to using it if and when he should be in a position or should think fit to compete in business with the company". The reasoning here is clearly unsound. If it were accepted, it would mean, for example, that an attorney would be entitled to use and divulge information given to him in confidence by his client once the relationship between them was terminated. In other words, it is submitted, the agreement as to confidential information should be treated as a separate one and not as being part of the same agreement which constitutes the relationship. The next case cited by Gower is that of Cranleigh Engineering v. Bryant.[5] Here the defendant, the former managing director of the plaintiff company, developed and designed a particular method of constructing a swimming pool. The construction of swimming pools was the company's business and, whilst the defendant was still employed by them, the plaintiffs applied for a patent in respect of it naming the defendant as its inventor. The Patent Office wrote to the plaintiffs drawing their attention to the existence of a similar patent. This letter was received by the defendant and he did not inform the plaintiff company of its contents. Subsequently the defendant left the plaintiff company and immediately obtained an assignment of the rival patent. The plaintiffs, inter alia, claimed an injunction restraining him from making use of certain features in the design of the swimming pool which he had developed whilst in their employ and which were not contained in the rival patent. They also pleaded that he had received the information concerning the other patent in confidence as an officer of their company, had failed to disclose it to them and had failed to attempt to procure the assignment of it for them. In obtaining the assignment of the patent he had therefore wrongfully made use of confidential information. As to the first part of their claim Roskill J. held that the information was of "a confidential nature". He then went on to hold that the defendant had received it in circumstances of confidence and here he referred to the judgment of Lord Buckmaster L.C. in Cook v. Deeks[6] where he said:

> "... men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."(7)

The defendant was in such a position and therefore Roskill J. held:

> "Bryant, in my judgment, acquired this information, which, as I have held, was confidential information, as the plaintiffs' managing director, and he acquired it in confidence. He has sought since he left the plaintiffs to turn this information to his own advantage... In my judgment, that, on the authorities, involves a breach of his duty of confidence to the plaintiffs, and he should be restrained from committing such breach..."(8)

As far as the rival patent was concerned, Roskill J. held that the defendant was in breach of his duty in not communicating to the board of the plaintiffs the information he received concerning its existence, in taking no steps to protect the plaintiffs against the possible consequences of the existence of that patent and in using the information so obtained to procure the patent for himself. He had only become aware of its publication "because of his contractual and confidential relationship with the plaintiffs". Finally, he went on to say:

> "... I have not lost sight of the fact that the heads of agreement unlike the draft service agreement which B refused to sign, contained no express obligation not to divulge confidential information, but this makes no difference, for, were it necessary, I would not hesitate to imply into the contract of employment between B and the plaintiffs the relevant obligation. It is both reasonable and necessary so to do."(9)

Thus we see that in the first claim the court held that the information was of a confidential nature. This was found to be so because the particular aspects of the construction of the pool with which the court was concerned were not so simple that they could be easily obtained. The court then went on to hold that the defendant had obtained this information in a position of confidence and therefore his use of it was wrongful. As far as the plaintiffs' second claim was concerned, however, nothing was said about the "nature" of the information. B was simply held to have obtained it in a position of confidence.

It would seem that we may distinguish here between two situations. Firstly, there is the situation where A is given information and it is agreed that he will only use it to the benefit of the company and will not pass it on to anyone else or make use of it himself either whilst with the company or after he has left it. Secondly, we have the situation where A agrees that he will inform his company of any information which he ascertains whilst with the company which would be useful to it and that he will not use that information himself, nor divulge it to a third party, either whilst with the company or after he has left it. We are, of course, here concerned with the duty to neither make use of the information himself nor to divulge it to a third party. Where the information is of a "secret" or "confidential" character such agreements will be easily implied. On the other hand, this will not be so where the information

is not of such a character but is information already known to third parties or of a particularly obvious nature. Again, apart from the question of implied agreements, where the information is of a secret or confidential character such an agreement, if it is found, will most probably be valid whilst if the information is not of such a character the agreement will most probably be an unreasonable restraint upon trade and hence be unenforceable.

All attempts to classify "types" of information which may be considered as "property" of the company are doomed to failure. In any event even it this were possible it would be irrelevant for if there is no understanding that the information be kept "confidential" there can be no breach of duty.

This duty will usually be implied from the very fact that the director has undertaken to act in the interests of his company. Such implication will, however, not necessarily exist. Apart from a specific agreement between the director and his company to the effect that certain information will not be kept confidential, there may be occasions where the directors primary obligation towards his company is so limited that such an obligation cannot be implied.

Finally, it is submitted, that breach of this duty should, in our law, give rise to the normal remedies for breach of contract. It is damages which the company suffers and there is no reason why it should be compelled to sue for profit if this profit is less than the damage suffered or why it should be entitled to profit if it is greater.

Competition

The director's duty not to compete with his company, if such a duty exists at all, is as yet ill-defined. Two matters are often confused with this question which, it is submitted, are in principle distinct from it. Firstly, where a director acts for himself or for another when he ought to have acted for his company we are concerned with a breach of his undertaking as such and the question of competition does not arise. Secondly, where a director uses or conveys confidential information, he breaches his duty not to do so and it is irrelevant whether or not such information is used to compete with the company. It would therefore seem that competition must be defined as an act or acts the effect of which is to render it more difficult, or even impossible, for other persons acting on behalf of the company to forward its interests either generally or in a particular matter.

It has been held that a director of one company cannot be restrained from acting as a director of a rival company. In Wilson v. London Midland and

Scottish Railway Company[1] it was said that a director is not disqualified from holding office or acting as a director, by reason of the fact that he may also be a director or a shareholder in another company which has entered into a trading contract with his company, although he may not vote upon the contract. In Bell v. Lever Bros.[2] it was said:

> "The principle will be found in the case usually cited in relation to it, although reported only in the Weekly Notes, of London and Mashonaland Exploration Company v. New Mashonaland Exploration Company, where it was held that, it not appearing from the regulations of the company that a director's services must be rendered to the company and to no other company, he was at liberty to become a director even of a rival company, and it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company he could at the instance of the company be restrained in his rival directorate. What he could do for a rival company, he could, of course, do for himself."(3)

This reasoning is not altogether satisfactory. If there is a rule preventing a director from competing with his company it would apply equally to the case where he acted for himself. Nevertheless the judgment clearly suggests that he can compete. Sealy says that "In the absence of an express prohibition in the terms of his appointment, or perhaps an implied prohibition in special situations, there is no rule which prevents a director from becoming a director or a member of a rival company, or competing with the company on his own account."[4] He then goes on to say that:

> "A suggested example of a 'special situation' in which competition would not be permitted is where the type of business is highly competitive or the market very restricted, so that damage to the beneficiary by the fiduciary's own trading would be inevitable."(5)

He finds authority for this latter proposition in the case of Hivac Ltd. v. Park Royal Scientific Instruments Ltd.[6] This case did not relate to a director but to an employee who did part-time work for a rival company in a highly specialised field. In fact the two companies were the only manufacturers of the particular article in England. Gower also cites this case saying:

> "Having regard to this decision it is submitted that the position of directors requires consideration. It is established that the servant's duty of fidelity imposes lesser obligations than the full duty of good faith owed by a director or other fiduciary agent. How can it be that a director can compete whereas a subordinate servant cannot? It seems clear that , at the very least, a service director is not allowed to do so, and it is suggested that the same should apply to any director." (7)

It does indeed seem anomalous to suggest that a director may act so as to prevent his company from forwarding its interests and yet breach no duty. It is submitted that two of the major difficulties here lie in the approach of English Law. If a director may not place himself in a position where he could breach his duty, this would mean that, if a director was under a duty not to compete, he would breach the fiduciary duty if there was but a possibility of competition. Secondly, if the rule were accepted, it would mean that the company would have two remedies - the right to obtain an injunction and the right to claim profits made by the director as the result of so competing with his company. The latter remedy would appear to be particularly inappropriate especially when coupled with the idea that the director may be liable for profits where he stood in a position in which he could have breached his duty. It is submitted that in our law, if such an action is permitted, the companies action will lie for damages and that this in itself will keep the concept of competition within reasonable limits. This remedy coupled with an injunction to restrain a director should, it is submitted, be sufficient.

Unfettered Discretion

It is usually said that the director is under a fiduciary duty not to bind his discretion. Thus Gower says:

> "Since the directors' powers are held by them in trust for the company they cannot fetter their future discretion. Thus it seems clear as a general principle, despite the paucity of reported cases on the point, that directors cannot validly contract (either with one another or with third parties) as to how they shall vote at future board meetings. This is so even though there is no improper motive or purpose... and no personal profit reaped by the directors under the agreement..."(1)

In our law, at least, this does not appear to be a duty at all. It is obvious that if the director exercises his discretion contrary to the interests of the company he cannot plead that he did so because he was bound by a contract. But of course no one can plead that he breached a contract because of an undertaking with a third party to do so. In Coronation Syndicate v. Lilienfeld and The New Fortuna Company Limited[2] Solomon J.

> "It appears to me there is a very great difference in principle between the case of a shareholder binding himself by such a contract and the directors of the company undertaking such an obligation. The shareholder is dealing with his own property, and is entitled to consider merely his own interests, without regard to the interests of the other

shareholders. But the directors are in a fiduciary position and it is their duty to do what they consider will best serve the interests of the shareholders. If, therefore, they have bound themselves by contract to do a certain thing and thereafter have bona fide come to the conclusion that it is not in the interests of the shareholders that they should carry out their undertaking, I do not think that the court would be justified in interfering with their discretion and compelling them to do what they honestly believe would be detrimental to the interests of the shareholders ... For this breach of contract they may be personally liable in damages, but if that is their honest conviction I do not see how we can compel them to perform their contract."(3)

The rule is therefore that the courts will not grant specific performance where it will result in the director having to breach his duty towards his company.

RATIFICATION AND RELEASE

Ratification of Directors' Breaches of their Fiduciary Duties

The first problem that arises here may be simply stated. Are there certain duties the breach of which cannot be ratified by the majority of shareholders or may such breaches of duty always be ratified provided that in doing so the majority does not commit a "fraud on the minority"? This question may be best answered by first considering the meaning of the expression "fraud on the minority". Wedderburn says that:

> "'Fraud' in this context, seems to bear its wide equitable meaning and is not confined to fraudulent misrepresentations of the common law world, although there will, of course, be included. But its exact definition in this area of law has never been properly investigated, for the reason that it has not usually been discussed in the context of ratification."(1)

Gower says:

> "... the exact meaning of the expression 'fraud on the minority' is not easy to determine. But at least it is clear that both 'fraud' and 'minority' are used somewhat losely. There need not be any actual deceit; if there were, those on whom it was practised would have a common law remedy against those who had wilfully deceived them. 'Fraud' here connotes an abuse of power analogous to its meaning in a court of equity to describe a misuse of a fiduciary position."(2)

Thus it is clear that we are not dealing with "fraud" properly so-called but rather with the prohibition of certain acts which are said to be "frauds" per se. This notion of "fraud" in equity has already been dealt with in some detail. We are dealing with "acts of a fraudulent character" and, as Wedderburn puts it, "our quest is for a definition of that type of 'fraudulent' transaction 'which it is not competent for the shareholders to carry out' by a bare majority."[3] Thus the question asked above is answered to this extent. The motives of the shareholders appear to be irrelevant and the question is as to whether or not there are certain acts which may not be ratified.

It is here the the rule in Foss v. Harbottle[4] comes into the picture. Although said to be merely a rule of procedure, it is generally agreed that the rule may be simply stated in terms of majority rule. The minority cannot bring an action where the wrong complained of can be ratified by the majority or, to put it the other way around, the shareholder may bring an action "when what he complains of could not be validly ratified by an ordinary resolution". Thus in determining when a minority may bring an action the court must determine

whether or not the wrong could have been ratified. If it could not be ratified it is referred to as a "fraud on the minority" - "frauds on the minority" are the exceptions to the rule.[5)]

We are therefore, once again, confronted with the old problem in connection with "frauds" in equity. Unable to apply general principles in determining what acts are wrongful and what acts are not, it is simply stated that certain acts are per se wrongful. This means that in determining what acts are "frauds" in this sense we can only list those acts which the courts have refused to permit to be ratified but cannot ask the obvious and important question "why cannot they be ratified?" If we do the only answer which we will receive is that "they cannot be ratified because they are 'frauds', and they are 'frauds' because they cannot be ratified". Thus Wedderburn says:

> "The state of mind of the majority cannot be the dividing line for their votes are, at any rate in general meetings, 'rights of property' to be used largely in their own interests. Fraud lies rather in the nature of the transaction than in the motives of the majority."(6)

It therefore follows, as we have seen, the only method of ascertaining what acts are "frauds upon the minority" is to ascertain what acts the courts have refused to permit to be ratified. This process of reasoning can be seen from the following extract from Gower where he says that fraud

> "... covers certain 'acts of a fraudulent character' - in the wider sense... of which 'familiar examples are when the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate."(7)

He then goes on to say that most of the cases in which the principle has actually been applied appear to fall within one of the following three classes: (a) expropriation of the company's property, (b) release of directors' duties of good faith, and (c) expropriation of other members' property.[8)] Of these he says:

> "... in all these cases the motives of the controllers appear to be irrelevant. The decisions, however, purport to be examples of an alleged general principle that the majority must exercise their powers 'bona fide for the benefit of the company as a whole'. In so far as this suggests that some subjective bad faith (or improper motive) is a necessary precondition to liability under (these) heads... it is submitted that it cannot be supported. If the controllers are expropriating to themselves the company's property their action is invalid without proof of bad faith, nor can they justify their actions by proving that they honestly believed this to be in the best interests of the company. The position seems to be the same when the majority are seeking to

release the directors from their duties to act in what they honestly believe to be the company's interests; the director's motive admittedly is a relevant factor but not, it is submitted that of the shareholders who purport to ratify."(9)

We turn now to consider the question as to which duties may be and which duties may not be ratified. Here we will consider first those duties which are said to arise from the principle of conflict of interest and duty.

We have already seen that where a director acts on behalf of his company in a matter in which he has an interest in a transaction with himself or with a third party who knows of his breach of duty, the contract is voidable. Thus the company in such cases may always ratify such a breach of duty if one considers the acceptance of the contract by the company to be ratification. The same is the position where he transacts with his company but fails to do so openly or omits to make a disclosure other than a disclosure relating to profits.

What is the position, however, where the director makes a profit as a result of such a transaction which could be claimed by the company? This raises the question of profits generally. The question here is said to depend upon whether the majority are attemtping to expropriate the company's property. As we have seen the usual rule is that if a director wishes to keep a profit he must make a full disclosure to the general meeting (or to the board if the articles so provide). But this, as we shall now see, is not the invariable rule in English Law. The question as to whether or not he may be permitted to take the profit appears to depend upon whether he is attempting to appropriate "the company's property" or merely property which he is under an obligation to account to the company for.

It will be recalled that in English Law, included under the concept of "profits", are those cases where the director simply helps himself to the company's assets, where he takes something for himself which he ought to have taken for his company, and where he makes an incidental profit as the result of carrying out his administration. In the latter case he is said to be under an equitable obligation to account to his company but is only a constructive trustee of the property when the court actually orders him to account. In the other two cases, however, he is considered to be a trustee of the property from the moment it comes into his possession, in other words the property belongs to the company in equity.

This is the distinction which Gower makes under the heading "Expropriation of the company's property". In the second edition of his work he came to the conclusion that:

"(1) If the directors acquire property (including the benefits of a contract) when it is there duty to acquire it for the company, or to give the company an opportunity of acquiring it, they hold the property in trust for the company and it in equity belongs to the company. Hence neither they nor the general meeting can agree to their taking it beneficially because this would amount to a gift to them of the company's property which is ultra vires the company.

(2) But, provided the directors have acted in good faith, a contract for valuable consideration between them and the company can always be ratified, and so can the retention of profits which they have incidentally made as a result of their position so long as it was not their duty to acquire that profit for the company or to give the company an opportunity of acquiring it."(10)

It seems rather extraordinary that Gower can come to the conclusion that such acts are ultra vires and, at the same time, considers them to be fraud on the minority. What is more, although he speaks of the "controllers... expropriating to themselves the company's property..." One would think that the fact that such persons were the "controllers" would be irrelevant if such an act were ultra vires.

Gower's conclusion here is based to a large extent upon the case of Cook v. Deeks.[11] The facts of this case have already been outlined, it will be recalled that three directors of the company obtained a contract in their own names which the court found they ought to have taken for the company. These directors were also the majority shareholders and thus the question arose as to whether they could in general meeting ratify their breach. Here Lord Buckmaster L.C. said:

"... the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, ... it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires of a company to make a present to its directors it appears quite certain that the directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority... In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of a company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of the shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts..."(12)

Here the reasoning is clearly that the majority cannot make a present to themselves of the company's assets. It is suggested that in doing so they may be acting ultra vires but this point is not pressed and the decision is not based upon it.

A further case cited by Gower is that of Burland v. Earle,[13] the facts of which have also been noted above. It will be recalled that here the court held that the property sold by the director to his company had not been originally purchased by him as trustee for it as he had had no mandate to purchase. After stating the rule in Foss v. Harbottle Lord Davey went on to say:

> "But an exception is made to the second rule (that the company is the proper plaintiff where the wrong alleged to have been committed was a wrong done to the company), where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were a plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A fimiliar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate." (14)

In the third edition of his work Gower no longer states that such transactions are ultra vires. Nevertheless, he does not accept that ratification is not possible only where the majority is attempting to expropriate the "property" of the company for itself. Thus he cites Parke v. Daily News[15] (which he does not consider to be in fact based upon ultra vires) in which case, as we have seen, the directors, who held the majority of the shares, wish to pay a large sum to those of its employees who had become redundant as the result of the sale of the company's major asset.

Wedderburn,[16] with perhaps some reluctance, adopts much the same approach. Whilst Gower deals with ratification of directors' duties under "Expropriation of the company's property" and "Release of directors' duties of good faith", he deals with these two cases of frauds on the minority under the headings "Mala fides" and "Other breaches of duty". Under the latter he deals with the question of profits - it is, he says, "secret profits which are forbidden the director". As we have seen "profits" include appropriations of the company's property and therefore he is here concerned with the same matters as Gower was under that heading. He begins with the statement in Burland v. Earle to the effect that the minority can sue whenever the wrong

doer is in control "appropriate to themselves money, property, or advantages which belong to the company, or in which other shareholders are entitled to participate". He accepts the distinction drawn by Gower on the basis of this proposition but without enthusiasm, saying that the courts in England "up to the Court of Appeal at least... must recognise... that ... some breaches, and certain appropriations of property by the majority, amount to fraudulent appropriations of company's 'assets' and are not ratifiable."[17] Here too he cites Cook v. Deeks. Nevertheless he does not suggest, as Gower did, that such transactions are ultra vires.

A case which has caused untold unhappiness as far as this theory is concerned is that of Alexander v. Automatic Telephone Company.[18] In this case the directors, who had a majority shareholding, fixed the sum of sixpence as payable on application and two shillings and sixpence on allotment for each share but exempted themselves from payment. A minority shareholder made application for a declaration that the directors were in breach of duty in so exempting themselves. The court accepted that the directors had acted in good faith but nevertheless allowed the minority to compel them to pay. The difficulty is that the court quite clearly accepted that if the directors had made full disclosure to the company to begin with they could have retained the benefit. Thus Lord Lindley M.R. said:

> "The maxim caveat emptor has no application to such cases, the directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all shareholders may participate."(19)

The case cannot therefore be easily fitted into the suggested scheme of things. If the "profit" for which the directors had to account was the "property" of the company why was it said that they could not take "without informing" the shareholders? If such were the case the shareholders could never have permitted them to retain it in the first place. If, on the other hand, the profit was not the "property" of the company, why was a shareholder's action permitted? It appears to be accepted that the better view is that the profit made by the directors was not the property of the company and that the case is therefore an exception to the rule in Foss v. Harbottle rather than an exception to the rule that the majority cannot ratify their own expropriation of the company's "property". This is clearly the view of Wedderburn. He says :

> "Alexander's Case suggests that some breaches open to sanction by

disclosure (and, therefore one would have thought, to ratification) allow for a majority action in spite of the rule in Foss v. Harbottle. (This may be) the only real exception to the rule..."(20)

Another case which is not easily reconciled with the suggested rule is that of Regal (Hastings) v. Gulliver.[21] As we have seen, Sealy criticises this case on the basis that the court should simply have held that the "profit" was the "property" of the company and not that the directors were merely under an equitable obligation to account.[22] It will be recalled that there the court held that the directors could have obtained the permission of the company to keep the profit. If Sealy's view had been adopted this of course would not have been possible. Gower admits the difficulty here and attempts to explain it thus:

"On the other hand, in Regal (Hastings) Ltd. v. Gulliver the directors had not appropriated any property of the company. Prima facie, therefore, the company could ratify what they had done and enable them to retain the profit. The difficulty, however, is that they had used information coming to them as directors, and, as we have seen, it may be that this is to be regarded as the company's property. If so, the shares which they acquired belonged in equity to the company. However, the present to them of the shares would not necessarily have been improper. Since the company was financially unable to acquire the shares there might have been a bona fide decision of its members that it was in the interests of the company to allow the director to retain the shares and the profits made from them - especially if the directors refrain from voting. In Cook v. Deeks the directors had profited at the company's expense; in Regal they profited without harming it in any way."(23)

Thus we have a further suggested distinction, namely, that the majority may ratify the directors appropriation of the company's property provided that this does not cause damage to the company.

We have seen that the cases of Punt v. Symons & Company Limited[24] and Piercy v. Mills & Company Ltd.[25] have given rise to considerable controversy. In Punt's Case the directors issued shares with the object of creating a sufficient majority to enable them to pass a special resolution depriving other shareholders of special rights conferred on them by the articles of the company. The object of this was to procure a majority. In Piercy's Case the company's two directors issued share in order to prevent three further directors being elected who would, of course, have placed them in the minority. It will be recalled that Gower considered that these were cases where the directors had failed to exercise a fiduciary duty namely, to exercise their powers for the purposes for which they were granted. As the court had permitted minority actions, he held that breaches of this duty could not be ratified. We have seen that in Hogg v. Cramphorn[26] this view was not

followed for the court referred the matter back to the general meeting for decision. Referring to the Savoy Hotel Case and to Piercy v. Mills Wedderburn says of Hogg's Case that one might have expected that the court would have held that no ratification was possible and suggests that this could have been done upon the following reasoning.

> "The argument justifying such a conclusion would run along lines for which some authority can be found, as follows: that 'the right to issue new capital is an advantage that belongs to the company'; that the directors had, therefore, 'appropriated to themselves an advantage which belonged to the company'; and that, therefore, the case had been properly brought by the minority member, based on an expansion of the notion of corporate 'property', bringing the wrongful issue of shares into the ambit of the 'expropriation' cases."(27)

The fact that Buckley J. permitted ratification was seen by Wedderburn, at first, as evidence of the fact that the directors had not appropriated "property" of the company. Why then was a minority action permitted? The court appears to have accepted that even had the directors not purported to give the trustees ten votes per share the majority could nevertheless have sued. Wedderburn therefore came to the conclusion that as the court appears to have accepted that this was a "corporate" action the case was, like Alexander's Case, an exception to the rule in Foss v. Harbottle in that the minority could sue although the majority could ratify.(28)

In Bamford v. Bamford(29) the court took a rather different line. There Plowman J. held that the directors could only exercise their powers in the interests of the company and therefore there was a residual power left in the general meeting to do so in interests other than the company's. The action that was brought in this case would seem to have been understood as a "personal" one in the court of first instance and based upon the rule that a shareholder may sue to enforce his personal rights under the memorandum and articles of association. His right being to see that these are adhered to. In the past it was accepted that a minority action could only be brought in such an instance where the breach of the articles was such as could not be ratified and Bamford's Case would therefore appear to alter this rule or, at least, to be an exception to it. In the Court of Appeal,(30) however, Plowman J's. reasoning was rejected and the action was said to be in respect of a wrong done to the company. Thus Gower concludes that both Hogg's and Bamford's Cases suggest that it is an "oversimplification to say that the possibility of ratification by ordinary resolution is always a decisive test".(31) In any event, what is important for the present purposes is that ratification of acts done for "a collateral purpose" or for an

"improper purpose" are not considered to be expropriations of the company's "property".

It seems generally agreed that acts done mala fides by the directors cannot be ratified. Quite what is meant by mala fides here is as we have seen not easily determined. Gower, stating that the majority cannot release the directors from their duty of good faith, says the the majority cannot ratify where the directors have been fraudulent.

> "Thus although a resolution may authorise the directors to retain a profit made by them in good faith, it cannot, it is submitted, entitle them to retain a bribe corruptly... And here too 'fraud' is used in a wider sense than actual deceit or dishonesty. It seems to cover all cases in which they have not acted bona fide in what they believe to be in the best interests of the company. If they have acted dishonestly, or have not directed their minds to the question whether what they are doing is in the best interests of the company, a resolution in general meeting will not protect them." (32)

Wedderburn[33] says that the company cannot ratify mala fide acts. There is, he says, no doubt that acts which are mala fide, in the sense the the characters have primarily consulted interests other than those of the company, "are open to challenge by the minority on grounds of fraud". In other words the distinction here is the distinction between the two rules which, it is submitted, in fact exist behind the rule requiring the director to act bona fide in the interests of his company.

. . .

It is submitted that a distinction should be drawn between those cases where directors have exercised powers which they were under a duty to exercise in the "interests of the company" and those which they were under a duty to exercise bona fide in the interests of the shareholders qua shareholders. In regard to the former, a breach of duty should always be ratifiable provided the general meeting does so in the interests of the company. As has already been submitted, the general meeting should only have the power to act in the interests of the company in such cases and therefore, should it not do so, the "ratification" will be ineffective.

Where directors wrongfully exercise powers which they were under a duty to exercise to the benefit of the shareholders qua shareholders, ratification should always be possible - no matter in whose interests the shareholders choose to act. The only limit upon the power of the majority here are the rights of the minority.

It is submitted that, provided these conditions are complied with, all breaches should be ratifiable. There seems to be no reason why the shareholders should not be able to ratify any transaction provided they act in the interests of the company. Why should they suffer because the directors have acted in bad faith? Surely the directors' state of mind is irrelevant when it comes to the question as to whether or not the shareholders can ratify? Although it is unlikely to occur very frequently, it would be absurd if the shareholders could not ratify a director's mala fide breach of his duty if it were in the interests of the company to do so. For the same reasons the suggestion that the meeting cannot ratify an expropriation of the company's property must be rejected.

Release of directors from their fiduciary duties

To what extent can directors be released form their fiduciary duties? It is usually considered that clauses permitting the director to make disclosure to the board of his company rather than to the general meeting are exclusion or release clauses. This is clearly the view of both Parsons[1)] and Gower, the latter saying under the heading "Exclusion clauses in articles":

> "... just as the normal obligations of trustees can be waived or modified by express provisions in the trust deed under which they were appointed, so (within limits) can the normal fiduciary duties of directors be modified by express provision in the company's constitution. Such provisions have become common form in the articles of registered companies. The length to which they go varies. At their narrowest they provide that an interested director shall disclose his interest to the board, shall not be counted in determining whether a quorum is present, and shall not vote; at their widest they enable an interested director to attend and vote just as if he were not interested. However wide or narrow the conditions may be, it is invariable to provide that if complied with the contract shall be fully effective, and the director not liable to account for any profit made."(2)

Certain of the provisions discussed by Gower certainly release the director at least partially from his fiduciary duties. Others, however, would appear rather to maintain the duty and simply require the director to make disclosure to the board instead of the general meeting. It is submitted that this alteration of the duty in itself does not amount to a release for the director is still under the duty to disclose to the company and all that is happened is that he makes disclosure to the board instead of the general meeting.

The next question that arises is the effect of Section 70 sext of our Companies Act (Section 205 of the English Companies Act) which reads:

> "Subject to the provisions of this section any provision, whether contained in the articles of a company or in any contract with a company whether expressed or implied which purports to exempt any director, manager or officer of the company, or any person employed by the company as auditor from, or to indemnify him against any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void."

Of the English section Wedderburn says "But the articles may, it seems, still avoid breach of duty in some cases by ensuring that there is no duty to break."(3) There can be no doubt that on a strict interpretation of this section it does not prevent a company from releasing a director from a fiduciary duty altogether but merely prevents a company from releasing him from liability should he breach such a duty.

It is submitted that a director cannot be released from his duty to act bona fide in the interest of his company. In the case of a business company the directors act in the intermediate interests of the shareholders and this requires them to run the business so as to maximise profits. This is the interest of the company. Should the shareholders wish to change this there is, of course, no reason in principle why they should not do so. This, however, would not entail a release of the company's directors from their duty to act in the interests of the company but would amount merely to an alteration of the content of that duty. Release from such a duty can only mean the granting of the directors the right to manage the company in whatever interest they please, including their own. It would be the same, in principle, as appointing a trustee and granting him the power to do whatever he pleased with the trust fund. In such a case no doubt this would amount to a donation. In the case of a company it would amount to an abuse of corporate device.

From this it would follow that a director cannot be released from his duty to act in the interests of the company when acting on behalf of that company nor can he be permitted to take for himself what he ought to take for the company.

It is generally accepted that a director may be released from his duty not to act for the company in a matter in which he has an interest. Statute, of course, requires him under pain of a fine, to disclose his interest and our act actually forbids him under a similar penalty, to act at all in such an event until he has obtained the authorisation of the board. If it is accepted that Section 70 quin has no invalidating effect then there appears to be no reason why this duty may not be excluded. Both Gower and Parsons consider that although such a duty be excluded the director is still under a duty to act in the interest

the company.

> "Release from a duty not to put himself in the way of temptation does not mean that he is entitled to yield to temptation. He remains subject to the discipline of the principle that he must act in the interests of the company."(4)

ıis undoubtedly must be correct.

The director's duty to act openly and to disclose certain information ther than profits) cannot, it is submitted, be waived. Clearly no company ›uld permit its directors to deal secretly with it and, as far as the duty to sclose is concerned, it has been submitted that this duty arises out of the rector's duty to act in the interests of his company and therefore it, similarly, ınnot be waived.

The duty to account for profits is, as we have seen, in English Law is a very ɛtensive one including the director's duty to account for property of the company hich he has taken, property which he has acquired for himself which he ought to ave acquired for the company and incidental profits. It is submitted that the .rst two mentioned would fall within the duty to act bona fide in the interests of ıe company and therefore the director cannot be released from this duty and ermitted to take such profits for himself. The last mentioned however does ıot fall within the ambit of that duty. It is submitted that there is no reason, n principle, why a director should not be permitted to take incidental profits or himself.

SUMMARY

This thesis considers the nature of the relationship between a director and his company and the principles of the fiduciary doctrine which exists because of that relationship, the interests which he is bound to advance, the fiduciary duties which seek to ensure that he acts in those interests and, finally, the compatibility of the doctrine with the principles of our law.

The nature of the relationship between the director and his company has probably been the most important practical question serving to keep alive the controversy as to the nature of legal personality. Seeking to find the nature of this relationship in corporate theory, it is at once evident that the traditional theories can provide no guidance. They attempted to answer the question "What is a company?" upon the reasoning that, as man has rights because he has certain attributes, therefore companies are either real things with similar attributes or fictitious human beings. The theory of "the legal entity" which has succeeded them and which is most widely held today, is, however, completely sterile. In the final analysis it says nothing more helpful than that a company is a subject of rights - as are all legal personae - because it is a subject of rights. Because more than this is needed, those holding this theory are driven back upon variants of the traditional theories and in doing so make all the old, untenable assumptions as to the nature of corporate personality.

Seeking an explanation of one of the variants of the legal entity theory in the case law, "the modern organic theory" points to the fact that acts of directors have been attributed to their companies as establishing that the board of directors constitutes an "organ" of the company. The "internal" relationship between this "organ" and the company is found in those cases where it has been held that when the management of the company is vested in the board, the members cannot by a simple majority interfere with the board's exercise of its powers. This is thought to indicate that both the board and the general meeting are "organs" of the company. The theory raises a number of seemingly unanswerable problems and, in particular, apart from some vague

onstitutional analogies, gives us no more than this extra-legal, tructural explanation of the director-company relationship. Further- ore, beginning with the assumption that a company is an entity with nterests, the theory denies any necessary connection between the nterests of the company and those of its members, the general meeting eing considered to be an administrative "organ" of the same nature as he board.

Hart points to the fact that the explanation of corporate ersonality as given by the Hohfeldian analysis fails in that it seeks paraphrase or translation of terms relating to corporations into terms elating to individuals. We are, however, not dealing with a mere horthand symbol as the word "company" has a distinct function in that t is used in conclusions of law which apply rules in special ircumstances in a manner distinct from, though analogous to, those in hich such rules are applied to individuals apart from such circumstances. is explanation, however, is drastically incomplete in that we are not old why this is done. Thus the central question remains unanswered.

It is submitted that the question of the relationship between the irector and his company may best be considered by beginning with the xtra-legal concept of the "interest". We then observe that when a man ets out to do something in order to satisfy an interest he acquires, by hat very fact, a further interest, namely, an interest in the successful ompletion of what he set out to do. We may therefore divide interests nto those interests the satisfaction of which is an end in itself "immediate interests") and those the satisfaction of which serves to ender possible the satisfaction of other interests ("intermediary nterests"). The law as evolved for individuals does not, of course, ecognise such a distinction, treating all a man's interests as being mmediate.

Then, in order to avoid involved questions of group existence, we egin with the "one-man", unincorporated business. Here the istinction made by the proprietor between his "business" and his other ffairs constitutes a distinction between certain intermediary interests nd his other interests. He will probably refer to the intermediary

interests which he has so distinguished as "the interests of my business" but, in doing so, will be merely pointing to this distinction and will not be suggesting that the business has interests of its own in the same way as he, as a human being, has interests. His decisions as to this distinction (i.e. whether or not to have a business), as to its extent and as to its continuance are clearly decisions made in his "other interests", namely, those the satisfaction of which is dependent upon the satisfaction of the distinguished intermediary interests. Should the proprietor appoint an agent to run the business for him he will most probably instruct him to act "in the interests of the business". This will be a perfectly unambiguous mandate to the agent to act only in certain interests of the proprietor. Should he instruct the agent to make decisions also as to the extent of the business (e.g. the amount of profit to be retained in the business) or as to its continuance, it would be clear that the agent would have to make such decisions in the proprietor's "other" interests. Third parties will, of course, not have to acknowledge this distinction, unless they specifically contract to do so. Finally, it must be stressed that the existence of the business is solely dependent upon this distinction.

The distinction, having been once made, presses for recognition. It finds its legal recognition in incorporation which fits it into the existing frame-work of the law by means of the fiction that the intermediary interests of the members thus distinguished are the immediate interests of another person. In other words the fiction is used as a formula. Whether the company has one member or many, what occurs with incorporation remains the same. Where there are more members than one the law has simply recognised and distinguished the identical, intermediary interests of a number of people.

It is evident that if the members of the company managed its affairs themselves they would now be bound to manage them "in the interests of the company". This is not because they would be acting for anyone else in the sense that an agent acts for his principal. Rather it is because, having acquired legal recognition of this distinction, they cannot destroy it without a corresponding legal recognition of their act. Should they appoint directors to run the company for them, these directors will stand

n exactly the same position as did the agent-manager of the unincorporated usiness in so far as their duty to advance these interests is concerned. hey will, of course, in fact be acting in the interests of other persons nd thus the analogy is so close that it virtually reaches identification t this point. Here again the directors may be authorised to act also n certain "other" interests of the shareholders, for example, to decide pon the amount of capital that should be used in the business, dividends tc. These are the interests of the shareholders in the company. They ay be called "the interests of the shareholders qua shareholders" and ust be distinguished from "the interests of the company". Finally, it hould be noted that where two or more agents or directors are appointed, n the case of the unincorporated and incorporated business respectively, he fact that they may have authority only to act jointly cannot, of course, relieve any of them of their duty to act in the interests of their principal or company.

The director's primary relation to his company consists, therefore, in his duty to act in its interests. The precise legal source of this duty has given rise to much debate and has in the main centred around the question as to whether the director can be classified as a trustee or as an agent. Today it is generally accepted that this question is, at best, academic for it is agreed that the director is, in any event, a fiduciary and therefore under a duty to exercise his powers in the interests of his company. Director is fiduciary!

Unfortunately, it is no easy task to determine exactly what a "fiduciary relationship" is for a great number of apparently heterogeneous relationships are said to be "fiduciary". What is more, the fiduciary relationship is very frequently associated with the doctrine of undue influence, undue influence being said to be presumed in the event of such a relationship. An examination of those cases dealing with this presumption reveals, however, that the courts have neither confined the presumption to the recognised fiduciary relationships nor insisted that a fiduciary relationship will always, per se, give rise to it. When we turn to examine those fiduciary relationships concerned with the management of one person's affairs by another we find the fiduciary duties to which they give rise appear to have little or no connection with the doctrine of undue influence. Although much has been said that is unclear, it seems reasonable to conclude that the fiduciary relationship cannot be

defined in terms of the duties to which it gives rise. The common factor lies rather in the doctrine's origin in the early jurisdiction of Chancery concerning matters of "confidence".

The fiduciary relationship is a doctrine of the Court of Chancery and its principles find their origin in the early jurisdiction of that court. The Chancellor began to exercise his jurisdiction at a time when the common law was proving unequal to the great changes wrought with the passing of feudalism. The Court therefore was never solely a court of equity in the true or philosophic sense of the word, its task being mainly that of supplementing the common law. The Chancellor's jurisdiction was supplementary in two senses. Firstly, he acted only where the common law gave a defective remedy or no remedy at all. Secondly, even within this area, he could not displace the common law, having always to acknowledge the legal rights of the parties.

The common law with which the Chancellor had to work was almost exclusively concerned with land and, drawing little distinction between substantive law and its cumbersome rules of procedure, it had virtually ceased to develop the few remedies lying to some extent outside that area. An examination of even these writs reveals an overwhelming concern with property and a mode of thought fashioned almost exclusively by its concepts. There is no evidence of contract. What was not property was tort; a law of tort for a long time concerned only with direct acts of physical violence to person or property and, even when this approach was eventually relaxed, the act of commission remained an essential element. When undertakings began to receive the attention of the courts they were approached upon these principles of tort, being seen for some time as rendering "wrongful" acts of commission done in violence of them.

The fact that the common law gave no remedy was, however, not enough to induce the Chancellor to intervene. The plaintiff had to base his claim upon "reason and conscience". This has led to a serious misunderstanding of the nature of early Equity for it is usually thought to indicate that Chancery was a court of equity in the true or philosophic sense. True equity, however, finds its guiding principle in the law itself. It acts where, in the particular circumstances, the generality of the rules of law result in injustice which is "antithetic to the very purpose of the generalization". The Chancellor on the other hand found his guiding principle outside the law, namely, in the prevailing

philosophy of medieval Europe. "Conscience" was seen as the principle by which the general rules of reason were applied to the particular case. Thus the Chancellor worked with a principle by means of which an entire legal system could have been constructed and he was prevented from accomplishing this only by the existence of the common law and the fact that he was bound to follow it. It nevertheless resulted in his making general rules which frequently ran contrary to those of the common law, although stated in terms of the conscionable exercise of its rights.

Acting upon this guiding principle and working with the concepts of property and tort, the Chancellor adopted untechnical procedures which enabled him to handle, far more easily than could the common law, matters relating to the administration of assets. Such matters fell within that area of his jurisdiction characterised as "things of confidence". "Confidence" covered a wide range of circumstances including, but by no means limited to, undertakings. It has been suggested that the Chancellor did enforce certain contracts as such and that his jurisdiction in regard to them may be distinguished from his jurisdiction as to matters of "confidence". It does not appear, however, that the Chancellor ever drew such a distinction. He acted rather upon the widely accepted principle of his time, namely, that a promise rendered wrongful a subsequent act done contrary to it, and the remedies which he gave were essentially proprietary. In those cases where he came closest to acting upon contractual principles there remained strong elements of both tort and property. Furthermore, no distinction can be drawn between the circumstances in those cases and the circumstances in cases which were unquestionably accepted as matters of confidence.

In a sense it is fruitless to attempt to classify the Chancellor's jurisdiction in terms of such concepts as contract and tort. In "conscience" a man's obligations could arise for many reasons and in such a scheme of things there is little need to distinguish between the various circumstances giving rise to them. The natural distinction is between the reasons why acts are unconscionable. Confidence is such a distinction.

The concept of confidence was therefore far wider than contract and included all obligations arising in conscience as the result of confidence

reposed in another. Sometimes the confidence was negative in character, merely requiring the party in whom it was reposed not to do something. In other cases it was positive in the sense that it required him to act. This distinction is rather blurred by the fact that damages could only be obtained at common law. This had the effect of rendering it extremely difficult to enforce a positive undertaking. Such undertakings could only be enforced to the extent that the Chancellor held acts of commission contrary to them to be invalid and gave the plaintiff a "proprietary" remedy. Hence the two situations were treated alike. This can be clearly seen in the most important institution of confidence, namely, the use. Here the feoffee to use was in some cases merely under a duty not to deal with the trust property. In others cases, however, he was under a positive duty to administer. Both situations are, however, dealt with upon the same principles. An act done contrary to his undertaking by the feoffee to use was a wrong and the cestui que use's remedy lay in property.

During the latter part of the seventeenth century it came to be felt that Chancery's old, wide, discretionary jurisdiction could no longer be maintained and the Chancellors set out to mould Equity into a consistent and definite body of law. This meant that general rules had to be evolved and the circumstances stated which would give rise to rights and duties. The former task was not new to Chancery but upon the court's ability to achieve the latter depended its claim to be a court of law.

In the case of the trust the Chancellor had begun to focus attention upon the trust property rather than the trustee's conscience and this resulted in the concept of equitable estates. But the main obstacles in the way of establishing Equity as a system of law lay rather in the realms of obligations. Here, instead of principles based upon the wrongfulness of particular acts in terms of their particular circumstances, general rules had to be evolved basing equitable rights and duties upon given, factual, general circumstances. Thus in the case of the trust the development of equitable estates left completely unanswered the problem involved in formulating rules as to the obligation of the trustee to administer it.

If Chancery was, however, to state general circumstances giving rise

to personal rights and obligations, it would evolve general rules openly encroaching upon the jurisdiction of the common law. This was avoided, firstly, by holding that the Court's jurisdiction as to certain matters was peculiarly its own, namely, matters of "fraud" and breach of "trust". Secondly, the Chancellor made no claim to be enforcing undertakings but instead emphasised that it was wrongful behaviour with which he was concerned. A "fraud" in Equity is to this day an act committed in breach of an equitable duty, whether or not such duty was self-imposed and usually without regard being had to the "wrong doer's" state of mind. Thirdly, the Chancellor purported merely to follow the law. An equitable wrong is the unconscionable exercise of a legal right. Fourthly, he never generalised as to those circumstances which would give rise to positive equitable duties but instead placed them upon certain specified persons.

Thus we may summarise the principles with which the Chancellor worked in these cases of confidence: (i) he was concerned with the unconscionable act of commission; (ii) such an act is "unconscionable" because the party had undertaken to act or not to act in a certain way and the act violated this undertaking; (iii) it is not denied that the defendant was entitled so to act at law - what he did was to exercise his legal rights in an unconscionable way; (iv) the plaintiff's remedy lies in property or is, at least, based upon proprietary notions (no damages can be obtained in equity); (v) finally it must be noted that the Chancellor has no direct means with which to enforce a positive undertaking to act. We shall see that this he later manages to do to a limited extent by presuming the commission of a wrong unless certain positive acts are done.

During this period the modern trust is developed as an administrative device. Here we see the development of the first fiduciary relationship. Bound now to define those circumstances in which he will hold a person under an equitable obligation the breach of which is an equitable fraud, the Chancellor defines the trust in terms of the proprietary relationship existing between the trustee and cestui que trust. Thus, because he is forced to deny that the trustee's obligations arise from general principles concerning his undertaking, the Chancellor adopts an approach which suggests that the rules developed for the enforcement of the trustee's duties can never be applied to any other type of administrator.

(If rules apply to the trustee because of the proprietary relationship brtween him and his cestui que trust then they cannot apply where such a relationship does not exist.) This is, of course, unacceptable and the Chancellor is thus led to adopt a middle-of-the-road and very illogical approach. Never really rejecting the principle of conscience, he placed certain defined relationships in a class upon the basis that they gave rise to similar duties in conscience. He then enforded these duties by applying the same or analogous rules because the relationships fell within that class. ie fiduciary relationship!

The development of the other fiduciary relations took place hand in hand with the development of the fiduciary duties. These appear to have three sources, the first, and perhaps most important of which being certain cases dealing with "unconscionable bargains" obtained from young heirs. The Chancellor considered that a person transacting with a young heir stood, because of the heir's inexperience and necessity, in a position of power over him. This position of power resulted in a duty in conscience being placed upon a person so transacting with the heir to see to it that he obtained no advantage from him which he could not have obtained but for the heir's inexperience and necessity. Such a person was therefore under a duty to pay a fair price or to see to it that the heir was independently advised. This positive duty was enforced by presuming the commission of a wrong, namely, that the bargain had been obtained by deliberately taking advantage of the heir's position of weakness. ie a fair, RS/ain

The Chancellor then applied the same principles to the case where a weaker person (because of youth, age etc.) had placed confidence in another to the effect that the other would always treat with him fairly or where his weakness was such as to permit the stronger party actually to dominate him. These we may, perhaps, call the "confidence negative" and "dominance" situations respectively. Just as the necessity of the young heir had given rise to a position of power, so too did the weakness or confidence of such persons. These principles then came to be applied to relationships where one person had undertaken to do something for another so as to relieve that other from a position of necessity, e.g. the attorney and client relationship pendente lite. The fact that the client was dependent upon the attorney gave the attorney a power to

extract an unconscionable bargain. At first the relationship itself, which was, of course, a relationship of confidence and which we may call the "confidence positive" situation, was not enforced. Later, however, the undertaking came to be stressed and eventually certain duties arising from it and concerning transactions between the parties came to be enforced, at least to a limited extent, upon the same principles. This was done on the basis of a presumed wrong. If these obligations were ignored by the doing of some act of commission contrary to them, a wrong was committed. In such a case there was, naturally, no need to find an element of necessity or of weakness and this seems to have resulted in a tendency for the courts to hold that the relationship of "positive confidence" gave rise, per se to a position of power. The tendency persists to this day, causing considerable obscurity and, at times, outright absurdity.

Secondly, the rule was developed to the effect that transactions entered into by a person acting on behalf of another in which he has a personal interest are voidable at the instance of the beneficiary. Such transactions are voidable no matter how "fair" the price, the rule being based upon the notion that a person acting on behalf of another should not place himself in a position where his interests conflict with his duty.

Thirdly, the rule as to "profits" was developed. This at first took place in two fairly distinct lines of cases. The trustee who misappropriated trust property had, of course, long been liable to account for it to his cestui que trust. At the beginning of the eighteenth century, however, it was held in the case of Keech v. Sandford that, in order to prevent possible frauds, a trustee of a lease, who renewed it in his own name, must hold for his cestui que trust even although he took upon the landlords refusal to renew it for the trust. The reason for this rule lay in the court's fear that it would not always be able to ascertain whether or not the trustee had in truth been unable to renew for his cestui que trust. Secondly, there were those cases where it was held that the mortgagor of a lease was entitled to it although the mortgagee had renewed it in his own name. Here the rationale was rather different, it being thought that the access which the mortgagor

had to the landlord would enable him unfairly to obtain its renewal for himself. In both class of case, however, the claim was thought to be based upon a single idea, namely, that the plaintiff had a right to the property in the sense that he had a right or interest in Equity in the property which required the defendant to hold it for him. On the same reasoning it was held that a trustee must account for the benefit of a contract of sale which he had undertaken to make on behalf of his beneficiary and for the profits made by purchasing his own property on behalf of his cestui que trust. In the former case the property and in the latter case the money remained that of the cestui que trust. It would appear that where no such proprietary link existed the beneficiary had no action and that the general action as to profits was developed during the latter part of the nineteenth century.

✓N.Z. Lord Eldon attempted to place the fiduciary duties relating to administrators upon a consistent basis. Taking the reasoning used in those cases where the fiduciary acted on behalf of his beneficiary in a transaction in which he had an interest, namely, that such transactions were voidable no matter how fair the price because the fiduciary has placed himself in a position where his interests conflicted with his duty, Lord Eldon then combined it with the preventative reasoning in Keech v. Sandford. Thus one rule was forged. Actual conflict of interest was equated with breach of duty and the fiduciary who failed to make disclosure when transacting with his beneficiary therefore committed the wrong of allowing his interests to conflict with his duty. On the other hand, the fiduciary was liable for "profits" in order to prevent him from breaching his duty to act in the interests of his beneficiary and, therefore, committed the wrong of placing himself in a position where his interests "may" have conflicted with his duty.

During the nineteenth century the final step was taken in the development of the general action as to profits. Unable to render the fiduciary accountable for those profits which the beneficiary could not claim as his "own" in Equity, the Chancellor developed the concept of equitable obligation whereby the beneficiary was able to claim what "ought" to be his in Equity. This development had become necessary as the result of the now wide use made of the administrator under a general duty to administer the interests of his beneficiary without regard to any

particular property. In the case of the trustee, bound to administer certain defined property, the old rule was enough to ensure that, if he acted at all, he acted in the interests of his cestui que trust. The general action became necessary to ensure that the administrator under a general duty was in a similar position.

Turning now to the fiduciary doctrine in modern law, we may distinguish between the following three situations. Firstly, the one party to a relationship enters into the transaction with the other because he feels bound to do so in the sense that the other is in a position of "dominance" over him. Secondly, he enters into the transaction without considering its terms because he trusts the other will treat with him fairly ("negative confidence"). Thirdly, he enters into the transaction without considering its terms because he believes that the other is acting for him ("positive confidence"). All three situations give rise to fiduciary relationships. The first two concern the doctrine of undue influence and the duties to which its presumption gives rise. The third is the administrator-beneficiary relationship based upon the conflict of interest and duty principle. It should be noted, however, that either of the first two relationships may arise out of the existence of the third.

In order to understand the duties to which this lastmentioned relationship gives rise it is necessary first to consider, briefly, the question of the presumption of undue influence. Here we find that in those relationships where neither party is under a duty to act in the interests of the other the one party to the relationship as defined is either young or inexperienced, for example the relationships of parent and child and guardian and ward. These relationships are thought to give rise to confidence (in the negative sense) and this, coupled with the element of youth, results in an inability on the part of the child to make a "free" decision. By means of a presumption a duty is placed upon the parent or guardian either to pay a fair price or to see to it that the child is independently advised. Because this duty is said to arise out of a stated relationship, the courts have been misled into applying the presumption to all stated relationships, regardless of whether or not they are defined as such so as to include a weaker party.

This we see in the spiritual advisor-devotee relationship which is invariably said to give rise, per se, to a presumption of confidence and even domination. An examination of the cases, however, reveals that an element of weakness is almost invariably to be found. The anomalies inherent in this approach have, however, been far more marked in those cases where the relationship is that of administrator and beneficiary. Thus transactions between attorneys and their clients and agents and their principals have been frequently set aside simply on the basis of such a presumption.

As we have seen, Equity does not enforce, as such, the positive confidence element of those fiduciary relationships arising from the fact that one person has undertaken to act in the interests of another. It merely ensures that if the fiduciary acts at all, he acts honestly and in accordance with his undertaking. Should he act contrary to it he commits a fraud in equity - the fraud of having placed himself in a position where his interests conflicted with his duty, or where they could have so conflicted. Taken out of its original context and extended so as to be equated with actual breach of the duty to act in the interests of the beneficiary, this principle lies at the bottom of the unsatisfactory and unsettled state of the fiduciary doctrine applying to administrators. The principle can only sensibly be applied in one situation; namely, where it is used to render voidable transactions entered into by the fiduciary on behalf of his beneficiary in which he had a personal interest conflicting with the interests of his beneficiary. Its application elsewhere leads only to anomalies. It results in certain transactions being declared voidable on the ground that the fiduciary had stood in a position where he "might" have breached his duty to act in the interests of his beneficiary; the fact that he is able to prove that he not only did not breach this duty but, in fact, had acted solely in order to advance the interests of his beneficiary or that he had paid a fair price, being treated as irrelevant.

It is usually said that all contracts between such fiduciaries and their beneficiaries are voidable. This is not correct and results from the confusion brought about as a result of the abovementioned extension of the conflict of interests and duty principle. There are in

fact two rules.

Firstly; transactions entered into by the fiduciary on behalf of his beneficiary in which he has an interest conflicting with his duty. This is, as we have seen, the true conflict of interest and duty situation. Such transactions have always been held to be voidable at the instance of the beneficiary no matter how fair the price. Recently, however, it has been suggested that where there are co-fiduciaries one of them may purchase, even although he did not sever the relationship, provided he did not actually purport to act for his beneficiary in the sale. This is a major departure from the traditional rule and appears to be far too widely stated.

Secondly, transactions between the fiduciary and his beneficiary: here the rule is that the relationship must be terminated (at least as far as the transaction itself is concerned) and the fiduciary must act openly and must make full disclosure of all relevant information ascertained by him as the result of his position as such. The confusion in regard to this rule has arisen due to two factors. On the one hand, the idea that undue influence is to be presumed in the case of all fiduciary relationships has frequently resulted in a demand for two further requirements for the validity of such a transaction, namely, independent advice and, if this is not given, evidence that the fiduciary acted in the interests of his beneficiary just as if the relationship had not been severed. The conflict of interest and duty principle, on the other hand, has led to the notion that such contracts are always voidable no matter how fair the price. Finally, these two factors, when coupled with a frequent failure to distinguish disclosure as required by this fiduciary rule from disclosure as required in certain cases by statue or company charter, has led to great uncertainty as to what exactly the fiduciary must disclose. It is submitted that the reason for the duty determines its content. The fiduciary's duty here arises from the fact that he was under a duty to act in the interests of his beneficiary and, therefore, it follows that, on severing that relationship, he must disclose to his beneficiary all information which he acquired as such and which he would have been under a duty to use for the benefit of the beneficiary had the relationship not been severed.

Turning now to the modern profits rule, it will be recalled that the term "profits" is given a very wide meaning in Equity. It includes both "profits" made by the fiduciary at the expense of his beneficiary (i.e. as the result of a breach of his undertaking) and incidental profits made as the result of having fulfilled his undertaking. It is evident that the fiduciary's accountability for the latter type of profit cannot sensibly be based upon the conflict of interest and duty principle. This is thought by some to prove that the fiduciary should not be accountable for such profits. On the other hand it might be argued that it is simply the rationale here which is anomalous, a rationale which, in any event, exists only for historical reasons, namely to render the fiduciary accountable for property not belonging to his beneficiary in Equity. At times it has been sought to avoid the absurdity inherent in this reasoning by holding, in certain cases, that such profits indeed "belong" to the beneficiary thus giving him, without more ado, a proprietary claim to them. This is, however, only achieved by extending the concept of property beyond all reasonable bounds.

The rule requiring the fiduciary to account for profits has been used to render him accountable in a wide variety of circumstances. It has been applied so as to prevent him from appointing himself to a position of remunerative employment or from deciding upon his own remuneration. So, too, is he accountable for all profits made resulting from his use of property entrusted to him, regardless of whether or not he acted bona or mala fides. Again, he is accountable for any profits obtained as the result of doing something for himself which he had undertaken to do for his beneficiary and for profits made in the course of carrying out his undertaking. Finally, he is accountable for any profit accruing from his position as such and even, in some cases, for profits made as the result of a transaction with his beneficiary totally unrelated to their relationship.

When considering the remedies open to the beneficiary who does not consent to the fiduciary taking the profit, two situations must be distinguished. Firstly, the right to claim property which was entrusted to the fiduciary or property into which it has been converted. Here the beneficiary has the normal rights of an equitable owner and thus

may claim the property from anyone except a bona fide purchaser for value. Secondly, those cases where the beneficiary's claim is not based upon ownership in equity: here he does not claim that the property (or money) is his but that it ought to be his. His claim is based upon an "equitable obligation" and therefore in such cases the constructive trust is a purely remedial device. Until the court finds for the beneficiary, the fiduciary does not hold the property in trust. Finally, it must be noted that the distinction between these two remedies is of the utmost importance in the field of company law.

Certain other duties are said to arise from such a fiduciary relationship. The fiduciary's duty not to compete has received little attention and is as yet largely undetermined. In the only case where the subject has been treated at any length, the duty was based upon the conflict of interest and duty principle, it being held that the fiduciary could be prevented from entering into a line of business which would or could have a detrimental effect upon the business which he was under a duty to administer for his beneficiary. The fiduciary's duty not to "misuse" confidential information is similarly unsettled. The early cases dealing with this duty based the fiduciary's liability upon three quite distinct grounds. In some cases it was said that "confidential" information is "property" belonging in equity to the beneficiary. In others it was held that a fiduciary's misuse of it constitutes a breach of "confidence". In yet other cases it was held to be a breach of contract giving rise to an action for damages at common law. This problem, which remains unsettled, has two principle causes. Firstly, Chancery's almost exclusive concern with property and, secondly, the common law doctrine of consideration. It would seem that today the courts use the notions of property and confidence only when they wish to circumvent the restrictions placed upon them by this doctrine.

Is the fiduciary doctrine thus outlined compatible with the principles of Roman Dutch Law? The terms "fiduciary" and "fiduciary relationship" are extensively used in our law but this does not, of course, mean that we have accepted the doctrine itself. These terms have been used in connection with the doctrine of undue influence and to describe persons administering the affairs of others, the relations between such persons and their beneficiaries and certain rights and duties flowing from these relations. Whilst it is accepted that the

equitable rule as to the presumption of undue influence forms no part of Roman Dutch Law, it appears to be generally thought that the fiduciary doctrine applying to administrators has either been received into our law in order to fill a lacuna or is in fact also a doctrine of the Civil Law itself.

IV.B It is submitted that the doctrine is unknown to the Civil Law. No trace of it can be found in our old authorities and indeed it would be surprising if this could be done for the trust concept is unknown to civil law. In that system the duties of the administrator are dealt with upon entirely different principles. In the first place, his duty to act in the interests of his beneficiary is enforced as such and breach of it renders him liable in damages. Secondly, he is prohibited from advancing his own interests when carrying out his duty - unless it is agreed upon before hand that he may do so. Thirdly, the administrator is forbidden to act for his beneficiary in matters in which he has an interest and, should he do so, the transaction is voidable unless bona fide third parties are affected. In spite of suggestions and even certain texts to the contrary, these transactions are voidable regardless of the good faith of the administrator. The rule is based upon the belief that a person acting for another cannot make decisions for that other in matters in which he has a personal interest. Such transactions are voidable no matter how honestly he acts. The administrator may, however, always transact with his beneficiary or with a co-administrator provided he does so as an extraneus; that is to say by severing his relationship with his beneficiary and transacting as a principal. He must transact palam et bona fide and good faith here requires him, inter alia, to disclose all information which he acquired as administrator and which he would have been under a duty to use for his beneficiary had he not terminated the relationship. This duty to disclose is not based upon any notion of "confidence" but upon the administrator's duty to act in the interests of his beneficiary and to account to him on the termination of his administration. Finally, the administrator is accountable for all profits made during the course of his administration. By this it is meant that he must account for all benefits which he obtained as the result of his having acted in the interests of his beneficiary. The rule is based neither upon the idea

of conflict of interest and duty nor upon any extended notion of property. It is based solely upon the concept of administration. Just as the administrator may claim all reasonable expenses whilst acting on behalf of his beneficiary, so too must he account for all profits which he acquires during the course of his administration.

N.B Our courts have, unfortunately, been strongly influenced by English law with the result that they have frequently based these rules upon the conflict of interest and duty principle. Thus it is said that the administrator is liable for profits because he is a fiduciary and therefore, he may not place himself in a position where his interests conflict with his duty. This has in turn led to a failure to distinguish between those cases where the administrator has breached his duty to act in the interests of his beneficiary and those where he is merely liable for an incidental profit. Thus the administrator has been held accountable for "profits" instead of damages where he in fact breached his primary duty. The influence of English law has also led to the introduction of the extended notion of property found in Equity, information being held to be a type of "property" and the "profits" accruing as the result of its use being thought to "belong" to the beneficiary.

N.B We turn now to consider the position of the director. The rules relating to directors of companies were developed by the process of drawing analogies between their position and those of other administrators. In English law this process tends to be obscured by the fact that the director is first classified as a fiduciary in order to bring him within the jurisdiction of Equity. There the analogy of the trustee has been used in so far as the director administers the company's property and the analogy of the agent in so far as he represents it in transactions with third parties. In spite of frequent suggestions to the contrary, it appears to be reasonably clear that the courts have deliberately used this process of analogy and have never seriously entertained the proposition that the director may actually be classified as a trustee or an agent properly so-called. In South African N.B law this process of analogy has a long history, clear authority for it being found in the Digest. It is also greatly simplified by the fact

that it is a process of direct analogy. Although analogies may, of course, be drawn between the director and all other administrators known to our law, it is obviously the mandator whose position is most analogous. N.B.

N.B. In English law the director is said to be under a fiduciary duty to act bona fide in the interests of his company. This rule, which is accepted as being part of our law, is rendered extraordinarily complex as the result of the almost total confusion which exists as to its content. Because he is not thought to be under a positive duty to act for his company, the rule has often been taken to be merely a statement in positive terms of the fiduciary's duty not to act in interests other than those of his beneficiary. This is, however, not what the courts have usually meant when they have applied the rule. Rather have they meant that they will not interfere with the decisions of directors made in good faith, even although they would appear in fact not to be in the best interests of the company. In other words the courts will not interfere in matters of business judgment.

This confusion has been made worse by the fact that, owing to the chaotic state of corporate theory and, in particular, to the wide acceptance of the so-called "legal entity theory", doubt exists as to what exactly "the interests of the company" are for which the director must act. One result of this is the notion that a director may act intentionally to advance the interests of certain persons - or even of some metaphysical "entity" - bona fide believing that their (or its) interests are the "interests of the company" and yet nevertheless be mistaken. To put it another way, he may be bona fide in error as to the identity of his beneficiary. This confusion becomes rampant when it is said that in such a case the director is guilty of a breach of his duty to act in good faith in the interests of his company.

These corporate theories also give rise to anomalies in the opposite direction, namely, they lead to the idea that the director may act contrary to the interest of the shareholders and yet act in "the interests of the company". This is because the legal entity theory fails to distinguish between the "interests of the company" and the "interests of the shareholders qua shareholders" (i.e. between the

shareholders distinguished and recognised intermediary interests and those other of their interests the satisfaction of which is made possible by the satisfaction of these recognised intermediary interests.) Nevertheless, such acts clearly cannot go unchecked and therefore those holding this theory are forced to find some other rule in order to invalidate them or, rather, to explain why the courts have done so. Thus it has been suggested that the director is under a further fiduciary duty to exercise his powers for the "purpose" for which they were granted or, even, that such acts are simply beyond his powers. Neither of these contentions can be accepted. The former requires the acceptance of an implicit and unstated duty existing somewhere between the director's duty to exercise his powers in the interests of the company and the rule as to the limit of his powers, requiring him to exercise his powers for certain, unstated purposes only. The latter requires the acceptance of the proposition that a director may act beyond his powers even although he acted within his powers as set out in the company's articles.

It has been suggested that the rule requiring directors to act in the interests of their company does not give rise to a test as to the validity of their acts which is distinguishable from the test as to the extent of the company's powers. In other words, acts not done in the interests of the company are ultra vires. This cannot be accepted. The ultra vires doctrine provides a purely objective test and rests upon the requirement that a company states in its objects clause the business which it proposes to carry on. The fact that the courts are willing to construe "incidental" objects does not alter the nature of the doctrine in the slightest. An activity is reasonably incidental to the objects of the company if it is so upon objective criteria. The confusion here has, in the main, resulted from a failure to distinguish between objects and powers and has arisen most frequently in regard to donations. It is submitted, however, that where directors have the power to make donations not one but two questions remain to be answered. Firstly, "Was the donation made in a transaction related, objectively speaking, to one of the objects of the company?" Secondly, "Did the directors make the donation bona fide believing it to be in the interests of the company?"

All the other fiduciary duties of the director are said to be based upon the principle that he, as a fiduciary, cannot place himself in

position where his interests conflict, or may possibly conflict, with is duty. The principle is said to apply to situations where he urports to act both on his own behalf and on behalf of his company nd to other situations where he acts only to advance his own interests. t applies in some situations where he has breached his duty to act in he interests of his beneficiary and in others where he has not. It pplies to certain cases where he has made a profit and to others where he as made none. The rule is therefore not based upon the notion of profits", as is frequently suggested, and it includes not only conflict ituations properly so-called but also breaches by the director of his rimary duty to his company and even possible breaches of it.

Where a director acts for his company in a matter in which he has n interest we have the conflict of interest and duty situation properly o-called. Should he enter into a transaction on behalf of his company ith himself, the transaction is voidable at the instance of the company. o too is it voidable where the transaction is with a third party who has nowledge of the director's breach of duty. Whether or not the director ctually profited as the result of such a transaction is always rrelevant.

Unlike the trustee, a director is not a necessary party to ontracts made on behalf of his beneficiary and, therefore, where a irector has an interest in a contract of his company but is neither he other contracting party nor purports to act on its behalf, we appear o be dealing with a situation which is peculiar to directors. Is he evertheless under a duty to take part in the deliberations of the board? N. 13 riginally this was thought to be the case and therefore it was held that he director could not thus avoid disclosure. Today, however, a irector is not considered to be under a duty to take a full part in all is company's affairs. His fiduciary duties merely prevent him from cting in other interests when, and if, he does act. Thus it would ppear to follow that there is no reason why the directors of a company annot transact on behalf of the company in a matter in which one of heir number has an interest, provided the director takes no part in he proceedings and makes no profit as a result of it. In any event it s submitted that he is in the position of a person transacting per nterpositam personam, or in a position directly analogous to such a

person, and should be under a similar duty to disclose. In our law failure to do so should render the contract voidable where the third party had knowledge of the director's breach and should give rise to an action for damages.

It is frequently said that a director cannot contract with his company. This is not correct. It arises as the result of the confusion of this situation with the case where the director transacts on behalf of his company with himself. The rule is that a director may do so provided he acts openly and makes full disclosure. The generally accepted rule of English law to the effect that such contracts can only be made on disclosure to the general meeting appears to be anomalous today when the director is not considered to be bound to take part in all the deliberations of the board. In South Africa the rule may well be the civil law rule to the effect that he can contract with his co-directors provided he does so openly and in good faith, palam et bona fide. This requires, inter alia, disclosure of all information which he would have been under a duty to use for the benefit of the company had he been acting for it in the transaction.

N.B. As we have seen, the concept of property in Equity covers three distinct situations. Thus the director is accountable for property which he has misappropriated, for advantages obtained as the result of his breach of duty and for all profits accruing to him during the course of his administration. It has been submitted that in South Africa the first two situations give rise to an action for damages and only the third to an action for profits. In English law the position as to the third situation rests upon unsatisfactory and unsettled principles. The duty to account for these profits is said to exist in order to prevent the director from breaching his duty to act in the interests of his company. It is thought to be a "preventative" rule. This reasoning, when coupled with the conflict of interest and duty principle, leads to the idea that a director may not take such a profit because, if he did, he would have placed himself in a position where he "may" have breached his duty to act in the interests of his company. Thus it is said that his interests "may" have conflicted with his duty and therefore he must account - even although the court finds that he in fact acted

roughout solely in the interests of the company! In order to avoid is rather absurd reasoning it has been suggested that the company's laim is based rather on an extended notion of property. If, however, his latter approach be accepted the English rule will be very wide ndeed. It would lead, in many cases, to a director being held ccountable for profits made by him as the result of his taking an pportunity which his company neither could nor wished to take for tself.

The case of profits arising from a transaction between the irector and his company has, in English law, for historical reasons, lways been treated separately. Where the director secretly sells his n property to the company, the decisive question is whether or not he riginally acquired it for himself in breach of a duty to acquire it for is company. If not, the company may avoid the contract but cannot hold he director to it and sue for the profits. If, on the other hand, it as acquired in breach of duty, the company has the option of either oiding the contract or suing for the "profits". These rules veloped before the concept of equitable obligation, being based upon he idea that in the former case the company has no right in the property. oday various reasons are given to justify the former rule. Thus it is aid that to allow the company to sue for profits where the director was nder no duty to acquire for it would amount to the court re-writing the ontract between them or would set the court the "impossible" task of ssessing the profit.

The origins and development of the rule rendering the director ccountable for profits made where he is held to have originally equired in breach of duty are of considerable importance for here we e Equity, again, seeking to enforce the undertaking itself by means the fiduciary concept. Chancery was, of course, severely ndicapped in dealing with the case where the director purchased for mself instead of purchasing for his company in that it did not purport enforce his undertaking as such and could give no remedy in damages. here the director, however, resold the property to his company, the urts held that he had sold property which already belonged to the mpany in Equity and therefore the company was entitled to claim the fference between the amount for which the director had purchased the

roperty and the amount at which he had sold it to the company. The idea was that the money claimed was still the company's money in Equity or it had been wrongfully obtained from the company by some one to hom its property was entrusted. In the early cases it was said that he property belonged to the company in Equity because the director was resumed to have purchased it originally for his company. This was, nitially at least, no more than a method of rendering the director ccountable for what was thought to be a breach of good faith in the ransaction between him and the company. Later, however, the courts egan to look more to the circumstances of the original purchase, at irst merely to see whether the director had purchased for himself as art of a scheme to resell - in which case he was presumed to have urchased as agent for the company - but later, however, to ascertain nether he in fact had been authorised to purchase on behalf of the ompany. Thus the emphasis has moved almost entirely away from the idea f unfair advantage taken by a fiduciary of his beneficiary in a trans- ction between them and is now firmly focused upon the fiduciary's duty o administer. The extraordinarily narrow view of this duty, i.e. the nsistence that there be an actual mandate to purchase and not simply a uty to advise to purchase, is due largely to the major role that cases oncerning promoters have played in the development of the rule.

If the director is held to have "sold" to the company its own roperty where he originally acquired it for himself in breach of a duty o acquire it for the company, why could not the company have sued him or it even although there was no subsequent resale? This final step as taken with the development of the "corporate opportunity" doctrine. hus the director's undertaking is enforced in such cases not by an ction for damages but by means of an action for all property (in its idest sense) which he acquires as the result of such a breach. It is a laim based upon the idea that the "opportunity" which he used belonged" to the company.

Although these rules are based almost exclusively upon principles eculiar to Equity, our courts have nevertheless attempted to follow hem. Holding that they are applied to the director because he, as a iduciary, is forbidden to make a "profit" at the "expense" of his

ompany or to place himself in a position where his interests conflict ith his duty, it is said that he is accountable for "profits" made as he result of selling property to the company which he ought, in the irst place, to have purchased for it. Such a duty exists where he is harged with a specific mandate to purchase the property for the ompany or in the event of other "special circumstances." An express andate to purchase is thought to be necessary because an individual irector as such normally has no power to purchase on behalf of the ompany. This curious reasoning leads to the unacceptable conclusion hat, provided no special mandate is given, directors may always purchase roperty for themselves which, acting collectively, they ought to have urchased for their company. It is, however, thought to be so undamental that the other "special circumstances" are but cautious xtensions of the idea. Thus it is said that a director is under a duty o purchase for the company when he is in a position to completely dominate" the board. Finally, our courts have gone so far in their ttempt to apply these Equitable principles that they have even uggested, although the suggestion has never in fact been applied, that he company's claim is a proprietary action based on the notion that the roperty belongs to it the moment the director, in breach of duty, urchases it for himself.

It is submitted that these principles are totally irreconciable lth those of our law. With us the director should be liable to the ompany in damages where he has purchased something for himself which e ought to have purchased for the company or which he ought to have ivised the company to purchase. In the event of his selling such roperty to it, the company should be able to avoid the contract either ecause the director failed to act palam et bona fide or because he urported to act both for his company and for himself in the transaction. lternatively, it should have an action for damages. It is submitted hat the doctrine of "corporate opportunity" can never form part of our aw.

The director is said to be under a duty not to misuse "confidential nformation". The principles upon which this duty is enforced and its mits are no more settled here than they are in the case of other iduciaries. Frequently information is said to be a type of property

and the director who misuses it is held to be liable upon the same basis as he is liable for profits from the use of the company's property properly so-called. Sometimes, on the other hand, misuse of such information is said to be a "breach of confidence". Where, however, consideration can be found it is today usually held to be a breach of contract giving rise to an action for damages at common law.

The director's duty not to compete with his company, if indeed there is such a duty, is in a similarly unsettled state. It is submitted that many of the difficulties here can be avoided by distinguishing two other, and in principle, unrelated concepts, from the concept of competition. These are, firstly, the duty to act in the interests of the company and, secondly, the duty not to misuse confidential information. This having been done, it is submitted that competition may be defindd as the act of rendering more difficult, or even impossible, the task of others under a duty to act in the interests of the company. The duty thus defined, the conflict of interest and duty rationale should be abandoned for it leads to the anomalous conclusion that a director can breach this duty by placing himself in a position where he "may" compete with his company. The question should simply be whether or not he did in fact compete.

It is accepted that, provided they do not commit a "fraud on the minority", the shareholders may ratify a director's breach of his fiduciary duties. "Fraud" here, however, does not mean actual deceit. Rather is it that certain acts of directors may not be ratified and any attempt to do so is, per se, "fraud on the minority" - regardless of the state of mind of the members purporting to ratify. There are therefore no principles underlying the decisions as to which breaches of duty cannot be ratified.

N.B. Most authorities maintain that there are two fiduciary duties the breach of which cannot be ratified. These are, the duty to act in the interests of the company and the duty not to appropriate profits which "belong" to the company. At first sight the former proposition may appear sound enough. When, however, it is appreciated that it denies the possibility of the ratification of such a breach by a disinterested majority acting solely in the interests of the company, it might be thought that the advisability of such a rule is not so obvious. The latter proposition is based upon a distinction drawn by Equity for

reasons entirely unconnected with the question of ratification and it is submitted that its application here can serve no useful purpose at all. What is more, it cannot be reconciled with all the cases and certainly can have no application in our law.

It is submitted that the question of ratification should be approached by first drawing a distinction between those cases where the directors have exercised powers which they were under a duty to exercise in the "interests of the company" and those where they have exercised powers which they were under a duty to exercise in the interests of the shareholders qua shareholders. The former can always be ratified provided the members act in the interests of the company. The latter can always be ratified provided the rights of a minority are not affected.

To what extent can a director be released from his fiduciary duties? Statute apart, it is submitted that he can never be released from his duty to act in the interests of the company for such a release must be, by definition, an abuse of the corporate device, for it is entirely dependent upon the fulfilment by the members and the directors of their duty to act in the company's interests. Provided, however, he acts in these interests, there appears to be no reason why a director should not be released from his other fiduciary duties.

(pages 1-3)

N O T E S

INTRODUCTION

(1) Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle", (1958) Cambridge Law Journal 93 at p.97; Cilliers and Benade, Maatskappyreg, consider that this is because the concept is founded upon moral considerations, see p.206

(2) Murray, (1948) Annual Survey of South African Law at p.80; see also De Villiers and Mackintosh, The Law of Agency in South Africa, 2nd ed. at pp.1-2.

(3) Per Innes C.J. in Robinson v. Randfontein Estates G.M. Co. 1921 A.D. 168 at p.178.

(4) See for example Robinson v. Randfontein Estates G.M. Co. 1921 A.D. 168 at p.178. It is interesting to note that even there the reference to D.18.1.34.7. as authority for the proposition that the doctrine forms part of Civil Law was made with reference to a statement to that effect by Lord Cranworth in Aberdeen Railway Co. v. Blackie Bros. (1854) 1 Macq. 461.

(5) Gower, Modern Company Law, 3rd ed at p.516

(6) See for example Vinter, Fiduciary Relationship and Resulting Trust. The doctrine is, however, not limited to these given relationships, see Tate v. Williamson (1866) L.R. 2 Ch. App. 55

(7) See for example Gower, op.cit., at pp.520-524

(8) Beuthin, "The Range of a Company's Interests", (1969) South African Law Journal 155 at p.156

(9) Sealy, "Fiduciary Relationships", (1962) Cambridge Law Journal 69

(10) Sealy, "Fiduciary Relationships", (1962) Cambridge Law Journal 69 at pp.74-79

(11) Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119 at p.124

(12) Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119 at p.122

(13) Berle, "Corporate Powers as Powers in Trust", (1931) Harvard Law Review 1049 at p.1049

(14) "Corporate Opportunity", (1961) Harvard Law Review 765 at p.765

(15) Sutton's Hospital case (1612) 10 Co. Rep. 1a,23a, here Coke C.J. referred to directors as "trustees".

(16) "The precise legal category in which a director belongs has been debated in academic and judicial writing. All are agreed that he is a fiduciary of some kind..", Parsons, "Directors' Duty of Good Faith," (1967) 5 Melbourne Law Review 395 at p.397

(17) Parsons, ibid at p.416

(18) "The trustee is always in a position of some temptation by the very fact of managing the funds of another"; quoted by Gareth Jones, "Unjust Enrichment and the Fiduciarys' Duty of Loyalty", (1968) 84 Law Quarterly Review 472 at p.486 from "Corporate Trustees' Conflict of Interests", (1958) 25 University of Chicago Law Review 382 at p.386

(19) Gower, op.cit. chapt.23

(20) See for example Gower, op.cit., at p.562

(21) See for example Gower, op.cit., at pp.520-524; Beuthin, "The Range of a Company's Interests", (1969) South African Law Journal 155; Rubner, The Ensnared Shareholder.

PART I

THE NATURE OF THE RELATIONSHIP BETWEEN DIRECTOR AND COMPANY

(1) Hart, "Definition and Theory in Jurisprudence", (1954) 70 Law Quarterly Review 37 at p.49

(2) Dewing, quoted by Gellespie in "The Thin Corporate Line : Loss of Limited Liability Protection", (1969) 45 North Dakota Law Review 363 at p.367

(3) Radin, "The Endless Problem of Corporate Personality", (1932) 32 Columbia Law Review 643 at p.643

(4) See Murray A. Pickering, "The Company as a Separate Legal Entity", (1968) 31 Modern Law Review 481 at pp.481-482 where he says: "The Difficulties experienced by the courts from time to time in separating the company as a legal entity from its members are evidenced by the remarkable range of judicial expletives or, in Younger L.J.'s phrase, 'terms of polite invective' which they have used on appropriate occasions to describe corporations, including, for example, 'a merenominee', 'a mere fraud',

an 'agent','a trustee', a 'mere device', 'a myth and a fiction', 'a pretended association', a 'bubble', an 'unreal' procedure, 'a cloak', 'an alias', 'a name', an 'artificial legal thing', a 'legal abstraction', 'mere machinery', 'a metaphysical conception', 'a sham or bogus', 'an abstract conception', a 'simulacrum', 'a cloak', a 'mere alter ego', 'an abstract being', a 'creature', 'a screen' and even a 'black sheep'...'a hollow sham' and an elementary device'."; see pp.481-482 for authorities cited.

(5) See for example Benade who, speaking generally, says "Met die talle uiteenlopende beskouings oor die aard van die regspersoon blyk dit lank reeds duidelik dat 'n enkele teorie wat algemeen sal bevredig, onbereikbaar is. Nogtans stel elke ontwikkelde regstelsel hom in op sekers uitgangspunte oor die aard van die regspersoon"; "Die Selfstandigheid van die Maatskappy-Regspersoon", (1967) 30 T.H.R.-H.R. 213 at p.216

(6) See for example Gower, Modern Company Law, 3rd ed. at p.517

(7) Radin, "The Endless Problem of Corporate Personality", (1932) 32 Columbia Law Review 643 at p.643

(8) Pollack, "Has the Common Law Received the Fiction Theory of Corporations?", (1911) 27 Law Quarterly Review 219

(9) Nêkám, The Personality Conception of the Legal Entity, at pp.49-52; Buckland, A Text Book of Roman Law, maintains that it was only in the Byzantine age that "persona" came to be used in this technical sense, see p.173; see also Duff, Personality in Roman Law, chap.I

(10) Nêkám, op.cit., at p.51

(11) Personality; Radin, loc.cit.

The Fiction Theory

(12) See Duff, Personality in Roman Law. The Theory was advanced by Gierke. The main reasons why the fiction Theory is attributed to the Romans are such phrases as "hereditas personae vice fungitur" and D.46.1.22. "hereditas personae vice fungitur, sicuti muncipium et decuria et societas". Duff points out that this text, which is referred to by Savigny, is unique. What is more "(a)ll Florentius is saying is that a muncipium is in some ways treated like a human being by the law - not that it is regarded by means of a fiction as capable of suing, owning etc." Other texts usually referred to are D.4.3.15.1. where Ulpian submits that a corporation cannot itself be guilty of dolus (but, on the other hand, D.4.2.9.1. is to the

effect that they can be guilty of metus); D.22.5. to the effect that a corporation, as an incerta persona, could not take under a will; D.4.6.22.2. which says that the edict dealing with those cases where restitution is granted to those being absent, were undefended, applies also to the case of lunatics, infant children, and town corporations. But see D.3.4.2., corporations may appoint an agent; D.38.16.3.6. they may manumit a slave; D.35.1.9.7. a town can take an oath by the mouth of its representatives. Duff, concluding that all personality was created by the state, is of the opinion, however, that the Romans never developed a theory of corporate personality.

(13) See for example, Holland, Jurisprudence, 13th ed. at p.99 as to the writing of Pope Innocent IV whom Gierke considered was the first man to use the famous phrase "persona ficta". Pope Innocent IV held that "cum collegium in causa universitatis fingatur una persona" and that a corporation could commit neither sin nor wrong. See also Duff, op.cit.; Maitland, Preface to Gierke, Political Theories of the Middle Ages p.xix

(14) Here the early dictum of Coke C.J. in Sutton's Hospital Case is usually referred to: "a corporation aggregate of many is invisable, immortal, and rests only in the intendment and consideration of the law...they cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney...a corporation aggregate of many cannot do fealty, for an invisable body can neither be in person, nor swear...." So too Blackstone considered that a corporation could not commit treason, a felony, or other crime in its corporate capacity nor could it commit battery or "such like personal injuries; for a corporation can neither beat, nor be beaten...", Commentaries 1775 vol.1 pp.476-7. There are, of course, a host of dicta in the cases which appear to support this theory. Pollock, however, maintained that the common law did not stand committed to it, "Has the Common Law Received the Fiction Theory of Corporations?", (1911) 27 Law Quarterly Review 219; see also Geldart, "Legal Personality", (1911) 27 Law Quarterly Review 90 where he says that "..if we have accepted the fiction theory, and the concession theory, our acceptance has never been more than skin deep, at p.93. The fiction theory is also said to be authodox in South Africa, see Benade, "Verontagsamming van die Selfstandigheid van die Maatskappy-Regspersoon", (1967) T.H.R. - H.R. at pp.216-220. He says, however, that "(i)n Suid-Afrikaanse en Engelse regsbronne word steeds lippediens aan die fiktiewe entiteit as grondslag van ons maatskappyereg bewys, dog nie so dikwels, sonder om enige beginsel of vaste metode to volg, word van heirdie uitgangspunt afgewyk." The theory has

also been widely accepted in America, see for example Bank of United States v. Deveaux 9 U.S. (5 Cranch) 61 (1809)

(15) Pound, Jurisprudence, vol.iv at p.228; see also, for example, Keeton, Elementary Principles of Jurisprudence, 2nd ed., at p.168. Savigny's theory must, of course, be seen as a development of his first proposition as to the purpose of law, namely, that all law exists for the sake of the liberty inherent in each individual; therefore the original concept of personality must coincide with the idea of man.

(16) Salmond, Jurisprudence, 9th ed. at p.325. Thus, too, Machen says "(a)lthough corporate personality is a fiction, the entity which is personified is no fiction. The union of members is no fiction...(a)lthough corporate personality is a fiction, yet it is a fiction founded on a fact..", "Corporate Personality", (1911) 24 Harvard Law Review 253 at p.266

(17) Salmond, op.cit., at p.325

(18) Salmond, op.cit., at pp.325-327

(19) Maitland, Preface to Gierke, Political Theories of the Middle Ages at p.xxvi

(20) Geldart, "Legal Personality", (1911) 27 Law Quarterly Review 90 at p.92

(21) Duff, Personality in Roman Private Law, at p.212

(22) Wolff, "The Nature of Legal Persons", (1938) 54 Law Quarterly Review 494 at p.496

(23) Salmond, op.cit., at p.331

(24) Geldart, loc.cit., at p.94

(25) Radin, "The Endless Problem of Corporate Personality", (1932) 32 Columbia Law Review 643 at p.662; Duff op.cit., at p.211; Pound, Jurisprudence, vol iv at p.216

(26) Salmond, op.cit., at p.332

(27) Paton, Jurisprudence, 3rd ed. at p.369

The Organic Theory

(28) Duff, Personality in Roman Private Law, considers that, although the Romans did not develop a theory of the gesamint person, there is very little in the texts

fundamentally opposed to realism, see chap.ix, see also at pp.33-35 for discussion of the word "corpus"

29) Wolff, "The Nature of Legal Persons", (1938) 54 Law Quarterly Review 494 at p.499

30) See for example the discussion of this in Pound, Jurisprudence, vol. iv at p.64; 2 Puchta der Institutionem (9th ed. 1881) 207 quoted by Pound at p.64

31) Dicey, "The Combination Laws", (1904) 7 Harvard Law Review 504 at p.513

(32) Maitland, Introduction to Gierke, The Political Theories of the Middle Ages at p.xxvi

(33) Paton, Jurisprudence, 3rd ed. at p.372

(34) Wolff, loc. cit., at p.499

(35) Wolff, ibid. at p.500

(36) Paton, op.cit., at p.372

(37) Hart, "Definitions and Theory in Jurisprudence", (1954) 70 Law Quarterly Review 37; Wedderburn, "Corporate Personality and Social Policy", (1965) 28 Modern Law Review 62 at p.70

(38) Maitland, Trust and Corporation, Collected Papers 312 at p.383

(39) Wolff, loc.cit., at p.501

(40) Thurman Arnold, The Folklore of Capitalism chp.8

(41) Keeton, Elementary Principles of Jurisprudence, at pp.167-168

(42) In the Quo Warranto Case (The Proceedings between the King and the City of London on an information in the nature of a Quo Warranto, 5 State Trials (1683) 435) Treby argued for the City of London; "Suppose that they under their common seal should commit treason..what judgment shall be given against them in their corporate capacity? What? It shall be that 'suspendatur per collum corpus politicum'. And then, what execution shall be done upon that sentence? What? Must they hang up the common seal?" Of this Pollock says; "Observe he does not say 'delinquere non potest' but 'suspendi per collum non potest' a very different matter." This seems to be a bit thin.

(43) Lennard's Carrying Co. v. Asiatic Petroleum (1915) A.C. 705

(44) Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (G.B.) Limited (1916) 2 A.C. 307; it is, however, not much of a tendancy. In Lennards case Viscount Haldane said, "..a corporation is an abstraction" and in the Daimler case Lord Parker said, "For certain purposes a court must look behind the artificial persona - the corporation - and take account of and be guided by the personalities of the natural persons, the corporators.

(45) Willis v. Association of Universities of the British Commonwealth (1964) 2 All E.R. 309.

(46) Wedderburn, "Corporate Personality and Social Policy", (1965) 28 Modern Law Review 62 at p.69

(47) Willis v. Association of Universities of the British Commonwealth (1964) 2 All E.R. 309 at p.42

(48) Bonsor v. Musicians Union (1956) A.C. 104

(49) Willis v. Association of Universities of the British Commonwealth (1964) 2 All E.R. 309 at p.342; Pearson L.J. said "The council is in some respects a separate entity"; Salmond L.J. said "I am prepared to accept (and indeed I am inclined to agree) that the council is a separate entity..."; Wedderburn remarks "The tenor of these judgments makes it clear that the judges are now willing to seize on slender evidence to treat a body or institution as a legal "entity", loc. cit., at p.71

The Purpose Theory

(50) Gaius, Inst. 2.11. "Quae publicae sunt, nullius videntur in bonis esse; ipsius enim universitatis esse creduntur privatae sunt, quae singulorum hominum sunt."

(51) Sometimes emphasis is not placed upon property, "purpose" being seen as a general concept embracing all types of persona. Thus Geldart says "(f)rom this point of view rights do not necessarily belong to persons: rather persons are a particular class of purpose". (1911) 27 Law Quarterly Review 90 at p. 101

(52) Friedman, Legal Theory, at pp.361-362

(53) Planiol's views, of course, differ widely from those of most theorists who advanced the purpose theory and, indeed it might be thought that they should not be considered under this rubric at all. It is submitted that this may be done - at least for the purposes of this thesis - in that the type of co-ownership as envisaged by Planiol is essentially based upon the notion of purpose. It is the common purpose which leads to its adoption. See Planiol

1 Traité elementaire de droit civi. The translation is from Pound, Jurisprudence, Vol. 1 at p.225

(54) Pound, op. cit., at pp.225-226; Geldart says that it is a strange kind of co-ownership which gives no right of possession or right of partition. Barker, on the other hand, considers that the purpose actually owns the property. "It is a common and continuing purpose, continuously entertained by a body of persons which owns the capacity and constitutes the legal person. The 'person' which owns the property of an Oxford or Cambridge college is neither the founder, now gone, nor the body of his living successors. It is the purpose which animated the founder and which continues (it may be... in a new and modified form) to animate his successors." - see Barker's translation of Gierke, Natural Law and the Theory of Society, at p.lxxiiif.

(55) Duff, Personality in Roman Private Law, at p.221

(56) Paton, Jurisprudence, 3rd ed. at p.374

(57) Duff, op.cit., at p. 218, who says of this theory that "(it) has been held unconsciously by those who knew no theories, like the early Roman and English lawyers, and consciously by those who knew too many and revolted against them, like Ihering.

(58) Per Lord Wrenbury in Macaura v. Northern Assurance Co. (1925) A.C. 619 at p. 633

(59) Paton, op.cit., at pp.370-371

(60) Kelsen, Lauterpacht, "Kelsen's Pure Science of Law", in Modern Theories of Law, at p.113; see Paton, op. cit., at p.371-372

THE THEORY OF THE LEGAL ENTITY

(1) Canfield, "The Scope and Limits of the Corporate Entity Theory", (1917) 17 Columbia Law Review 128; Latty, "The Corporate Entity as a Solvent of Legal Problems", (1936) Michigan Law Review 597; Nékám, Personality Conception of the Legal Entity (1938); Pound, Jurisprudence, Vol. IV at p.191 et seq.; Murray A. Pickering, "The Company as a Separate Legal Entity", (1968) 31 Modern Law Review 481; Benade, "Verontagsamming van die Selfstandigheid van die Maatskappy-Regspersoon", (1967) 31 T.H.R.-H.R. 213

(2) Pound, op.cit., Vol IV at pp. 191-192

(3) Nékám, op.cit., at p.16

(4) Nékám, op.cit., at p.21

(22-24)

(5) Nékám, op.cit., at p.22

(6) Nékám, op.cit., at p.21. It is, he says, a "(c)lassificatory term used in legal science."

(7) Nékám, op. cit., at p.21. "Should the legal scientist find certain data in life which obviously contradict a theory - however carefully worked out, however acceptable from all other points of view he must necessarily reject it or complete it." at p.17.

(8) Nékám, op.cit., at p.24

(9) Nékám, op.cit., at pp. 24-27. "Well, we sit here, perfectly impartial; we have no prejudices, either theological or otherwise. If you come there you may find unusual things happening; you may find an idol bringing an appeal to the Privy Council. In our Courts a human being is the only person that is allowed to appear' but with India it is often different, and in their courts the idol of a temple may appeal, and all we take care of is to say that the idol must not sue except by a friend who will be answerable for costs." The Work of the Empire Judicial Committee of the Privy Council (1922) 1 Cambridge Law Journal 143 at pp. 153-154

(10) Nékám, op.cit., at p.26

(11) Nékám, op.cit., at p.34. "Reality outside of what he believes to be such, has no meaning for man."

(12) Nékám, op.cit., at 33-37. "...the question whether or not a group as such corresponds to anything real in life, whether it is only a fiction of ours or a reality of the outside world having its own will and organs and personality - though this may be a very important problem from the point of view of philosophy or psychology - is something with which law, as such, has absolutely nothing whatever to do." at p.35

(13) Nékám, op.cit., at p.37

(14) Nékám, op.cit., at p.40

(15) Nékám, op.cit., at pp. 40-41

(16) Nékám, op.cit., at pp.41-45

(17) Nékám, op.cit., at p.27

(18) Nékám, op.cit., at p.27. "Since every conceivable interest attributed to any conceivable entity may be regarded as socially important by some community, anything may become a subject of rights - anything existing or anything to which the lawmaking community attaches any existence at all, and human personality or will is by no means a preliminary

condition to its formation. "This being so... the subject of rights can, as such, have but a passive role in law. It can enjoy, and it is protected without its intercession in enjoying, certain interests which are useful or which are considered to be useful by the community..." at pp. 27-28

) Nékám, op.cit., at p.46

) Nékám, op.cit., chap. 5

) Nékám, op.cit., at pp. 100-101; Blackstone, 1 Comm.475

) Blackstone, 1 Comm. at p.475

) Nékám, op.cit., at pp. 101-102

) Nékám, op.cit., at pp.102-104

) Nékám, op.cit., at p.104; Sutton's Hospital Case 10 Co. Rep. 31a

) Nékám, op.cit., at pp. 105-106

) Nékám, op.cit., at pp.106-107

) Nékám, op.cit., at p.99

) Nékám, op.cit., at p.26

) Nékám, op.cit., at p.26. Cf. Gray, The Nature and Source of Law. At p.28 he says; "So not only as a being which has the possibility of willing, but as a being which can have manifold bodily and spiritual needs and interests, as a human centre of interests, is a man a person." At p.47 he says, writing of inanimate things as legal personae, "(i)f there is a fiction here, it was not in attributing the real will of a human being to the thing, but in assuming that the thing had an intelligence of its own. It would seem, however, that there was often no conscious fiction, but some vaguely realized belief that the thing had a true intelligence and will..."

) Nékám, op.cit., at pp.46-48

) Whether a particular theorist holds Nékám's view or that of Pound is not always easily determined. It is suggested that the difference between the two is this; that although both consider that the legal entity itself is the creation of law (and who does not?), Nékám considers that the community first decides that some entity (existing or believed to exist) has interests which require protection. The view expressed by Pound does not insist upon this. To him we may simply create the legal entity by attributing interests to it. Thus we have once again two theories which may be distinguished on the basis that one requires a reality (or believed raility) and the other does not. Cf. the theory as stated by Canfield who says that certain fictions are "obviously arbitrary and are often in truth contrary to fact and were invented by the courts for the purpose of being able to administer justice without expressly disregarding a rule which literally applied would produce results opposed to justice. The legal conception of a corporation, on the other hand, is of a very different nature, and on account of those fictions of law,

which are indeed contrary to fact, it is misleading to call the theory of a corporate entity a fiction. It is a "fiction" only in the sense of an act of "imagining"... For the act of "imagining" a certain relation for the purpose of giving effect to the real intention of the parties and expressing a thought grounded in the nature of things involves something very real and true rather than false. The corporate entity theory, therefore, is of precisely the same nature as the doctrine of implied conditions in contracts and the doctrine of relation in the law of agency."

) Radin, "The Endless Problem of Corporate Personality", (1932) 32 Columbia Law Review 643

) Radin, Ibid. at pp. 651-652

) Murray A. Pickering, "The Company as a Separate Legal Entity", (1968) 31 Modern Law Review 481

) Murray A. Pickering, Ibid, at pp. 502-503

) Murray A. Pickering, Ibid. at p.504

) Murray A. Pickering, Ibid. at p. 484

) Murray A. Pickering, Ibid. at p. 484

) Murray A. Pickering, Ibid. at p. 486

) Continental Tyre & Rubber Company (G.B.) Ltd. v. Daimler Company Ltd. (1915) 1 K.B. 893

) Ibid. at p. 916; see Daimler Company v. Continental Tyre & Rubber Company (1916) 2 A.C. 307, and especially Lord Parker's statement that a company is "Not a natural person with a mind and conscience" and Lord Shaw of Dunfermline - "An incorporated company cannot with propriety have such terms (as allegiance and loyalty) applied to it as if it were a mind subject to emotions or possessions or a sense of duty." So too Lord Haldane said that a company "has no mind of its own anymore than a body of its own", Lennards Carrying Company v. Asiastic Petroleum (1915) A.C. 705 H.L. In Houghton & Company v. Northard, Lowe and Willis (1928) A.C. 1 at p. 14 Lord Dunedin said that it is not "a being who has eyes and ears". See too Citizens Life Insurance Company v. Brown (1904) A.C. 423 where Lord Lindley rejected any suggestion that a state of mind could exist in, or should be imputed to a company. Pickering also refers to the well-known passage in Blackstone (note (14) supra) where he says that a company cannot commit treason etc.

) Murray A. Pickering, loc. cit., at p.487

) Murray A. Pickering, Ibid. at pp. 498-499

) Of course the negative nature of theory proves exceedingly useful. Benade, accepting the theory, shows that when the corporate entity is disregarded the courts are not making an inroad into a dogmatically established doctrine; see "Verontagsaming van die Selfstandigheid van die Maatskappy-Regspersoon", (1967) 31 T.H.R.-H.R. 213

The Modern Organic Theory

(46) Gower, Modern Company Law, 3rd ed. Chapters 7 and 8.

(47) A term which is frequently used to describe it.

(48) Gower, op. cit., at p. 144

(49) Lennards Carrying Company v. Asiatic Petroleum (1915) A.C. 705

(50) Ibid. at pp. 713-714

(51) Gower, op. cit., 2nd ed. at p.135 (omitted in 3rd ed.)

(52) The Lady Gwendolen (1965) 2 All.E.R. 283(C.A.)

(53) Ibid. at p.302

(54) Leigh, "The Alter Ego of a Company", (1965) 28 Modern Law Review 584 at p. 586

(55) Leigh, Ibid. at p. 587

(56) Gower, op. cit., at p.133

(57) See Winn (1929) 3 Cambridge Law Journal 398; Walsh, (1949) 62 Law Quarterly Review 345; Glanville Williams, Criminal Law, The General Part, 2nd ed. at pp. 862-865. De Wet en Swanepoel, Strafreg. The question has, of course, given rise to considerable controversy. Whether the cases cited by Gower do in fact entirely support his "organic theory" is doubtful, the courts, it would seem have tended rather to hold that the wrongful is liable - see Director of Public Prosecutions v. Kent & Sussex Contractors Ltd. (1944) K.B. 146; R v. I.C.R. Haulage (1944) K.B. 551 (C.A.)

(58) Daimler Company v. Continental Tyre & Rubber Co. (1916) 2 A.C. 307 at p. 340; Mitchell v. Egyptian Hotels (1915) A.C. 1022 at p.1037

(59) Lumley v. Gye (1853) 2 E & B 216

(60) Thomson & Co. v. Deakin (1952) Ch. 646 C.A.

(61) Bolton (Engineering) Co. Ltd. v. Graham & Sons (1957) 1 Q.B. 159 C.A. where the intention of the managing directors of a company held to be the company's intention as to the occupation of premises.

(62) See Diemont and Marais, The Law of Hire Purchase in South Africa, 3rd ed. at p. 35; see also Hamman's review of this work in (1944) 8 T.H.R.-H.R. 195 at p.199. The same question is raised by Sec. 23 of the Bills of Exchange Act in terms of which a signature by procuration operates as notice that the agent has a limited authority to sign. It has been held that this does not apply to directors signing on behalf of a company; see Insurance Trust Investment (Pty) Ltd. v. Star King Properties (Pty) Ltd. 1961 (4) S.A. 786 (N); Bedit Properties (Pty) Ltd.

v. Charchat 1962 (2) S.A. 118 (E); Cowen, The Law of Negotiable Instruments in South Africa, 4th ed. at p.148 et seq.

(63) Lennards Carrying Co. v. Asiatic Petroleum (1915) A.C. 705.

(64) Automatic Self-Cleansing Filter Syndicate v. Cuninghame (1906) 2 Ch. 34 C.A.

(65) Aickin, "The Division of Power Between Directors and General Meeting as a Matter of Law and as a Matter of Fact", (1967) 5 Melbourne University Law Review 448.

(66) Aickin, loc.cit., at p. 449; Holdsworth, History of English Law, vol. 8 at p.202

(67) Aickin, ibid. at p.449

(68) Sec. 90

(69) Foss v. Harbottle (1842) 2 Hare 461

(70) Ibid. at p.492

(71) Isle of Wight Railway Co. v. Tahourdin (1883) 25 Ch.D. 320 (C.A.)

(72) Ibid. at pp. 331-332

(73) Automatic Self-Cleansing Filter Syndicate v. Cuninghame (1906) 2 Ch. 34 (C.A.)

(74) Ibid. at p. 38

(75) Ibid. at p. 42-43

(76) Ibid. at p.45

(77) Gramophone and Typewriter Ltd. v. Stanley (1908) 2 K.B. 89 (C.A.)

(78) Ibid. at pp.105-106

(79) Ibid. at p.98

(80) Salmon v. Quin & Axtens Ltd. (1909) 1 Ch. 311 (C.A.); Quin & Axtens Ltd. v. Salmon (1909) A.C. 442 (H.L.)

(81) Ibid. (C.A.) at pp. 319-320

(82) Ibid. (H.L.) at p.444

(83) Gower, op.cit., 2nd ed. at p.122, 3rd ed. foot note at p.131

(84) Shaw & Sons (Salford) Ltd. v. Shaw (1935) 2 K.B. 133 (C.A.)

(85) Ibid. at p.134

(86) Scott v. Scott (1943) 1 All E.R. 582

(87) Gower, op.cit., at pp. 132-133

(88) Gower, op.cit., at p.133

(89) Beuthin, "The Range of a Company's Interests", (1969) South African Law Journal 155

(90) Beuthin, ibid. at pp. 155-156

(91) Hahlo, Company Law Through the Cases, 2nd ed. at p.327

(92) Automatic Self-Cleansing Filter Syndicate v. Cuninghame (1906) 2 Ch. 34 (C.A.) at p.44

(93) Gower, op.cit., at p.563

(94) Gower, op. cit., at p.522

(95) Bamford v. Bamford (1968) 2 All E.R. 655

(96) Ibid. at p. 655; Plowman J. found authority for this in Irvine v. Union Bank of Australia (1877) 2 App. Cas. 366, which dealt with a limitation placed upon the borrowing power vested in the board, and Grant v. United Kingdom Railway Co. (1888) 40 Ch.D. 135, where a contract entered into on behalf of the company contrary to its articles by its directors in which all except one had personal interests, was ratified by a simple majority.

(97) Gower, op.cit., at p. 137; the decision of the Court of Appeal is reported as Bamford v. Bamford (1969) 2 W.L.R. 1107 C.A. Here Harman L.J. described the process by which Plowman J. reached his decision as being "curiously inept", see p. 112. The Appeal Court held, correctly it is submitted, that the allotment was merely voidable at the instance of the company and therefore the shareholders were not exercising a "residuary" power to allot when ratifying the allotment. It is submitted that there is a further error in Plowman's reasoning and that is that a general meeting cannot be said to have a power to act in interests other than those of the company. Nevertheless, the first proposition is correct, namely, that a company's powers are vested originally in the company and then "delegated" to the directors.

(98) Gower, op. cit., at p.136

(99) Gower, op. cit., at p.137

WOLFF, HOHFELD AND HART

Wolff's Restatement of the Fiction Theory

(1) Wolff, "The Nature of Legal Persons", (1938) 54 Law Quarterly Review 494

(2) Wolff, ibid. at pp. 505-506

(3) Wolff, ibid. at pp. 509-511

(4) Wolff, ibid. at p.507. Thus he says, "To sum up;- the value of the fiction formula is that it starts from a natural, extra-judicial conception of personality, as founded in ethics and religion and adds that certain groups and institutions determined by law, though lacking in the supreme dignity, that is human dignity, are nevertheless treated by law as if they were human beings."

(5) "Fictions" are frequently divided into "historic fictions" and "dogmatic fictions". The former being used for the creation of new rights or new remedies, the latter being the deliberate treatment by the law of one thing as though it were another. The fact that Wolff says the theory is a "formula" would suggest that he considers the fiction to be historic and yet his insistence upon basing personality upon ethical and religious considerations suggests that the fiction is dogmatic. See Friedman's criticism of Wolff's suggestion that the fiction is merely a formula, Legal Theory at pp.360-361

(6) Wolff's views have been criticised by Pound but on different grounds. Wolff considers that many of the defects attributed to the fiction theory are only "apparent defects." Thus it is accused of being incompatible with the conception of subjective rights for these can only belong to beings having wills. Here Wolff points to the fact that we attribute rights to humans who are not recognised as having wills. Pound agrees with him here but strangely does not grant him credit for this reasoning. The theory has, of course, been accused of leading to unfortunate political results and here the use made of it to justify the expropriation of church property during the French Revolution is usually referred to. Wolff denies the validity of this criticism: "..it is for the law, not theory, to state positively who shall succeed to the property of an extinct legal subject." Pound says he is not impressed by this reasoning but his criticism here is curious. "If apart from the creative action of the state there is nothing, if the property is held by a fictitious entity, so that when the fiction is put an end to no pre-existing de facto entity which the law clothed with legal personality remains, why should not the state succeed?" But why should it?; Jurisprudence, vol.iv at pp.231-239

he Hohfeldian analysis

7) Hohfeld, Fundamental Legal Conceptions.

8) Radin, "A restatement of Hohfeld," (1938) 51 Harvard Law Review 1141 at p. 1141

9) Radin, "The Endless Problem of Corporate Personality," (1932) 32 Columbia Law Review 643

10) Radin, ibid, at pp.651-652

(49-61)

(11) Radin, "A restatement of Hohfeld", loc. cit., 1141 at p.1141

(12) Radin, ibid. at pp. 1160-1161

(13) Radin, ibid. at p. 1161

(14) Radin, "The Endless Problem of Corporate Personality", loc. cit., at p.653

(15) Radin, ibid. at pp. 653-654

(16) Hart, Definition and Theory in Jurisprudence," (1954) 37 Law Quarterly Review 37

Hart's Definition

(17) Hart, Definition and Theory in Jurisprudence," (1954) 37 Law Quarterly Review at pp. 37-41

(18) Hart, ibid. at pp. 41-45

(19) Hart, ibid. at pp. 45-47

(20) Hart, ibid. at p.47 and pp. 53-56

(21) Hart, ibid. at pp. 44-45

(22) Hart, ibid. at p.52

(23) Hart, ibid. at pp. 52-53

(24) Hart, ibid. at pp. 53-54

(25) Hart, ibid. at p.53

SUGGESTED APPROACH

(1) Pound, Jurisprudence, vol. iii at pp. 16-17; the idea, of course, is that of Ihering's: "So not only as a being which can have manifold bodily and spiritual needs and interests, is a human centre of interests, is a man a person." Gray, The Nature and Sources of the Law at p.28

(2) Pound, op.cit., at p.21

(3) "What is a corporation? In the first place, there must be a body of human beings united for the purpose of forwarding certain of their interests." Gray, op. cit., at p.50

(4) Nékám, op.cit., at p.34

(5) Hart, "Definition and Theory in Jurisprudence", (1954) 37 Law Quarterly Review 37

(6) Duff, Personality in Roman Private Law at p.22 says of the famous words of Innocent IV "cum collegium in causa

universitatis fingatur una persona" that, "this could no doubt mean 'is a fictitious person', in the Savigny sense; but it can equally mean 'is treated as an individual, as one person not a number of persons."

(7) Blackstone, 1 Commentaries at pp. 476-477

(8) Bamford v. Bamford (1968) 2 All E.R. 655

(9) Ibid.

PART 2

THE FIDUCIARY RELATIONSHIP

Introduction

(1) Parsons, "The Director's Duty of Good Faith", (1967) 5 Melbourne University Law Review 395 at p. 397

(2) Palmer, Company Law, 21st. ed. at p. 526

(3) Ex Parte Dale & Co. (1879) 11 Ch.D. 772 at p.778

(4) Tate v. Williamson (1866) 2 Ch. App. 55 at p. 61

(5) Story, Equity Jurisprudence 3rd ed. at p.108

(6) Story, op.cit., at p.108

(7) Vinter, Fiduciary Relationship and Resulting Trust, 2nd ed.

(8) Vinter, op.cit., at pp. 1-2

(9) Story, op.cit., at p. 128

(10) Powell v. Powell (1900) 1 Ch. 243

(11) Ibid. at pp. 245-246

(12) Parfit v. Lawless (1872) L.R. 2 P. & D. 462

(13) Ibid. at p. 468

(14) Howes v. Bishop and wife (1909) 2 K.B. 390

(15) Ibid. at p. 399

(16) See for example Nedby v. Nedby 5 De G. & Sm. 377; Barron v. Willis 3 (1899) Ch. 578; MacKenzie v. Royal Bank of Canada (1934) A.C. 468

(17) Mutual Finance Ltd. v. John Wetton and Son Ltd. (1937) 2 K.B. 389

(18) Ibid. at p. 394

(19) Chitty, Contract, 22nd ed. at p.154

(20) Chitty, op.cit., at p.154

(21) Tate v. Williamson (1866) L.R. 2 Eq.; 2 Ch. App.

(22) Ibid. at pp. 60-61

(23) Antony v. Weeraskera (1953) 1 W.L.R. 1007

(24) Tufton v. Sperni (1952)2T.L.R. 516

(25) Antony v. Weeraskera (1953) 1 W.L.R. 1007

(26) Tufton v. Sperni (1952)2T.L.R. 516

(27) Smith v. Kay (1859) 7 H.L.C. 750

(28) Ibid. at p. 771

(29) In re Coomber, Coomber v. Coomber (1911) 1 Ch. 723 (C.A.)

(30) Ibid. at p. 726

(31) Ibid. at pp. 728-729

(32) Tufton v. Sperni (1952)2T.L.R. 516 at p. 530

(33) Vinter, op. cit., at p. 526

(34) Jacobus Marler Estates v. Marler 114 L.T. 640

(35) Ibid. at p. 640

(36) Robinson v. Randfontein Estates G.M. Co. Ltd. 1921 A.D. 168 at p. 229

(37) Palmer, op.cit., at p. 526

(38) Gower, op. cit., at p. 516

(39) Snell, Equity, 26th ed. at p. 255

(40) Snell, op.cit., at p. 261

(41) Lewin, Trusts, 16th ed. at p. 196

(42) Lewin, op.cit., at p. 693 and p. 700

(43) See Stoljar, The Law of Agency, at p. 288; Fridman, The Law of Agency, 2nd ed. at p. 124 et seq.

(44) Stoljar, The Law of Agency at p. 288

(45) Sealy, "Fiduciary Relationships", (1962) Cambridge Law Journal p. 69

(46) Sealy, ibid. at p. 71; this, of course, admits of no doubt. "By common consent..three classes of 'use' ...had escaped the meshes of the Statute of Uses, and under the popular name 'trusts' (though there is no technical magic in the word) had completely re-established the doctrine of equitable interests...", Jenkins, A Short History of English Law, at p. 221

(47) Sealy, ibid. at pp. 71-72

(48) Sealy, ibid. at p. 72

(49) See for example, Maitland, Equity; Story, Equity Jurisprudence.

(78-82)

The Court of Chancery

(1) Maitland, Equity, 2nd ed. at p. 5

(2) Barbour, "Some Aspects of Fifteenth Century Chancery", (1917-1918) 31 Harvard Law Review 834 at pp. 834-835

(3) See generally Holdsworth, History of English Law, vol. v p. 215 et seq.; Plucknett, A Concise History of English Law at p. 673; Fifoot, English Law and Its Background, at pp. 74-78

(4) Barbour, ibid. at pp. 834-835

(5) Holdsworth, op.cit., vol. v at p. 215

(6) Thus Barbour says, "Although it has become the fashion to discount the opposition between equity and law, this very opposition was an important factor in the fifteenth century."; loc. cit., at p.835

(7) Maitland, op.cit., at pp. 5-6

(8) See for example Holdsworth, op.cit., vol xii at p.225; Plucknett says, "Equity is often spoken of as a supplement or an appendix to the common law; a mediaeval lawyer would perhaps have caught our meaning better if we were to say that it is a sort of gloss written by later hands around an ancient and venerable text." op. cit., at p. 673

The Common Law

(1) Plucknett, A Concise History of English Law, 5th ed. at p. 505

(2) Plucknett, op.cit., at p. 502

(3) Fifoot, English Law and its Background, at p. 45

(4) Plucknett, op. cit., at p. 506

(5) Fifoot, op. cit., at p. 45

(6) Plucknett, op. cit., at p. 177

(7) Holdsworth, History of English Law, vol. v at p. 281; see generally at pp. 278-291

(8) Fifoot, op. cit., at p. 70

(9) Fifoot, op. cit., at p. 70

(10) Fifoot, op. cit., at p. 72 says, "The praecipe was the model upon which all the proprietary writs were framed. The writs of debt, detinue and of account were but variations upon a single theme, distinguished only by the material which X must 'render' to A".

(11) Plucknett, op.cit., at p. 357

(12) Potter, Historical Introduction to English Law 4th ed. at p. 32

(13) Potter, op.cit., at p. 373

(14) Winfield, The Myth of Absolute Liability, (1926) 42 Law Quarterly Review at p. 37

(15) Holdsworth, op.cit., vol. iii 375

(16) Potter, op.cit., at p. 380; A most balanced view is expressed by Fleming Trespass, he says, was "concerned with the grosser delicts which almost always must have consisted in some form of intentional aggression rather than accidental harm. This was probably so because, in the first instance, people rarely came into close contact with each other in the absence of urban, industrial, and transport conditions which have made random collisions so familiar a feature of the latter day scene. What injury was suffered at the hands of the neighbour was therefore more likely than not the result of deliberation: and at an age which life was notoriously 'brutish and short' the very idea of unintentional harm seemed pardonably a little extravagant.", An Introduction to the Law of Torts, at pp. 3-4.

(17) See generally Fifoot, op. cit., at pp. 76-77

(18) See for example, Potter, op.cit., at p. 450; generally Barbour, Oxford Studies in Social and Legal History.

(19) Detinue was recognised as a separate action as early as 1232 - see Barbour, op.cit., at p. 28

(20) Maitland, Equity and Forms of Action, at p. 332; "If we would rethink the thoughts of our forefathers we must hold that the action of debt is proprietary", History of English Law, Pollock and Maitland, vol. 2 at p. 205

(21) Potter, op.cit., at p. 454; Barbour, op.cit. at pp. 25-26

(22) See Potter, op.cit., at p. 452. He suggests that the fact that the writ was so proprietary in character seems later to have resulted in the requirement of quid quo as a ground of action.

(23) Barbour, op.cit., at p. 25

(24) Barbour, op.cit., at p. 34

(25) Plucknett, op.cit., at p. 363

(26) Potter, op.cit., 453

(27) Ames, Lectures on Legal History, at p. 71; Ames, History of Trover, Anglo-Am. iii, 432-434

(28) See Potter, op.cit., at p. 455; Barbour, op.cit., at p. 29

(29) Potter, op. cit., at p. 455

(30) Potter, op.cit., at p. 455

(31) See Potter, op.cit., at p. 480

(32) See Barbour, op.cit., at pp. 25-40

(33) See generally Fifoot, History and Sources of the Common Law at pp. 268-288

(34) Potter, op. cit., at p. 459

(35) Barbour, op.cit., at p. 14. This would appear the better view, see Fifoot, History and Sources of the Common Law.

(36) Potter, op.cit., at p. 459

(37) Fifoot, op.cit. at p. 72

(38) See Jackson, History of Quasi-Contract. It was used as a quasi-contractual remedy, e.g. if money due by A to B was paid by A to C by mistake.

(39) Potter, op.cit., at p. 459; Barbour, op.cit., at p.13

(40) Barbour, op.cit., at p. 16

(41) "Glanvill speaks simply of 'debt' and the writ is designed to secure to the plaintiff his debitum, his due, whether it be money or chattels...", Plucknett, op.cit., at p. 364

(42) See for example, Barbour op.cit. who says, "In England of the early twelfth century the dominating force, juristically considered, was the land law, it is not surprising, therefore, that covenant first manifests itself in connexion with agreements relating to land.", op.cit., at p.17

(43) Fifoot, op.cit., at p.73

(44) Barbour, op.cit., at p.17

(45) Potter, op.cit., at pp. 456-457

(46) "Where the action is upon (a deed), if the speciality is lost, the whole action is lost.", Y.B. 24 Edw. III P.f. 24 pl. 1

(47) Reed v. Brookman (1789) 3 T.R. 151

(48) Barbour, op.cit., at pp. 20-23

(49) Barbour, op.cit., at p.21

(50) There are various theories as to the origins of the writ which need not concern us here - see, for example, Potter, op.cit., at pp. 400-401

(51) Potter, op.cit., at p. 376

(52) Fifoot, op.cit., at p. 75

(53) See for example, Fifoot, op.cit., at p. 76

(54) Y.B. 21 Edw. IV, H., pl. 22

(55) Potter, op.cit., at p. 376

(56) Fifoot, op.cit., at p. 74

(57) Fleming, Introduction to the Law of Torts, at pp. 3-4

(58) Fifoot, op.cit., at p.80

(59) See Barbour, op.cit., at p. 45 where he says; "From motives of public policy the law placed certain persons or classes of persons in a peculiar position. Innkeepers, common carriers, and smiths were required to show a certain amount of diligence in their respective work. It was not necessary that the smith should undertake to shoe carefully. The law imposed upon him the necessity of exercising a proper degree of skill; and this requirement removed the case from the old rule. Gradually this notion was pushed further, so that a smith incurred liability if he refused to shoe a horse, and damage resulted from his inaction, while an innkeeper who declined to provide food and fodder at his inn became liable in an action on the case. Taverners, vintners, and butchers must sell food of a certain quality; even without representation that it is good, they become liable in "Deceit" if the food is inferior and damage results.

(60) See generally Holdsworth, op.cit., vol. iii at pp. 371-400; Barbour, op.cit., at p. 45 et seq.

(61) Barbour, op.cit., at p.46

(62) Ames, Lectures on Legal History at p.131

(63) Barbour, op.cit., at pp. 47-48

(64) See generally Holdsworth, op.cit. vol. iii 407-411; Barbour, op.cit., at p. 23, Potter, op.cit., at p.427

(65) Somerton's Case (1433) 11 Hen. VI fo. 18 p. 10

(66) Barbour, sums up the position thus; "Assumpsit made its appearance about the middle of the fourteenth century. The presence of the undertaking in the action was occasioned by the limited notion of delictual liability. Used at first in cases of misfeasance alone, the action was extended after a prolonged struggle to breaches of undertakings by non-feasance. This was accomplished first in trespass on the case; the limitation which was ultimately imposed on Assumpsit was reached through Deceit. But Assumpsit in 1504 still remained a delictual action in the theory of contemporary jurists. There was no theory of consideration: the question of gratuitous promises had not arisen at all. The promise was not definitely at the basis of the action till later. It then became necessary to frame a test whereby the enforceability of promises might be determined and that test was found in the doctrine of consideration." op.cit., at p.53

(67) Slade's Case (1602) Coke Rep. 92

(68) Plucknett, op.cit., at p.647

The Principle of Conscience

(1) Holdsworth, History of English Law, vol. v at p.216

(2) Yale, Lord Nottingham's Two Treatise at p.16

(3) Barbour, Oxford Studies in Social and Legal History, vol. iv (1914) at p.154

(4) See, for example, Barbour, "Some Aspects of Fifteenth Century Chancery" (1917-1918) Harvard Law Review 834 at p.854

(5) Y.B. 8 Edw. IV 5.1. (p.6) referred to by Barbour, History of Contract in Early English Equity, Oxford Studies in Social and Legal History vol iv (1914) at p.83

(6) Quoted by Holdsworth, op.cit. vol i at p.407

(7) Holdsworth, op.cit., vol. v at p.216

(8) Barbour, "Some Aspects of Fifteenth Century Chancery", (1917-1918) 31 Harvard Law Review 834 at p.838. He also quotes the sudden outburst of Cardin al Morton who justified a subpoena by saying, "Nullus recedat a curia Cancellariae sine remedio" and the maxim of Bishop Stillington's "Deus est procurator fatuorum."

(9) Barbour, ibid. at p.834

(10) Holdsworth, op.cit., vol v at p.216. "(M)oral duty determined the rights and obligations of the litigants", Newman, Equity and Law - A Contemporary Study, at p. 26; see also Argument Proving from Antiquity the Dignity, Power and Jurisdiction of the Court of Chancery, I ch. Rep. (Appendix) 1 at p.47 (1616)

(11) Allen, Law in the Making, 4th ed. at pp. 306-314

(12) See for example, Allen, op.cit., at pp. 310-314

(13) Vinogradoff, "Reason and Conscience in Sixteenth Century Jurisprudence", (1908) 24 Law Quarterly Review 373 at pp. 378-379

(14) Aristotle, Ethics, (Ross' Translation), see Allen op.cit., at pp. 311-312

(15) Vinogradoff, loc. cit., at p. 378

(16) Quoted by Barbour, op.cit., at pp. 156-157. He goes on to say "Some utterances of the Chancellor, as reported in the Year Books, seem to give pertinence to this criticism, if they are read as unrelated statements. The principle enunciated is often vague and indefinite; it seems to shift and vary according to the idiosyncrasies of the particular Chancellor. One of two executors releases a debt due to the state of the testator without the consent of his co-executor. Both the executor and the debtor are brought into Chancery by subpoena. Counsel for the defendant contends that as each executor has full power,

his act cannot be attacked. But the Chancellor brushes aside this technicality. Each rule of law, he says, is or ought to be conformable to the law of God (le Ley de Dieu). Then with an eye to the particular facts of the case at issue, he reduces the law of God to one specific statement: "Le ley de Dieu est q un executor qui est de male disposition ne expenderoit touts les bien, etc." If the executor who has expended the assets of the estate does not make amends according to his ability," il sera damne in Hell"; but the Chancellor is not content to stop short with forecasting the melancholy consequences of such recalcitrance, he immediately asserts that to provide a remedy for such a case is "bien fait accord all conscience". (Y.B. 4 H. VII 4.8.)

(17) Barbour, op.cit., at p.73

(18) Vinogradoff, loc.cit., at p.373

(19) Holdsworth, op.cit., vol. i p. 395

(20) Barbour, loc. cit., at p.163

(21) Allen, op.cit., at p. 332; see too Vinogradoff, loc.cit., at p. 378

(22) See e.g. Hazeltine, The Early History of English Equity, Essays in Legal History, ed. Vinogradoff (1913) at p. 261 et seq. He draws attention to certain earlier developments in the practice of the common law and early kings.

(23) See Coing, "English Equity and the Denunciatio Evangelica", of the Canon Law.," (1955) 71 Law Quarterly Review 223

(24) Coing, Ibid. at p.231

(25) Coing, Ibid. at p.232

Procedure in Chancery

(1) Holdsworth, History of English Law, vol. v at p.288

The Chancellor's Jurisdiction

(1) Barbour, Oxford Studies in Social and Legal History, vol. iv (1914) at p.158

(2) Barbour, ibid. at p.158

The Chancellor and Contract

(1) Fifoot, English Law and its Background

(2) Avery, "An Evaluation of the Effectiveness of the Court of Chancery Under the Lancastrian Kings", (1970) 86 Law Quarterly Review 80.

(3) Barbour, Oxford Studies in Social and Legal History; see also Barbour, "Some Aspects of Fifteenth Century Chancery, (1917-1919) Harvard Law Review 834

(4) Barbour, op.cit., 73 et seq.

(5) Barbour, op.cit., at p.86

(6) Barbour, op.cit., at pp. 85-90

(7) Barbour, op.cit., generally at pp.97-110

(8) Barbour, op.cit., generally at pp. 110-114

(9) Barbour, op.cit., at p.120

(10) Barbour, op.cit., at p.122

(11) Barbour, op.cit., generally at pp. 130-132

(12) Barbour, op.cit., generally at pp. 110-114

(13) Barbour, op.cit., at p.113

(14) Barbour, op.cit., at pp. 113-114

(15) Barbour, op.cit., at p.130

(16) Barbour, op.cit., at pp. 132-137

(17) Barbour, op.cit., at p.137

(18) Ames, "Parol Contracts Prior to Assumpsit", (1894-1895) 8 Harvard Law Review 252

(19) Barbour, op.cit., at p.160

(20) Barbour, op.cit., at p.160

(21) Barbour, op.cit., at pp. 162-163

(22) Barbour, op.cit., at p.164

(23) Barbour, op.cit., at p.164

(24) Barbour, op.cit., at p.164

(25) Barbour, op.cit., at p.165

(26) Barbour, op.cit., at p.165

(27) Barbour, op.cit., at p.165

(28) Barbour, op.cit., at p.166

(29) Potter, op.cit., at p.451

(30) Plucknett, A Concise History of English Law, at p.652

Confidence

(1) Allen, Law in the Making, 3rd ed. at p. 333

(2) Allen, op.cit., at pp. 333-334

(3) See Allen, op.cit., at p.334

(4) Maitland, Equity at p.6-7; Plucknett, A Concise History of English Law at pp. 575-582

(104-109)

(5) Maitland, op.cit., at p.24; Plucknett, op.cit. at p.576

(6) See Barbour, "Some Aspects of Fifteenth Century Chancery"; (1917-1918) Harvard Law Review 834 at p.850; nor does he even think a specific trust res was required: "...it may be doubted whether the ecclesiastical Chancellors demanded in all classes the existence of a specific trust res; the money is delivered in confidence, and if confidence raised a binding obligation it may be satisfied by the delivery of an equivalent sum." at p.851

(7) See Hanbury, Modern Equity, 8th ed. at pp. 8-9;

(8) Hanbury, op.cit., at p.9

(9) See Plucknett, op.cit., at p. 576; Honore, South African Law of Trusts Chp. 1

(10) Plucknett, op.cit., at p. 577-578

(11) Avery, "An Evaluation of the Effectiveness of the Court of Chancery under the Lancastrian Kings", (1970) 86 Law Quarterly Review 80 at p.84

(12) Plucknett, op.cit., at p.578

(13) Maitland, op.cit., at p.29

(14) Maitland, Collected Papers, vol. iii at p.344

(15) Hanbury, op.cit., at p.23

(16) Radcliffe and Cross, History of English Law, 3rd ed. at p.134

(17) Maitland, op.cit., at p.38

Chancery as a Court of Law

(1) See Argument Proving From Antiquity The Dignity, Power and Jurisdiction of the Court of Chancery 1 Ch. Rep. (Appendix) 1 (1616) 47

(2) Yale, Lord Nottingham's Two Treatise at p.15

(3) Yale, op.cit., at p.14

(4) Holdsworth, History of English Law, vol. xi p.624

(5) See generally, Holdsworth, op.cit., vol. xi at p.624

(6) Plucknett, A Concise History of English Law, 5th ed. at p. 692

(7) Fifoot, English Law and its Background, at p.144

(8) See Holdsworth, op.cit., vol. xii at p.227

(9) Lord Chesterfield v. Janssen (1750) 1 Act 301

(10) Ibid. at p.333

(11) See Holdsworth, op.cit., vol. xii at p.102 et seq

(12) Fifoot, op.cit., at p.143

(13) Fry v. Porter (1670) 1 Mod. 300 at p.307

(14) Harris v. Tremenhere (1808) 15 Ves. 34

(15) Burgess v. Wheete (1757-1759) 1 Eden 177 at p.267

(16) Holdsworth, op.cit., vol. xii at pp. 266-267

(17) Yale, op.cit., at p.17

(18) Yale, op.cit., at p.27; Green v. Green 2 Sim. 394 at pp. 402-403

(19) Clark v. Waller (1598)

(20) Yale, op.cit., at p.38

(21) See Yale, op.cit., at p.18

(22) See Yale, op.cit., at p.18

(23) Yale, op.cit., at p.18; 11 Michigan Law Review 537; (1917) 26 Yale Law Journal 767; Cook, (1937) Columbia Law Review 37, 106, 288

(24) Earl of Bath v. Sherwin (1710) 10 Mod. 1; Holdsworth op.cit., vol xii at p. 223-224

(25) Ballows, A Treatise of Equity 2-3; see Holdsworth, op.cit., at pp. 223-224

(26) Holdsworth, op.cit., vol. xii at pp. 223-224

(27) Argument Proving From Antiquity the Dignity, Power and Jurisdiction of the Court of Chancery 1 Ch. Rep. (Appendix) 1 (1616) p.47

(28) Pluckmett, op.cit., at p.689

(29) Holdsworth, op.cit., vol xii at p. 233

(30) Ballows, op.cit., at p.3; Holdsworth, op.cit., vol xii at p.227

(31) Holdsworth, op.cit., vol xii at p.234

(32) Nocton v. Ashburton (1914) A.C. 932

(33) Ibid. at p. 952

The Trust

(1) See Potter, op.cit., at p. 611, Hanbury, Modern Equity 8th ed. at pp 10-13; trusts falling outside the Statute appear to have been created soon after its enactment, see Holdsworth, op.cit., vol. v pp. 305-337; Potter, op.cit., at p.613

(2) See Yale, op.cit., at p.82

(3) Fifoot, op.cit., at p.92

(4) Jane Tyrell's Case (1557) Dyer 155

(115-121)

(5) Sambach v. Dalston (1634) Tothill 188

(6) Fifoot, op.cit., at p.93

(7) See Yale, op.cit., at p.73

(8) Ames, Legal History, 247; see also Holdsworth, op.cit., vol v at pp. 307-308

(9) Plucknett, op.cit., at pp. 598-602

(10) Plucknett, op.cit., at pp. 598-602

(11) In Burgess v. Wheate 1 Eden 223 Lord Mansfield said that "in my opinion trusts were not on a true foundation till Lord Nottingham held the Great Seal"

(12) See Yale, "The Revival of Equitable Estates in the Seventeenth Century; An Explanation by Lord Nottingham", (1967) Cambridge Law Journal 72

(13) I Ric. 3.c.1. (1483)

(14) See Yale, "The Revival of Equitable Estates in the Seventeenth Century; An Explanation by Lord Nottingham", (1967) Cambridge Law Journal 72

(15) See Holdsworth, op.cit., vol iv at pp. 471-473 and vol vi at pp. 641-642; Potter, op.cit., at p.611 says that "the abolition of tenure meant that trusts were now to be used for administrative convenience and not to evade the revenue law."

(16) Hanbury, op.cit., at p.15

(17) Hanbury, op.cit., at p.16

(18) See for example Stoljar, The Law of Agency

(19) See generally Du Bois, The English Business Company After the Bubble Act 1720-1800

THE DEVELOPMENT OF THE DOCTRINE OF FIDUCIARY RELATIONSHIPS

(1) Ballows, A Treatise of Equity, at p.52

(2) Cook v. Fountain 3 Swan. 585 at pp. 591-592

(3) See Morely v. Morely (1678) 2 Ch. Cas. 2; Robinson v. Pett (1734) 3 P.Wms. 250; Ayliffe v. Murray (1740) 2 Akt 60; Gower v. Mainwaring (1750) 2 Ves. Sen. 89; Jones v. Lewis (1750-1751) 2 Ves. Sen. 240; Ex parte Belchier (1754) Amb. 219 Smith v. Freach (1741) 2 Akt.; Knight v. Earl of Plymouth (1747) 1 Dick. 120

The Cases of the Young Heirs

(1) Bill v. Price (1686) 1 Vern. 467

(2) Waller v. Delt (1676) 1 Ch. Cas. 276

(3) Nott v. Hill (1687) 2 Vern. 26

(121-128)

(4) Wiseman v. Beeke (1690) 2 Vern. 122

(5) James v. Oades (1700) 2 Vern. 403

(6) Lamplugh v. Smith (1688) 2 Vern. 78; see also Berney v. Pitt (1686) 2 Vern. 14; Knot v. Johnson and Graham (1687) 2 Vern. 27

(7) Vere Essex, Earl of Ardglasse v. Henry Muschamp (1684) 1 Vern. 237

(8) Walmesly v. Booth (1739) 2 Akt. 25

(9) Sir John Barnardiston v. Lingwood (1740) Akt. 133

(10) Lord Chesterfield v. Janssen (1750) 1 Akt. 301 at pp. 351-352

(11) Ibid. at pp. 351-352

(12) Proof v. Hinds (1735) Cases T. Talbot 113

(13) Ibid. at p.113

(14) Lord Chesterfield v. Janssen (1750) 1 Akt. 301 at p. 346

(15) Ibid. at pp. 346-347

(16) Hanbury, op.cit., at p.661

(17) Earl of Aylesford v. Morris (1873) 8 Ch. App. 484

(18) Earl of Aylesford v. Morris (1873) 8 Ch. App. 484; O'Rorke v. Bolingbroke (1877) 2 App. Cas. 1814; James v. Kerr (1889) 40 Ch.D. 449; Bromley v. Smith, Boustead v. Bromley, Smith v. Bromley (1859) 26 Beav. 644 at p. 662; Benchly v. Higgins (1900) 82 L.T. 143

(19) Shelly v. Nash (1818) 3 Madd. 232

(20) Savery v. King (1856) 5 H.L.C. 627

(21) Snell, Equity, 25th ed. at p. 502

(22) Hanbury, op.cit., at p. 661

The Development of the Doctrine between 1700 and 1827

(1) Holdsworth, History of English Law, vol xii at p. 235

(2) Manners v. Banning (1709) 2 Eq. Cas. Ab. 282

(3) Ibid. at p. 282

(4) Proof v. Hinds (1735) Cases T. Talbot 113

(5) Ibid. at pp. 115-116

(6) Walmesly v. Booth (1739) 2 Akt. 25

(7) Ibid. at p. 26

(8) Ibid. at p. 29

(9) Ibid. at pp. 29-30; it should be noted that although this case came to be cited as authority for the

proposition that the attorney-client relationship as such gives rise to a presumption of undue influence, Lord Hardwicke decided it upon a finding of actual imposition. "The defendant has said in his answer that this was a voluntary bond, but then he has likewise set forth the reasonable motives which might induce Japhet Crook to give this bond, namely, the many and frequent services the defendant has done. Now what are they? Only the few transactions from Oct. 1728 to the time the bond bears date. This is a false recital: and shows likewise that there is some imposition, and advantage taken of Japhet Crook's necessities."

(10) Young v. Peachy (1741) 2 Akt. 254

(11) The head note reads, "Where a father obtained an absolute conveyance from a daughter, in order to answer one particular purpose and afterwards makes use of it for another, this Court will relieve under the head of fraud. The case of Glissen v. Ogden is not reported.

(12) Ibid. at pp. 258-259

(13) Saunderson v. Glass (1742) 2 Akt 296

(14) Ibid. at p. 298

(15) Cary v. Mansfield (1749-1750) 1 Ves. Sen. 380

(16) The case is referred to in Cary's case, supra (15)

(17) Ibid. at p. 9

(18) Whelpdale v. Cookson (1747) 1 Ves. Sen. 9

(19) Ibid. at p. 9

(20) What is also of some interest is the fact that Lord Hardwicke considered that the transaction could have been validated if the consent of the majority of the creditors had been obtained. This opinion was criticised by Lord Eldon in Ex parte Lacey (1802) 6 Ves. Jun. 626 and by Lord Brougham in Aberdeen Railway Company v. Blackie Bros. (1854) 1 Macq. H.L. 461

(21) Cary v. Mansfield (1749-1750) 1 Ves. Sen. 380

(22) Ibid. at p. 381; counsel for the plaintiff cited Pierce v. Waring and Walmesly v. Booth. Of the latter case he said "As to Japhet Crook, he was at the very same time under prosecution for forgery and no one would appear for him." - a fact which throws some light upon the actual state of necessity in which Crook had been at the time.

(23) Griby v. Cox (1750) 1 Ves. Sen. 517

(24) See Howes v. Bishop and Wife (1909) 2 K.B. 390 C.A.; MacKenzie v. Royal Bank of Canada (1934) A.C. 468

(25) It might, however, be thought that Lord Hardwicke treated the case on the same basis as he had treated

all other cases where the relationship existed between two adults and no additional factor, such as necessity, was present.

(26) Hylton v. Hylton (1754) 2 Ves. Sen. 548

(27) It was argued that "the bill was to set aside this grant of annuity upon the general principle of being made just after coming of age, without being thoroughly informed, and that it is not necessary to prove imposition for these voluntary grants have not been allowed in several instances, and are to be compared to gifts to an attorney pending suit...." Pierce's Case was also cited.

(28) Ibid. at pp. 549-550

(29) See Vinter, Fiduciary Relationship and Resulting Trust at p. 66

(30) Bridgeman v. Green (1757) Wilm. 58

(31) Ibid. case at p. 61

(32) Carpenter v. Heriot (1759) 1 Eden 338

(33) Ibid. at pp. 340-341

(34) Norton v. Relly (1764) 2 Eden 286

(35) Welles v. Middleton (1784) 1 Cox 122

(36) Woodhouse v. Shipley (1742) 2 Akt. 535; this case concerned a bond between a man and a woman whom he intended to marry to the effect that the one would forfeit a certain sum of money to the other if he or she married a third party. The bond was declared invalid on the ground that, although the woman was a major, her parents were against this marriage and the bond therefore amounted to a "fraud" upon them.

(37) Welles v. Middleton (1784) 1 Cox 122 at p. 125; that this case was authority for the proposition that the relationship alone is sufficient to render such transactions voidable can be clearly seen from the head note which reads "A court of Equity upon general principles of policy will set aside any gift made by a client to an attorney during the time when the attorney has in his hands the transaction of the client's affairs, without proof of actual fraud.

(38) Fox v. MacKreth (1788) 2 Bro. C.C. 400

(39) Ibid. at pp. 420-421

(40) Ibid. at p. 424

(41) Ibid. at p. 425

(42) MacKreth v. Fox (1791) 4 Bro. Parl. Cas. 225; here the reporter says, "The point of this case may be more accurately obtained from the report in 2 Bro. C.C. 400." He refers to the head note in that report which reads

"A trustee for the sale of estates, for payment of debts, purchased them himself, by taking undue advantage of the confidence in him by the plaintiff..."

(43) Killick v. Flexney (1792) 4 Bro. 161

(44) Ibid. at p. 162

(45) Ibid. at pp. 162-163

(46) Newman v. Payne (1793) 2 Ves. Jun. 199

(47) Ibid. at pp. 201-202

(48) Massey v. Davies (1794) 2 Ves. Jun. 317

(49) Ibid. at p. 320

(50) Whichote v. Lawrence (1798) 3 Ves. Jun. 740

(51) Ibid. at p. 750; the head note reads "there is no general rule that a trustee to sell shall not purchase; but he shall not thereby gain a profit to himself".

(52) Campbell v. Walker (1800) 5 Ves. Jun. 678, see also Ex parte Reynolds (1800) 5 Ves. Jun. 707, where the agents of a bankrupt's estate were removed on the ground that one of them had purchased himself.

(53) Ibid. case at p. 680

(54) Gibson v. Jeyes (1801) 6 Ves. Jun. 268

(55) Ibid. at pp. 270-271

(56) Armitage's Trustees v. Allison (1911) N.P.D. 88

(57) Preller v. Jordaan 1956 (1) S.A. 483 A.D.

(58) Ibid. at p. 506

(59) Gibson v. Jeyes (1801) 6 Ves. Jun. 268 at p. 277 Lord Eldon was here criticising the judgment of Lord Thurlow in Fox's Case

(60) Ibid. at p. 278.

(61) Ex parte Lacey (1802) 6 Ves. Jun. 626; "positive confidence" because the beneficiary believes the fiduciary to be acting for him and not merely that the fiduciary will not act contrary to his, the beneficiary's interests. The latter we may call "negative confidence" see infra pp. 166-167.

(62) Ibid. at pp. 627-628

(63) Ex parte James (1803) 8 Ves. Jun. 337

(64) Ibid. at p. 353

(65) Hatch v. Hatch (1804) 9 Ves. Jun. 292

(66) Ibid. at pp. 297-298

(67) Coles v. Trecothick (1804) 9 Ves. Jun. 233

(68) Ibid. at pp. 244-245

(147-155)

(69) Ex parte Bennet (1805) 10 Ves. Jun. 381

(70) Ibid. at p. 345

(71) Randall v. Errington (1805) 10 Ves. Jun. 424

(72) Ibid. at p. 427

(73) Morse v. Royal (1806) 12 Ves. Jun. 359

(74) Huguenin v. Basely (1807) 14 Ves. Jun. 273

(75) Lowther v. Lord Lowther (1806) 13 Ves. 95

(76) Ibid. at p. 103

(77) Sanderson v. Walker (1807) 13 Ves. Jun. 601

(78) Ibid. at p. 601

(79) Huguenin v. Basely (1807) 14 Ves. Jun. 273

(80) Ibid. at p. 294

(81) Ibid. at p. 296

(82) Harris v. Tremenheere (1808) 15 Ves. Jun. 34

(83) Ibid., at pp. 41-42

(84) Coomber, Coomber v. Coomber (1911) 1 Ch. 723 C.A. at p. 727

(85) Wood v. Downes (1811) 18 Ves. Jun. 120

(86) Ibid. at p. 127

(87) Montesquieu v. Sandys (1811) 18 Ves Jun. 302

(88) Ibid., at p. 313

(89) Griffiths v. Robins (1818) 3 Mad. 191

(90) Goddard v. Carlisle (1821) 9 Price 169

(91) Ibid., at p. 180

(92) Williams v. Williams (1817) 3 Mer. 157

(93) Ibid., at p.160

(94) Yovatt v. Winyard (1820) 1 Jac. & W. 394

(95) Ibid. at p. 395

(96) Green v. Folgham (1823) 1 S. & S. 398

Transactions with third parties and the rule as to "profits"

(1) Keech v. Sandford (1726) Sel. Cas. T. King 61

(2) Ibid., at p. 62

(3) Hanbury, Modern Equity, 8th ed., at p. 254

(4) Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty", (1968) 84 Law Quarterly Review 472 at p. 474

(5) Holt v. Holt (1671) 1 Ch. Ca. 190-6

(6) Rushworth's Case (1676) 2 Free. 13

(7) Blewett v. Millet (1774) 7 Bro. P.C. 373

(8) Ibid., at p.375

(9) Pickering v. Vowles (1783) 1 Bro. C.C. 197

(10) James v. Dean (1805) 11 Ves. Jun. 383

(11) Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119

(12) Fox v. Mackreth (1788) 2 Bro. C.C. 400

(13) Massey v. Davies (1794) 2 Ves Jun. 317

(14) Newton v. Bennett (1784) 1 Bro. C.C. 359

(15) Holdsworth, op.cit., vol. xii at p. 229

(16) Burgess v. Wheate (1759) 1 Eden 177

(17) Ibid. (1759) W.Bl. at p. 162

(18) Middleton v. Spicer (1783) 1 Bro. C.C. 201

(19) Lord Kames, Principles of Equity, 3rd ed. (1778) vol. 2 at p. 87

(20) Ex parte Bennet (1805) 10 Ves. Jun. 381

(21) Ibid., at p.395; in Blewett's case we find counsel arguing that "the general rule, that no trustee shall benefit himself out of his trust estate."

THE DEVELOPMENT OF THE GENERAL RULE AS TO PROFITS

(1) Hart, "The Development of the Rule in Keech v. Sandford", (1905) 21 Law Quarterly Review 258 at p. 259

(2) Sealy, "Fiduciary Relationships", (1962) Cambridge Law Journal 69 at pp. 77-78.

(3) Per Sir William Grant in Randall v. Russell (1817) 3 Mer. 190; see also Wington v. Wilbey (1877) 76 L.T. 770 and Bevan v. Webb (1905) Ch. 620

(4) Hart, loc.cit., at p. 264, "but this is not the ground on which the rule was based in the leading case of Keech v. Sandford or in Blewett v. Millet, Griffen v. Griffen (1804) 1 Sch. & Lef. 352 and In re Biss (1903) 2 Ch. 40. In all these cases it was put on the ground of public policy - the danger to the beneficiary."

(5) Snell, Equity, 25th ed., at p.216

(6) See In re Biss (1903) 2 Ch.40; especially the judgment of Collins L.J.; Hart, loc.cit., at p.262

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(7) Ibid. at p.61

(8) Hart, loc.cit., at p.259

(9) Blewett v. Millet (1774) 7 Bro. P.C. (Toml.) 373

(10) Keech v. Sandford (1726) Sel. Cas. 61

(11) In re Biss, Biss v. Biss (1903) 2 Ch. 40

(12) Hart, loc.cit., at p. 259

(13) Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119 at pp. 132-133

(14) Tyuell v. Bank of London (1862) 10 H.L.C. 26

(15) Ibid. at p. 59

(16) Henderson v. Huntington Copper Company (1877) 4 R 294. 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, but be compelled to make it over to his constituent." per Lord Ordinary. See also Lister v. Stubbs (1890) 45 Ch.D. 1

THE MODERN FIDUCIARY DOCTRINE

(1) Tufton v. Sperni (1952)2T.L.R. 516

(2) Ibid., at pp. 519-520

Undue Influence

(1) Archer v. Hudson (1844) 7 Beav. 551 at p. 559

(2) Lancashire Loans Ltd., v. Black (1934) 1 K.B. 380 at p. 409; Powell v. Powell (1900) 1 Ch. 243

(3) Hoghton v. Hoghton (1852) 15 Beav. 278

(4) Story, Equity Jurisprudence, 3rd ed. at pp. 133-134

(5) Turner v. Collins (1871) 7 Ch. App. 329

(6) Ibid. at p. 340

(7) Savery v. King (1856) 5 H.L.C. (Clark) 627

(8) Ibid. at p. 655

(9) M'Mackin v. Hiberman Bank (1905) I.R. 296

(10) Ibid. at p. 304

(11) Lancashire Loans Ltd., v. Black (1934) 1 K.B. 380

(12) Nottidge v. Prince (1860) L.J. Ch. 857

(13) Ibid. at p. 865

(14) Ibid. at p. 865

(15) Lyons v. Home (1868) Eq.Cas. vol. vi 655

(16) Ibid. at p. 674

(17) Parfit v. Lawless (1872) L.R. 2 P. & D. 462

(18) Huguenin v. Basely 14 Ves. 273 at p. 288

(19) Morley v. Loughnan (1893) 1 Ch. 736

(20) Ibid. at p. 765 per Wright J.

(21) Allcard v. Skinner (1887) 36 Ch.D. 145

(22) Ibid. at p. 183

(23) Hanbury, Modern Equity, 8th ed. at p. 657

(24) Turner v. Collins (1871) 7 Ch. App. 329

(25) Ibid. at p. 339

(26) Per Lord Langdale M.R. in Archer v. Hudson (1844) 7 Beav. 551

(27) Wright v. Vanderplank (1856) 8 De G.M. & G. 133 at p. 146

(28) Powell v. Powell (1900) 1 Ch. 243

(29) Ibid. at p. 245-246

(30) Nottidge v. Prince (1860) L.J.Ch. 857 at p. 865

(31) Parfit v. Lawless (1872) L.R. 2 P. & D. 462 at p. 468

(32) Dent v. Bennett (1839) 4 My. & Cr. 269

(33) Ibid. at p. 276

(34) Billage v. Southey (1852) 9 Hare 534

(35) Williams v. Johnson (1937) 4 All E.R. 34 P.C.

(36) Ibid. at p. 36

(37) Smith v. Kay (1859) 7 H.L.C. (Clark) 750

(38) Story, Equity Jurisprudence, 3rd ed. at p. 135

(39) Story, op.cit., at p. 135

(40) Hunter v. Atkins (1834) 1 My. & K. 113, 135

(41) Ibid. at p. 135

(42) Prideau v. Lonsdale (1863) 1 De G.J. & Sm. 435

(43) Story, op.cit., at p. 134

(44) Holman v. Lyones (1854) 4 De. G.M. & G. 270

(45) Ibid. at p. 281

(46) Savery v. King (1856) 5 Clark 627

(47) Ibid. at p. 656

(48) Moody v. Cox and Hatt (1917) 2 Ch. 71 C.A.

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(49) Ibid. at p. 79

(50) Ibid. at p. 88

(51) Wright v. Carter (1903) 1 Ch. 27 at p.60 per Stirling J.

(52) Demerara Bauxite Co. Ltd. v. Hubbard and Others (1923) A.C. 673 P.C.

(53) Ibid. at p. 676

(54) Montesquieu v. Sandys (1811) 18 Ves. Jun. 302

(55) Holman v. Lyones (1854) 4 De G.M. & G. 270

(56) McMaster v. Byrne (1952) 1 All E.R. 1362

(57) Hunter v. Atkins (1834) 3 M. & K. 113

(58) Ibid. at p. 136

(59) Tate v. Williamson (1866) 2 Ch. App. 55

(60) Ibid. at p. 60

(61) Coomber, Coomber v. Coomber (1911) 1 Ch. 723 C.A.

(62) Ibid. at p. 727

(63) Ibid. at p. 729

(64) Inche Noriah v. Shaik Allie Bin Omar (1929) A.C.127

(65) Ibid. at p. 135, Morely v. Loughnan (1893) 1 Ch. 736 at p. 752

(66) Tufton v. Sperni (1952) 2 T.L.R. 516

(67) Ibid. at p. 520, Huguenin v. Basely (1807) 14 Ves. Jun. 273 at p. 295

(68) Ibid. at pp. 520-521; Morely v. Loughnan (1893) 1 Ch. 736

(69) Morely v. Loughnan (1893) 1 Ch. 736 at p. 751

(70) Tufton v. Sperni (1952) 2 T.L.R. 516 at p. 521

(71) Tate v. Williamson (1866) 2 Ch. App. 55

(72) Tufton v. Sperni (1952) 2 T.L.R. 516 at p. 525

(73) Antony v. Weereskam(1953) 1 W.L.R. 1007

(74) Hanbury, Modern Equity, at p. 658

(75) Goddard v. Carlisle (1821) 9 Price 169 Excq.

(76) Hunter v. Atkins (1834) 3 M. & K. 113

(77) Tate v. Williamson (1866) 2 Ch. App. 55

(78) Inche Noriah v. Shaik Allie Bin Omar (1929) A.C. 127

(79) Tufton v. Sperni (1952) 2 T.L.R. 516

(80) Edwards v. Meyrick (1842) 2 Hare 60

(81) Ibid. at p. 68

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(82) Rhodes v. Bate (1865) L.R. 1 Ch. App. 252

(83) Ibid. at p. 257

(84) Rhodes v. Bate (1865) 4 Giff. 670 at p. 681

(85) Walker v. Smith (1861) 29 Beav. 394

(86) Ibid. at p. 396

(87) Dent v. Bennett (1839) 4 My. & Cr. 269; Mitchell v. Homfray (1881) 8 Q.B.D. 587 (C.A.); Rhodes v. Bate (1866) L.R. 1 Ch. App. 252; Williams v. Johnson (1937) 4 All. E.R. 34 (P.C.)

THE FIDUCIARY DUTIES ARISING FROM THE FACT THAT ONE PERSON HAS UNDERTAKEN TO ACT IN THE INTERESTS OF ANOTHER

(1) Reading v. R. (1949) 2 K.B. 232

(2) Sealy, Fiduciary Relationships, (1962) Cambridge Law Journal 69 at p.76

(3) Bray v. Ford (1896) A.C. 44

(4) Ibid. at p. 51

(5) Hanbury, op.cit., at p. 254

(6) Snell, 26th ed. op.cit., at p. 255 et seq.

(7) Halsbury, 3rd ed. (Simons), vol. 14, at p. 626

(8) Lewin, Trusts, 26th ed., at pp. 193-195

(9) Gower, Modern Company Law, 3rd ed., at p. 526

(10) Gillet v. Peppercorne (1840) 3 Beav. 78

(11) Ibid. at p. 83

(12) Stoljar, The Law of Agency, at p. 288 et seq.

(13) Fridman, The Law of Agency, 2nd ed., at p. 125

The Concept of Conflict of Interest and Duty

(1) Aberdeen Railway Co. v. Blackie (1854) 1 Macq. 461

(2) Ibid. at p. 471

The avoidance of contracts between Fiduciary and Beneficiary

(1) Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119 at p. 124

(2) Ex parte Lacey (1802) 6 Ves. Jun. 626

(3) Farrar v. Farrar Ltd. (1888) 40 Ch. D. 395 at p.407

(4) Hanbury, Principles of Modern Equity, 8th ed. at p. 256

(5) See for example Lewin, op.cit., at pp. 700-701

(6) Re Boles and British Land Company's Contract (1902) 1 Ch. 244 at p. 246

(7) Campbell v. Walker (1800) 5 Ves. Jun. 678 at p. 681; Coaks v. Boswell (1886) II App. Cas. 232; Hamilton v. Wright (1842) 9 Cl. & F. III. As to what is a "reasonable time" see Beningfield v. Baxter (1886) 12 App. Cas. 167; Randall v. Errington (1805) 10 Ves. Jun. 423

(8) York Building Co. v. MacKenzie (1705) 8 Bro. P.C. 42

(9) Ex parte James (1803) 8 Ves. Jun. 337; York Building Co. v. ~~Secrecy~~ MacKenzie (1705) 8 Bro. P.C. 42; Re Bulmer (1937) Ch. 499; Campbell v. Walker (1800) 5 Ves. Jun. 678, (1807) 13 Ves. Jun. 601; Aberdeen Railway Co. v. Blackie (1854) 1 Macq. 461; In re Sherman (1954) Ch. 653

(10) Harvey v. Lambert (1888) 58 L.T. 499; Wright v. Morgan (1926) A.C. 788

(11) Baker v. Peck (1861) 9 W.R. 472; Parker v. McKenna (1875) L.R. 10 Ch.App. 96; In re Sherman (1954) Ch. 653; Re Postlethwaite (1888) 59 L.T. 58; Lewin, op.cit., at p. 693; Hanbury, op.cit., at p. 257

(12) Re Postlethwaite (1888) 59 L.T. 58

(13) Delves v. Gray (1902) Ch. 606

(14) Wright v. Morgan (1926) A.C. 788

(15) Ibid., at pp. 796-797

(16) Kelly v. Enderton (1913) A.C. 191

(17) Re Mulholland's Will Trust (1949) All E.R. 460; here the option had been acquired before the assumption of trusteeship.

(18) Holder v. Holder (1968) 1 All E.R. 655

(19) Ibid. at p. 677

(20) Snell, Principles of Equity, 26th ed. at p. 259

(21) Holder v. Holder (1968) 1 All E.R. 665 at p. 677

(22) Ibid. at p. 671

(23) Ibid. at p. 671

(24) Ibid. at pp. 671-672

(25) Ibid. at p. 677; "The reason given by Lord Eldon, that it is impossible to ascertain what knowledge

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the trustee may have, seems less persuasive in the light of Bowen L.J.'s famous dictum (in Edington v. Fitzmaurice (1881-1885) All E.R. 856 at p. 861) that 'the state of a man's mind is as much a fact as the state of his digestion' and the almost daily experience of any judge engaged in ascertaining the knowledge and intentions of a party to proceedings.", at p. 677

(26) Sanderson v. Walker (1807) 13 Ves. Jun. 601 at p.601

(27) See for example Halsbury, 3rd ed. (Simons), vol. 14 at pp. 626-627

(28) Coles v. Trecothick (1804) 9 Ves. Jun. 234, supra p. 147

(29) See for example Snell, op.cit., at p. 247; Hanbury, op. cit., at pp. 255-257

(30) Moody v. Cox and Hatt (1917) 2 Ch. 71

(31) Ibid. at pp. 79-80

(32) Hanbury, op.cit., at p. 256; see also Lewin, op.cit., at p. 699 and Ex parte James (1803) 8 Ves. Jun. 337

(33) Moody v. Cox and Hatt (1917) 2 Ch. 71

(34) Snell, op.cit., at p. 262

(35) Demerara Bauxite Company Ltd. v. Hubbard (1923) A.C. 673 supra p. 177

(36) Story, Equity Jurisprudence, 3rd ed. Chp. VII

(37) Sealy, loc.cit., at p. 126

(38) Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Company (1914) 2 Ch. 488

(39) Sealy, loc.cit., at pp. 124-125

(40) Sealy, ibid. at p. 126

(41) Chitty, Contracts, (General Principles) 22nd ed. at p. 119

(42) Sealy, loc.cit., at pp. 136-140

(43) Newman, Equity and Law, a Comparative Study.

Liability to Account for Profits

(1) Bray v. Ford (1896) A.C. 44

(2) Ibid. at p. 51

(3) Hanbury, Modern Equity, 8th ed. at p. 254

(4) Keech v. Sandford (1726) Sel. Cas. 61

(5) Regal (Hastings) Limited v. Gulliver (1967) A.C.134

(6) Ibid. at p. 144, 145

(7) Ibid. at p. 137

(8) Barnes v. Addy (1874) 9 Ch. 244

(9) Ibid. at p. 251

(10) It is interesting to note that Stoljar, op.cit., justifies the rule requiring a fiduciary to account thus: "The strongest fiduciary duty is that against bribes and secret profit, a duty directed not so much against corrupt and criminal practice, but rather to ensure that an agent discloses and disgorges all profits, that is profits that came to him where he sells for more or buys for less than the price expected, or where he obtained a bribe in the form of rebates or discounts or shares, or in the form of a separate reward or commission..." at p. 289

(a) Remuneration

(11) See Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119 at pp. 127-128.

(12) Bray v. Ford (1896) A.C. 44

(13) In re French Protestant Hospital (1951) Ch. 567

(14) Ibid. at p. 571

(b) A Fiduciary may not use property to his benefit which he holds for and to the use of another

(15) Sealy, loc. cit., at p. 131

(16) Holdsworth, History of English Law, vol. 12 at p.299

(17) Newton v. Bennett (1784) 1 Bro. C.C. 359

(18) Shallcross v. Oldham (1862) 2 J. & H. 609

(19) Ibid. at p. 616

(c) A fiduciary is accountable for all profits made as a result of taking for himself an advantage which it was his duty to take for his beneficiary

(20) Fawcett v. Whitehouse (1829) 1 Russ. & M. 132

(21) Andrews v. Ramsay (1903) 2 K.B. 635

(22) Salford Corporation v. Lever (1891) 1 Q.B. 168

(23) Keech v. Sandford (1726) Sel. Cas. 61

(24) De Busche v. Alt (1978) 8 Ch. D. 286

(25) Bentley v. Craven (1853) 18 Beav. 75

(26) Regal (Hastings) Ltd. v. Gulliver (1967) A.C.134

(d) A fiduciary is accountable for all profits made as the result of taking an opportunity arising during the course of his administration, even although he was under no obligation to take it for his beneficiary

(27) Attorney-General v. Goddard (1926) 90 L.J.K.B. 743

(28) Williams v. Barton (1927) 2 Ch. 9

(28a) Ibid. at pp. 11-12

(29) Phipps v. Boardman (1967) A.C. 46

(30) Ibid. 99

(31) Ibid. at p. 85; Regal (Hastings) Ltd. v. Gulliver (1967) A.C. 134 at p. 137

(32) Ibid. at p. 86; Regal (Hastings) Ltd. v. Gulliver (1967) A.C. 134 at p. 147

(33) Ibid. at pp. 86-87; Regal (Hastings) Ltd. v. Gulliver (1967) A.C. 134 at pp. 154 and 158

(34) Regal (Hastings) Ltd. v. Gulliver (1967) A.C. 134 at p. 154

(35) Phipps v. Boardman (1967) A.C. 46 at pp. 88-89

(36) Ibid. at pp. 88-89

(37) Ibid. at p. 88

(38) Ibid. at pp. 89-90

(39) Aas v. Benham (1891) 2 Ch. 244 C.A.

(40) Ibid. at p. 256

(41) Dean v. MacDowell (1878) 8 Ch.D. 345 C.A.

(42) Aas v. Benham (1891) 2 Ch. 244 C.A. at p. 258

(43) Phipps v. Boardman (1967) A.C. 46 at p. 93

(44) Ibid. at p. 93

(45) Ibid. at p. 125

(46) Ibid. at p. 126 et seq.

(47) Ibid. at p. 127 et seq.

(48) Ibid. at p. 115

(49) Aas v. Benham (1891) 2 Ch. 244 C.A.

(50) Phipps v. Boardman (1967) A.C. 46 at p. 107

(51) Ibid. at p. 112

(52) Ibid. at p. 102

(53) Ibid. at pp. 103-104

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(e) A fiduciary is accountable for all profits made as the result of his use of his position as such.

(54) Reading v. Attorney-General (1948) 2 K.B. 268; affd. in (1949) 2 K.B. 232; affd. in H.L. (1951) A.C. 507

(55) Attorney-General v. Reading (1949) 2 K.B. 268; the quotation of Denning J. is in (1948) 2 K.B. 268 at p.275

(f) A fiduciary cannot make any profit from the beneficiary in any matter relating to the beneficiary's affairs, although he was under no obligation in respect of that particular matter to act in the interests of the beneficiary

(56) Regier v. Campbell-Stuart (1939) Ch. 766

(57) Ibid. at p. 768-769

Disclosure of Profits

(58) Sealy, "Some Principles of Fiduciary Obligation" (1963) Cambridge Law Journal 119 at p. 135

Remedies

(1) Sealy, "Fiduciary Relationships" (1962) Cambridge Law Journal 69 at p. 75

(2) Sealy, "Some Principles of Fiduciary Obligation" (1963) Cambridge Law Journal 119 at p. 123

(3) Beckford v. Wade (1805) 17 Ves. Jun. 87

(4) Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 Law Quarterly Review 472

(5) Lister v. Stubbs (1890) 45 Ch.D. 1

(6) Gareth Jones, loc.cit., at p. 477

(7) Metropolitan Bank v. Heiron (1880) 5 Ex.D. 319

(8) Lister v. Stubbs (1890) 45 Ch.D. 1

(9) Metropolitan Bank v. Heiron (1880) 5 Ex.D. 319 at p. 323

(10) Ibid. at p. 325

(11) Sealy, "Some Principles of Fiduciary Obligation", (1963) Cambridge Law Journal 119 at p. 124

(12) Snell, Principles of Equity, 25th ed. at p. 173 Lewin, Trusts, 26th ed. at p. 8; Keeton, The Law of Trusts, 7th ed. at p. 217

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(13) Keeton, The Law of Trusts, 7th ed. at p. 230

✳(14) Scott, "Constructive Trusts", (1955) 71 Law Quarterly Review 39

(15) Sealy, "Some Principles of Fiduciary Obligation" (1963) Cambridge Law Journal at p. 132 et. seq.

(16) Scott, loc.cit., at p. 47

COMPETITION AND CONFIDENTIAL INFORMATION

Competition

(1) In re Thompson (1930) 1 Ch. 203

(2) Ibid. at p. 215

(3) Ibid. at p. 216

Confidential Information

(1) Supra pp. 153-154

(2) Morrison v. Moat (1851) 9 Hare 241

(3) Ibid. at p. 255

(4) See Sealy, "Fiduciary Relationships" (1962) Cambridge Law Journal 69 at p. 74 foot note 20

(5) Robb v. Green (1895) 2 Q.B. 315 C.A.

(6) Coco v. A.N. Clark (Engineers) Ltd. (1969) R.P.C. 41

(7) Ibid. at p. 44

PART 3

THE FIDUCIARY RELATIONSHIP IN ROMAN DUTCH LAW

(1) Preller v. Jordaan 1956 (1) S.A. 483 A.D.

(2) Spies N.O. v. Smith en Andere 1957 (1) S.A. 539 A.D.; see also Hahlo and Kahn, The Union of South Africa pp. 470-471; Scholtens, (1960) Acta Juridica pp. 276-288

(3) Miller v. Miller 1965 (4) S.A. 459 C.P.D.

(4) Ibid. at p. 463

(5) Ibid. at p. 463

(6) Joubert, "Contracts Between Doctors and Patients", (1969) South African Law Journal 290

(7) Ibid. at p.298

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(8) Yates v. Estate Yates 20 S.C. 35; "..if there had at the time been a recognised relation between them, it would have been the duty of the plaintiff, before entering into any contract with her for his own benefit, to see that she obtained independent advice." at p.37

(9) Armitage's Trustee v. Allison 1911 N.P.D. 88

(10) Savery v. King (1856) 5 Clark H.L. 627

(11) Holman v. Lyones (1854) 4 De G.M. & G. 270

(12) Wood v. Downes (1811) 18 Ves Jun. 120

(13) Upington v. Bullen (1842) 2 D. & W. 184

(14) Gibson v. Jeyes (1801) 6 Ves Jun. 266

(15) Montesquieu v. Sandys (1811) 18 Ves. Jun. 302

(16) Rhodes v. Bate (1865) L.R. 1 Ch. 252

(17) Tate v. Williamson (1886) L.R. 2 Ch.55

(18) Mitchell v. Homfray (1881) 50 L.J.Q.B.

(19) Wright v. Carter (1903) 1 Ch. 27

(20) Armitage's Trustee v. Allison 1911 N.P.D. 88

(21) Ibid. at p. 107

The Fiduciary Relation and the Administration of the Affairs of Others

(1) Refco Ltd., v. Amicor Investments 1964 (3) S.A. 184 F.C.

(2) Ibid. at p.190

(3) Murray, (1947) Annual Survey of South African Law at p.80

(4) De Villiers and MacKintosh, The Law of Agency in South Africa, at p.1

(5) Robinson v. Randfontein Estates Gold Mining Co. 1921 A.D. 168

(6) Ibid. at p. 178

(7) Sealy, "Fiduciary Relationships", (1962) Cambridge Law Journal 69 at p. 76

Is the Fiduciary Doctrine a Doctrine of Civil Law?

(1) See, for example, Aberdeen Railway Co. v. Blackie Bros. 1 Macq. (H.L.) 461; Baxter v. Beningfield 4 N.L.R. 143; Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Co. (1914) 2 Ch.488;

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Robinson v. Randfontein Estates Gold Mining Co. 1921 A.D. 168; Vinter, The Fiduciary Relationship and the Resulting Trust

(2) Allen, Law in the Making, 4th ed., at p. 316

(3) Sealy, "Fiduciary Relationships", (1969) Cambridge Law Journal 69 at p. 76

(4) Vinter, op.cit., at p. 3

(5) D.49.16.9.

(6) C.4.6.33.

(7) D.24.1.1.

(8) D.50.13.3.; C.10.52.9. As to whether a doctor is a fiduciary in our law - at least in the sense of a presumption of influence - see D.J. Joubert, "Contracts Between Doctors and Patients", (1969) South African Law Journal 290. Here it can be seen that contracts between physicians and patients were dealt with specifically and not as examples of a general doctrine. Joubert concludes that although certain writers were of the opinion that there was a presumption of metus in these cases, this was not part of Roman Dutch Law. "The result is that in Roman Dutch law there were certain general grounds on which a patient who had contracted with his doctor could obtain relief, but these were grounds upon which any contracting could obtain relief..." at p. 297

(9) D.14.6.1.1.

(10) D.26.8.54

(11) D.27.7.5.4.5. D.41.4.2.8., Inst. 1.2.1.

(12) Preller v. Jordaan 1956 (1) S.A. 483 A.D. at p. 484

(13) Voet 14.3.4

(14) Hargreaves v. Andrews 1915 A.D. 519

(15) Ibid. at p. 522

(16) D.13.12.

(17) D.18.1.34.7.

(18) ad D.1.3.12.

The Enforcement of the Administrator's Duty to act in the Interests of his Beneficiary

(1) Buckland, A Text Book of Roman Law, at pp. 153-154; thus Huber says, "He is obliged to execute his tutorship and he shall be accountable, not only for what he has managed ill, but also for what he has omitted to do." 18.23.; Domat says "..he shall be accountable not only for what he has managed ill,

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but also for what he omitted to do." 1.1.1.3.1.

(2) Grotius, Inleiding, 3.12.8.

(3) Van Leeuwen, Censura Forensis, 1.4.24.11.

(4) Voet 3.5.3.; Van Leeuwen, Censura Forensis 1.4.26.2.; see also generally as to the mandatory's positive duty: Van der Kessel, Praelectiones, Th. 571; Van Leeuwen, Roman Dutch Law 4.26.4.; Domat 1.2.3.2.1.; Mallison v. Tanner 1947 (4) S.A. 681 (T).

The Administrator may not act on behalf of his Beneficiary in matters in which he has a Personal Interest ✓

(1) D.26.8.5.pr.

(2) Domat 1.2.1.3.1.

(3) Inst. 1.22.; G.1.8.4.

(4) See infra p. 247, in other words it follows from the rule that a tutor cannot sell to a third party on the agreement that the third party will in turn resell to the tutor. This is merely an attempt to circumvent the rule. On the other hand the rule does not relate to the case where a third party purchases from a tutor without disclosing the fact that the purchase is in fact for a co-tutor. This, it is submitted, is to purchase per interpositam personam.

(5) Potheir 18.1.22.; 26.8.13.14; Contract of Sale 13; Domat 2.1.3.4.; Wessenbach ad Cod. 4.38.5.; Matthaeus de Auct. 1.10n.4.5.

(6) Voet 18.1.9.

(7) In re Neethling (1837) Menz. 228; Forbes, Still & Co. v. Sutherland (1856) 2 Searle 231; Baxter v. Beningfield 4 N.L.R. 143; Hargreaves v. Andrews 1915 A.D. 521; Robinson v. Randfontein Estates Gold Mining Co. 1921 A.D. 168; Osry v. Hirsch, Loubser & Co. 1922 C.P.D. 531

B Forbes Hargreaves Osry Robinson

(8) Godthofredus, ad C.4.35.5.

(9) Cujacius, ad D. 18.1.34.7.

(10) Donellus, ad C.4.38.5.

(11) Merenda, Controv.Jur. ad C. 4.38.5.

(12) See Scotts translation of D.26.8.7. Domat says that the tutor may authorise acts between himself and his pupil which are to the advantage of the pupil. This, it is submitted, is not the rule.

(13) Merenda, Controv. Jur. ad C.4.38.5

(14) Perezius, ad C.4.38.5.

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(15) Brunneman, ad C.4.38.5.

(16) Domat, 1.3.14.

(17) Potheir, ad D.18.1.46

(18) Wissenbach, ad C. 4.38.5.

(19) Matthaeus, De Auct. 1.10

(20) Groenewegen, ad C.4.38.5

(21) Voet, 18.1.9.

(22) In re Neethling (1837) 3 Menz. 228

(23) Forbes, Still & Co. v. Sutherland (1856) 2 Searle 231

(24) Ibid. at p. 238 - 239

(25) Baxter v. Beningfield 4 N.L.R. 143

(26) Hargreaves v. Anderson (Rews) 1915 AD. 521

(27) Ibid. at p. 522

(28) Louw v. J.H. Hofmeyr and Others (1869) Buch. 295

(29) Osry v. Hirsch, Loubser & Co. Ltd. 1922 C.P.D. 531

(30) Ibid. at p. 553

(31) Ibid. at p. 552

(32) Cujacius ad 18.1.34.7.

(33) Donellus ad. C.4.38.5.

(34) Merenda Controv. Jur. ad C.4.38.5.

(35) Perezuis ad C.4.38.5.

(36) Brunneman ad C.4.38.5.

(37) Domat

(38) Potheir Contr. de Vente

(39) Voet 14.3.4.

(40) Hargreaves v. Anderson (Rews) 1915 A.D. 521

(41) Ibid. at p. 524

(42) Donellus ad C. 4.38.5; see also Baxter v. Beningfield at p. 158 where this reasoning is used; Matthaeus de Auct. 1.10 (1-6).

(43) Wessels, The Law of Contract in South Africa, 4486

(44) Peffers N.O. and Another v. Board of Control 1965 (2) S.A. 53.

N.B

(45) Ibid. at p. 56

(46) Mackeurtan, 3rd edition. The Law of Sale of Goods in South Africa.

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The Administrator's Transactions with his Beneficiary as an Extraneus

(1) Osry v. Hirsch, Loubser & Co. Ltd. 1922 C.P.D. 531 at pp. 551-552

(2) Ibid. at p. 552

(3) Ibid. at p. 552

(4) Ibid. at p. 549

(5) D. 26.7.12.1.

(6) D.26.7.32.2.

(7) D.26.7.33.3.

(8) Cujacius ad. D. 18. 1. 34. 7.

(9) Merenda Controv. Jur. ad C.4.38.5.

(10) Brunneman ad C.4.38.5.

(11) Potheir, Contr. de Vente s.13, ad 18.1.22

(12) Wissenbach ad C.4.38.5.

(13) Matthaeus, De Auct., 1.10.(1-6)

(14) Groenewegen ad C.4.38.5.

(15) Voet 18.1.9.

(16) Baxter v. Beningfield 4 N.L.R. 143

(17) Ibid. at p.158

(18) Miller, "Fraudulent Non-Disclosure", (1957) 24 South African Law Journal 177 at p. 188

(19) Miller, ibid. at pp. 188-189

(20) Miller, ibid. at p. 189

Profits

(1) Watson, Mandate in Roman Law at p.178

(2) D.17.20

(3) G.3.46.4. and 5. As Domat says "For he ought not to reap any profit by the good offices which he does, so neither ought he to suffer loss by it." 1.1.15.2.4.

(4) D.17.10.2.

(5) D.17.5.5.

(6) D.17.10.8.

(7) D.17.16.

(8) D.17.6.6.

(9) D.17.48.2.

(10) D.17.6.6.

(11) Grotius, Inleiding, 3.12.8.

(12) Supra p.245

(13) Transvaal Cold Storage Co. v. Palmer 1904 T.S.4

(14) Ibid. at p. 20

(15) See generally De Villiers and Mackintosh, The Law of Agency

(16) Union Government v. Chappel 1917 C.P.D. 265

(17) Ibid. at p. 267

(18) Transvaal Cold Storage Co. v. Palmer 1904 T.S. 4 at pp. 21-22

(19) Davies v. Donald 1923 C.P.D. 295

(20) Ibid. at p. 300

(21) Thus Searle J.P. said, "Now if an owner of property has placed another person (A) in such a fiduciary relationship towards himself in respect of selling property, I think that if the owner subsequently finds out that A is negotiating for the sale to a third person, for whom A has constituted himself the agent, to the extent that the third person is relying on A's expert knowledge as to the value of the article, and under circumstances as that the owner may reasonably presume A is being paid for these services, then it lies upon the owner to make a full disclosure as to the adverse interest of A existing by reason of A's relationship to himself and if he does not do so, the contract can be set aside." at p.302

(22) Mallinson v. Tanner 1947 (4) S.A. 681 (T)

(23) Ibid. at p. 684

(24) Ibid. at p. 687

(25) Ibid. at p. 687

(26) Jones v. East Rand Extension G.M. Co. Ltd. 1903 T.H. 325

(27) Ibid. at pp. 334-335

(28) Dean v. McDowell L.R. 8 Ch.D. 354; here Cotton L.J. said that if a partner "makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, then the profit is made out of the partnership

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property, and therefore, of course, must be brought into the partnership account."

(29) Aas v. Benham (1891) 2 Ch. 244; here Lindley L.J. said, "As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, he must account to the firm for any benefit which he may have derived from the information."

(30) Peacock v. Marley 1934 A.D. 1

(31) Ibid. at p.5

(32) West Coast and Rand Labour Agency v. Abernethy 1908 E .D.C. 174

(33) Ibid. at p.178

(34) Corporate Opportunity (1961) 74 Harvard Law Review 765 at p.766

(35) Osry v. Hirsch, Loubser & Company Ltd. 1922 C.P.D. 531

(36) Ibid at p.566

(37) Robinson v. Randfontein Estates G.M. Co. 1921 A.D. 168

PART 4

THE DIRECTOR

The Analogy

(1) Gower, Modern Company Law, 3rd ed. at p.515

(2) Sealy, "Directors as Trustees", 1967 Cambridge Law Journal 83 at pp.83-86

(3) Sealy, ibid at p.85

(4) See for example Yale, Lord Nottingham's Two Treatises.

(5) THE CHARITABLE CORP. V. SUTTON (1742) 2 AKT 400
~~Sutton's Hospital Case (1612) 10 Co.Rep. 1a,23a~~

(6) Ibid.

(7) Russell v. Wakefield Waterworks Co. (1875) L.R. 20 Eq.474

(8) Ibid at p. 479

(9) Selangor Rubber Estates Ltd. v. Cradock and Others (1967) 2 All E.R. 1073

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(10) Ibid. at p. 1092

(11) In re Forest of Dean Coal Mining Co. (1879) 10 Ch.D.450

(12) Ibid. at pp. 451-452

(13) Selangor Rubber Estates Ltd. v. Cradock and Others (1967) 2 All. E.R. 1073 at pp. 1091-1095

(14) Re City Equitable Fire Insurance Co. (1925) Ch. 407

(15) Ibid. at p. 426

(16) York and North Midland Company v. Hudson (1854) 16 Beav. 485

(17) Ibid. at p. 491

(18) Turquand v. Marshall (1869) L.R. 6 Eq.112

(19) Ibid. at p. 133-134

(20) Aberdeen Railway Company v. Blackie Bros. (1854) 1 Macq. (H.L.) 461

(21) Ibid. at p. 469

(22) Regal (Hastings) Ltd. v. Gulliver (1967) A.C. 134

(23) Keech v. Sandford (1726) Sel. Cas. Ch. 61

(24) Ferguson v. Wilson (1866) L.R. 2 Ch. 77. "Wherever an agent is liable those directors would be liable, where liability would attach to the principal only, the liability is the liability of the company." at p.89 per Lord Cairns.

(25) Ibid. at p. 89; see too the remarks of Lord Selbourne in G.E. Railway v. Turner (1872) L.R. 8 Ch. 149 at p. 152, "...the directors are called trustees, they are no doubt trustees of assets which have come into their hands, or which are under their control..."

(26) Newborne v. Sensolid (G.B.) Ltd. (1954) 1 Q.B. 45

(27) Ibid. at p.51

(28) Imperial Hydropathic Hotel Company Blackpool v. Hampson (1882) 23 Ch.D. 1.

(29) Ibid. at p.12

(30) Robinson v. Randfontein Estates G.M. Company. 1921 A.D. 168

(31) Ibid. at p.216

(32) Watson, Mandate in Roman Law, at p.21

(33) See, Corporate Representation in the Middle Ages, Studies In Medieval Legal Thought, edited by Post.

(34) Domat 1.2.3. and 1.2.3.2.1.

(35) Trustees of Orange River Asbestos Company v. Hirsche and Others 10 Juta 71

(36) Ibid. at pp. 93-94

THE DUTY TO ACT BONA FIDE IN THE INTERESTS OF THE COMPANY

(1) Gower, Modern Company Law, 3rd ed. at p.520 quoting Lord Greene M.R. in Re Smith & Fawcett (1942)Ch. 304 at p.306

(2) Per Riche J. in Richard Brady Franks Ltd. v. Price (1937) 3 C.L.R. 112 at p.139

(3) For example compare the treatment of this subject by Walsh in his article "The Exercise of Powers in the Interests of a Company" (1967) 8 University of Western Australia Law Review 176 with Gower op.cit.

(4) Parsons, "The Director's Duty of Good Faith", (1967) 5 Melbourne University Law Review 395 at p.396

(5) Walsh, loc.cit.

(6) Walsh, ibid at p.176

(7) Gower, op.cit., at pp.520-521

(8) Poole v. National Bank of China Ltd. (1907) A.C. 229 at p.236

(9) Levin v. Felt & Tweeds Ltd. 1951 (2) S.A. 401 A.D. ✓ N.B

(10) Ibid. at p. 414

(11) Parsons, loc.cit. at p.417

(12) Gower, op.cit., at p.520

(13) Gower, op.cit., at p.520

(14) Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle," (1958) Cambridge Law Journal 93 at p.98

(15) Walsh, ibid. at p.181

The Duty to act for the Benefit of the Company and the Modern Organic Theory

(1) Automatic Self-Cleansing Filter Syndicate Co.Ltd. v. Cuninghame (1902) 2 Ch. 34 (C.A.)

(2) The case of Isle of Wight Railway Co. v. Tahourdin (1883) 25 Ch.D. 320 (C.A.) is usually cited as authority for this proposition.

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(3) Gower, op.cit., at p.132; see also Beuthin, "The Range of a Company's Interests", (1969) South African Law Journal 155 at pp. 155-156

(4) Walsh, "The Exercise of Powers in the Interests of a Company", (1967) 8 University of Western Australia Law Review 176 at p.194

(5) Walsh, ibid at p.194

(6) Sealy, "The Director as Trustee", (1967) Cambridge Law Journal 83

(7) Sealy, ibid. at pp. 89-90

(8) Palmer, Company Law, 26th ed. at p.530

(9) See for example Gower, op.cit., at pp.520-524

(10) Galbraith, The New Industrial State, at p.51

(11) Berle and Means, The Modern Corporation and Private Property.

(12) Berle and Means, op.cit. at p.124

(13) See especially "Corporate Powers as Powers in Trust", (1931) 44 Harvard Law Review 1049

(14) Dodd, "For Whom are Corporate Managers Trustees?", (1932) 45 Harvard Law Review 1145

(15) Report of June 14, 1954 (H.M. Stationery Office)

(16) Rubner, The Ensnared Shareholder, at p.61

(17) Penrose, The Theory of the Growth of the Firm. Rubner refers to this suggestion as "her piece de resistance". See also Donaldson, "Financial Goals: Management vs. Stockholders" (1963) Harvard Law Review.

(18) See for example Gower, op.cit., at p.522

(19) Rubner, op.cit.

(20) Gower, op.cit., at p. 522

(21) Beuthin, "The Range of a Company's Interests", (1969) South African Law Journal 155 at pp. 169-170. Beuthin does not give these views as necessarily his own.

(22) Beuthin ibid. at pp. 169-170

(23) Rubner, op.cit., at pp. 56-58

(24) Rubner, op.cit., at p.57

(25) See discussion in Beuthin, ibid. at p.170

(26) Rubner, op.cit., at pp. 53-54; Beuthin, ibid. at p.171

(27) Nash, "Administrative Law, Criminal Law and Inspection Under the Companies Act", (1967) 8 University of Western Australia Law Review 143, see also Holdsworth, History of English Law vol. viii pp. 201-202, Horowitz, "Historical Development of Company Law", (1946) 62 Law Quarterly Review 375

(28) Nash, ibid. at p. 145

(29) Nash, ibid. at p. 145

(30) Nash, ibid. at p. 147

(31) Tarver, "The Arrogance of Corporate Power: A Study of the Evolution of the Fiduciary Duty owed by Management to the Corporation or its Shareholders", (1967-68) 42 Tulane Law Review 155 at p. 174

(32) Tarver, ibid. at p.174

The need, in English Law, for a further duty

(1) Wedderburn, (1955) Cambridge Law Journal 37

(2) Gower, Modern Company Law, 3rd ed. at p. 521

(3) Re W. & M. Roith Ltd. (1967) 1 All E.R. 427

(4) Parke v. Daily News Ltd. (1962) Ch. 927

(5) Gower, op.cit. at p.522

(6) Sealy, (1967) Cambridge Law Journal 33 at pp. 33-35

(7) The Inspector's Report (H.M. Stationery Office) 1954.

The Further Test

(1) Gower, Modern Company Law, 3rd ed. at p.524

(2) Gower, op.cit., at p.524

(3) Wedderburn, (1955) Cambridge Law Journal 37; Sealy, (1967) Cambridge Law Journal 33

(4) Gower, op.cit., p.524; The Inspector's Report (H.M.S.O.) 1954.

(5) Gower, "Corporate Control: The Battle for the Berkley", (1955) 68 Harvard Law Review 1176 at pp. 1185-1186

(6) Gower, ibid. at p.1187

(7) Gower, op.cit., at p.524

(8) Gower, op.cit., at p.524

(9) Punt v. Symons & Co. (1903) 2 Ch. 506

(10) Ibid. at p.516

(11) Punt v. Symons & Co. (1903) 2 Ch. 506

(12) Ibid. at pp. 515-516

(13) Piercy v. Mills (1920) 1 Ch. 77

(14) Ibid. at pp. 84-85

(15) Wedderburn, (1955) Cambridge Law Journal 37

(16) Ibid. at p.40

(17) In re Smith and Fawcett Ltd. (1942) Ch. 304

(18) Ibid. at p. 306

(19) Parsons, "The Director's Duty of Good Faith", (1967) 5 Melbourne University Law Review 395 at p. 422

(20) Wedderburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation?" (1967) 30 Modern Law Review 77 In his note on Hogg v. Cramphorn Wedderburn says that "the views expressed by Wedderburn are, therefore, not now supported by authority; but they may still be relevant in view of the curious results produced by the doctrine in Hogg v. Cramphorn Ltd. itself.", at p.79 foot note 13. The "curious results" to which Wedderburn refers concern the court's view upon ratification.

(21) Hogg v. Cramphorn Ltd. (1966) 3 All E.R. 420

(22) The scheme was "intended not only to ensure that, if Mr. Baxter succeeded in onbtaining a shareholding which, as matters stood, would have been a controlling shareholding, he should not secure control of the company, but also, and perhaps primarily, to discourage Mr. Baxter from proceeding with his bid at all." ibid. at p. 426

(23) Ibid., at p. 428

(24) Ibid. at p. 429

(25) Beuthin, "Foiling the Take-Over Bidder", (1967) 84 South African Law Journal 349

(26) Beuthin, ibid. at p. 354

(27) Sealy, (1967) Cambridge Law Journal 33

(28) Sealy, ibid. at p. 34.

(29) Sealy, ibid. at p. 35

(30) Bamford v. Bamford (1968) 2 All E.R. 655

(31) Ibid. at pp. 657-658

(32) Ibid. at p.658

(33) Ibid. at p. 658

(34) Ibid. at pp. 658-659

(35) Ibid. at p. 665

(36) Ibid. at p. 665

(37) Irvine v. Union Bank of Australia (1877) 2 App. Cas. 366

(38) Grant v. United Kingdom Switchback Railway Co. (1888) 40 Ch.D. 135

(39) Ibid. at p. 140

(40) Gower, op.cit., at p. 524

(41) Gower, op.cit., at p.524

(42) Gower, op.cit., at p.566

(43) Gower, op.cit., at p.567

(44) Wedderburn, "Going the whole Hogg v. Cramphorn", (1968) 31 Modern Law Review 688 at p. 690

(45) Wedderburn, ibid. at p.690 footnote 14

(46) Hogg v. Cramphorn (1966) 3 All E.R. 420

(47) Mills v. Mills (1938) 60 C.L.R. 150

(48) Ibid. at p.164

(49) Treasure Trove Diamonds Ltd. v. Hyman 1928 A.D. 464

(50) Ibid. at pp.479-480

The Rule that a director must act in the interests of his company as a separate test for the validity of director's actions

(1) Parsons, "The Director's Duty of Good Faith", (1967) 5 Melbourne University Law Review 395 at p.416

(2) Walsh, "The Exercise of Powers in the Interests of a Company", (1967) 8 University of Western Australia Law Review 176

(3) Walsh, ibid. at p.188

(4) Hahlo, "Benefactions by Companies", (1967) 84 South African Law Journal 260 at pp. 260-261

(5) Gower, op.cit., at p.87

(6) Ashbury Railway Carriage & Iron Co. v. Riche (1875) L.R. 7 H.L. 653

(7) Attorney General v. Mersey Railway Co. (1907) 1 Ch.81

(8) Ibid. at pp. 99-100

(9) Introductions Ltd. v. National Provincial Bank (1968) 2 All E.R. 1221 (C.A.)

(10) Ibid. at p. 1225

(11) Bell Houses Ltd. v. City Wall Properties Ltd. (1966) 2 All E.R. 673; see note in (1966) 29 Modern Law Review 673

(12) Ibid. at p.687

(13) Gower, op.cit., at p.89

(14) Walsh, ibid. at p.188

(15) Hutton v. West Cork Railway Co. (1883) 23 Ch.D. 654 (C.A.)

(16) Ibid. at p.673

(17) Ibid. at p.673

(18) Re Lee Behrens & Co.Ltd. (1932) 2 Ch. 46

(19) Ibid. at p.51

(20) Parke v. Daily News Ltd. (1962) 1 All.E.R. 929

(21) Ibid. at p. 948

(22) Walsh, ibid. at p.190

(23) Cyclists Touring Club v. Hopkins (1910) 1 Ch. 179

(24) Ibid. at p.187

(25) Evans v. Brunner Mond & Co. (1921) 1 Ch.359

(26) Ibid. at p.369

(27) Re W & M Roith Ltd. (1967) 1 All.E.R. 427

(28) Wedderburn, "Ultra Vires or Directors' Bona Fides", (1967) 30 Modern Law Review 566; the head note begins "Ultra vires". Plowman J. made no reference to ultra vires in his judgment but did purport to apply the principle in Re Lee Behrens.

(29) Wedderburn, ibid. at p.569. Wedderburn asks if "it would not have made all the difference if...Roith himself had explained to a shareholders' meeting that he would withdraw from the business unless the new service agreement were made with appropriate pension provisions." at p.569

(30) This would have been the position had the court treated the matter as one relating to the director's fiduciary duties.

(31) Parsons, loc.cit., at p.420

(32) Charterbridge Corporation Ltd. v. Lloyds Bank Ltd. (1970) Ch. 62

(33) Re David Payne & Co.Ltd. (1904) 2 Ch. 608

(34) Ibid. at p.612

CONFLICT OF INTEREST AND DUTY

(1) Parsons, "The Director's Duty of Good Faith", (1967) 5 Melbourne Law Review 395 at p.397

(2) Aberdeen Railway Co. v. Blackie Bros. (1854) 1 Macq. 461

(3) Gower, Modern Company Law, 3rd ed. at p.526

(4) Parsons, loc.cit. at p.397

(5) Gower, op.cit., at p.526

(6) Gower, op.cit., at pp. 526-549

(7) Parsons, loc.cit, at p. 397

(8) Parsons, ibid. at p.416

(9) Infra at p.356

A Director may not act for his company in a matter in which he has an interest

(1) Aberdeen Railway Co. v. Blackie Bros. (1854) 1 Macq.461

(2) North West Transportation Co. v. Beatty (1887) 12 App. Cas. 589

(3) Ibid. at p.593-594

(4) Aberdeen Railway Co. v. Blackie Bros. (1854) 1 Macq 461 at p. 473

(5) Ibid. at p. 473

(6) Keech v. Sandford (1726) Sel.Cas.Ch.61

(7) Whelpdale v. Cookson 1 Ves.Sen.8

(8) Ex parte James (1803) 8 Ves.Jun. 337

(9) Ex parte Lacey (1802) 6 Ves.Jun.626

(10) Aberdeen Railway Co. v. Blackie Bros. (1854) 1 Macq. 461 at pp. 477-478

(11) E.B.M. Company Ltd. v. Dominion Bank (1937) 3 All. E.R. 555

(12) Ibid. at p.568

(13) Ibid. at p. 569

(14) Victor Limited (in liquidation) v. Lingard (1927) 1 Ch. 323

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(15) Ibid. at p. 330

(16) Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company (1914) 2 Ch. 488

(17) Ibid. at p. 503

(18) Cohen v. Directors of Rand Collieries 1906 T.S. 197

(19) Ibid. at pp. 201-202

(20) Gundelfinger v. African Textile Manufacturers 1939 A.D. 314

(21) Ibid. at p. 323

(22) Trek Tyres v. Beukes 1957 (3) S.A. 306

(23) Foster v. Foster (1916) 1 Ch. 532

(24) Trek Tyres v. Beukes 1957 (3) S.A. 306 at p.310

(25) Foster v. Foster (1916) 1 Ch. 532

A Director has an interest in a contract of his company but neither purports to act on its behalf nor contracts with it

(1) Benson v. Heathorn (1842) 1 Y & C.C.C. 326

(2) Ibid. at pp. 340-341

(3) Ibid. at pp. 342-343

(4) Imperial Mercantile Credit v. Coleman (1873) L.R. 6 H.L. 189, L.R. 6 Ch. App. 558

(5) Benson v. Heathorn (1842) 1 Y & CC.C. 326

(6) Imperial Mercantile Credit v. Coleman (1873) L.R. 6 H.L. 189; L.R. 6 Ch.App.558

(7) Ibid. at p. 563

(8) Ibid. at p. 567

(9) See Sealy, "The Director as Trustee", (1967) Cambridge Law Journal 83 at pp.87-88

(10) Sealy, ibid. at p. 96

(11) Sealy, ibid. at p.96

(12) Benson v. Heathorn (1842) 1 Y & C.C.C. 326 at p. 341

Contracts Between a Director and his Company

(1) Palmer, Company Law, 21st ed. at p. 563

(2) Aberdeen Railway Co. v. Blackie Bros. (1854) 1 Macq. 461

(3) Re Transplanters (Holding Company) Ltd. (1958) 2 All. E.R. 711

(4) Gower, Modern Company Law, 3rd ed. at p. 526

(5) Hahlo, Company Law Through the Cases, 2nd ed. p. 312

(6) Palmer, op.cit., at p. 563

(7) Hely-Hutchinson v. Brayhead Ltd. (1967) 2 All. E.R. 14

(8) Ibid. at p. 27

(9) Supra p. 201 et.seq.

(10) Hely-Hutchinson v. Brayhead Ltd. (1967) 3 All.E.R.98 at p.103

(11) Ibid. at p.106

(12) Parsons, "The Director's Duty of Good Faith", (1967) 5 Melbourne Law Review 395 at 399

PROFITS

(1) Supra at p.207 et.seq.

(2) Parsons, "The Directors Duty of Good Faith", (1967) 5 Melbourne Law Review 395 at p.407

(3) Parker v. McKenna (1874) 10 Ch.App.96

(4) Ibid. at p.118

(5) Ibid. at pp. 124-125

(6) Regal (Hastings) Ltd. v. Gulliver (1967) 2 A.C. 134

(7) Ibid. at p.137

(8) Ibid. at p.137

(9) Ibid. at p.149

(10) Keech v. Sandford (1726) Sel.Cas.Ch.61

(11) Ex parte James (1803) 8 Ves. Jun.337

(12) Hamilton v. Wright (1842) 9 Cl. & F. 111

(13) Ibid. at p.123

(14) Ex parte Lacey (1802) 6 Ves. Jun. 626

(15) Ex parte James (1803) 8 Ves.Jun. 337

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(38) Prentice, ibid. at p.454

Profits made from contracts with the company and "corporate opportunities."

(1) Sealy, "The Director as Trustee" (1967) Cambridge Law Journal 83 at p.98 foot note 85

(2) Corporate Opportunity (1961) 74 Harvard Law Review 765 at p.765

The Development of the Rules

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(2) Ibid. at p.340

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(28) Ibid. at p.804

(29) Ibid. at pp.804-805

(30) Ibid. at p.806

(31) Ibid. at p.806

(32) Ibid. at, p.806

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(37) Jacobus Marler Estates Ltd. v. Marler and Ano. (1913) 85 L.J.P.C. 167

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(39) Cook v. Deeks (1916) 1 A.C. 554 P.C.

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(1) Cowling v. Stableford & Co., (1905) 22 S.C. 363

(2) Ibid. at pp. 371-372

(3) Gower, Modern Company Law, 2nd ed. at p. 262

(4) Robinson v. Randfontein Estates G.M. Co. 1921 A.D. 168

(5) African Claim and Land Company v. Langerman ~~1905~~ 1906 T.S. 494

(6) Robinson's case at pp. 177-178

(7) Robinson's case at p. 234

(8) Robinson's case at p. 262

(9) Robinson's case at p.178

(10) Langerman's case at pp.504-505

(11) In re Cape Breton (1885) 29 Ch.D. 795

(12) Costa Rica Railway Co. v. Forwood (1901) Ch.D.746

(13) Cavendish Bentinck v. Fenn 12 A.C. 652

(14) Langerman's case at pp. 505-506

(15) Erlanger v. New Sombrero Co. (1878) 3 A.C. 1218

(16) Cavendish Bentinck v. Fenn 12 A.C. 652

(17) Burland v. Earle (1902) A.C. 83 P.C.

(18) Cook v. Deeks (1916)1A.C. 554 P.C.

(19) Robinson's case at p.179

(20) Langerman's case at p.504

(21) Robinson's case at p.216

(22) Robinson's case at p.195 and p.181

(23) Robinson's case at p.233

(24) Robinson's case at p.196

(25) Jacobus Marler Estates v. Marler 114 L.T. 640; Robinson's case at p.229

(26) Jacobus Marler Estates v. Marler 114 L.T. 640 at p.640

(27) Langerman's case at p.505

(28) Robinson's case at p.176

(29) Robinson's case at pp. 179-180

(30) Robinson's case at p.199

(31) Robinson's case at p.241

ABUSE OF CONFIDENCE, COMPETITION AND UNFETTERED DISCRETION

Abuse of Confidence

(1) Gower, Modern Company Law, 3rd ed. at pp.546-547

(2) See Sealy, "Fiduciary Relationships" (1962) Cambridge Law Journal 69 at p.74 foot note 20

(3) Industrial Plastics Ltd. v. Ferguson (1938) 4 All, E.R. 504

(4) Measures Brothers v. Measures (1910) 1 Ch. 336

(5) Cranleigh Engineering v. Bryant (1965) 1 W.L.R. 1293

(6) Cook v. Deeks (1916)1A.C. 554 P.C.

(7) Cranleigh Engineering v. Bryant (1965) 1 W.L.R. 1293 at p.1311; Cook v. Deeks (1916) A.C. 554 P.C. at p.564

(8) Ibid. at p. 1311

(9) Ibid. at pp. 1319-1320

Competition

(1) Wilson v. London Midland and Scottish Railway Co. (1940) Ch. 393

(2) Bell v. Lever Bros. (1932) A.C. 161

(3) Ibid. at p. 195

(4) Sealy, "The Director as Trustee", (1967) Cambridge Law Journal 83 at p.97

(5) Ibid. at p.97

(6) Hivac Ltd. v. Park Royal Scientific Instruments Ltd. (1946) Ch.169 (C.A.)

(7) Gower, op.cit., at p.548

Unfettered Discretion

(1) Gower, Modern Company Law, 3rd ed. at p. 525

(2) Coronation Syndicate v. Lilienfeld and the New Fortuna Co. Ltd. 1903 T.S. 489

(3) Ibid. at pp. 496-497

RATIFICATION AND RELEASE

Ratification of Directors' Breaches of their Fiduciary Duties

(1) Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle", (1958) Cambridge Law Journal 93 at p.96

(2) Gower, Modern Company Law, 3rd ed. at p.564

(3) Wedderburn, loc.cit., at p.96

(4) Foss v. Harbottle (1843) 2 Hare 461

(5) See generally Wedderburn, loc.cit.

(6) Wedderburn, ibid. at p.96

(7) Gower, op.cit., at p.564

(8) Gower, op.cit., at pp. 564-570

(9) Gower, op.cit., at p.570

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(10) Gower, op.cit., 2nd ed. at p.511

(11) Cook v. Deeks (1916) 1 A.C. 554 P.C.

(12) Ibid. at p.564

(13) Burland v. Earle (1902) A.C. 83 P.C.

(14) Ibid. at p. 93

(15) Parke v. Daily News (1962) Ch. 927

(16) Wedderburn, loc.cit., at pp.98-106

(17) Wedderburn, ibid. at p.105

(18) Alexander v. Automatic Telephone Co. (1900) 2 Ch.56

(19) Ibid. at p.67

(20) Wedderburn, loc.cit., at pp.105-106

(21) Regal (Hastings) v. Gulliver (1967) A.C. 134

(22) Sealy, "The Director as Trustee", (1967) Cambridge Law Journal 83 at p.98 foot note 85

(23) Gower, op.cit., at pp. 565-566

(24) Punt v. Symons & Company Ltd. (1903) 2 Ch. 506

(25) Piercy v. Mills & Co.Ltd. (1920) 1 Ch. 77

(26) Hogg v. Cramphorn (1966) 3 All E.R. 420

(27) Wedderburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation?", (1967) Cambridge Law Journal 77 at p.81

(28) Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle", (1958) Cambridge Law Journal 93 at pp.99-106

(29) Bamford v. Bamford (1968) 2 All E.R. 655

(30) Bamford v. Bamford (1969) 1 All E.R. 969

(31) Gower, op.cit., at p.585

(32) Gower, op.cit., at pp. 566-567

(33) Wedderburn, loc.cit., at p.98

Release of Directors from their Fiduciary Duties

(1) Parsons, "The Directors's Duty of Good Faith", (1967)

(2) Gower, Modern Company Law, 3rd ed. at p.529

(3) Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle", (1958) Cambridge Law Journal 93 at p.97.

(4) Parsons, loc.cit., at p.396; see also Gower, op.cit., at p.532.

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