ABERDEEN RAILWAY COMPANY, . . APPELLANTS.

BLAKIE, BROTHERS, ... RESPONDENTS (*a*).

1853.
13*th*, 30*th*, *and*
31*st May*.
1854.
20*th July*.

The Director of a Railway Company is a Trustee; and, as such, is precluded from dealing, on behalf of the Company, with himself, or with a Firm of which he is a partner.

It is a rule of universal application that no Trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect.

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object.

It may be that the terms on which a Trustee has attempted to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted.

It makes no difference whether the contract relates to real estate, or personalty, or mercantile transactions; the disability arising, not from the subject matter of the contract, but from the fiduciary character of the contracting party.

The law of Scotland and the law of England are the same upon these points;—both coming from the Roman law, itself bottomed in the plainest maxims of good sense and equity.

The rules which govern fiduciary relations are equitable rules, unknown to the English Courts of Common Law. Consequently in a case properly determinable by those equitable rules, the decision of a Court of Common Law, when opposed to them, must be disregarded.

(*a*) See Second Series, vol. xiv. p. 66.

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The great case of *York Buildings Company* against *Mackenzie*, decided by the House in 1795, under the advice of Lord Thurlow and Lord Loughborough, commented on and expounded.

Remarks of Lord Brougham as to the inconvenience occasioned in England by the severance of legal and equitable jurisdiction.

His Lordship's regret that the English are still without the doctrine of "bonâ fide consumptio et perceptio."

THE action was by Messrs. Blaikie, iron-founders in Aberdeen, against the Railway Company for performance of a contract whereby the Company had agreed to purchase and accept from Messrs. Blaikie certain iron chairs, which they were to manufacture for the Company at the rate of 8*l.* 10*s.* per ton. The summons concluded for implement of the contract or for damages.

The principal defence was, that Mr. Thomas Blaikie, the managing partner of the Pursuers, was at the time of the contract a Director, and indeed Chairman, of the Railway Company, and so incapacitated from dealing in that character with his own firm.

The Court of Session held that the Companies' Clauses Consolidation Act (*a*) did not nullify the contract, although under it the contractor ceased to be a Director. They therefore decided in favour of the Pursuers. Hence this appeal.

The *Solicitor-General* (*b*) for the Appellants: Blaikie was Chairman of the Company. He had a casting vote. Clearly, therefore, he was a trustee; and without reference to the special provisions of the Act, the general law applicable to all fiduciary relations interdicted him from making a contract in the business of the Company for his own individual benefit. This was

(*a*) 8 Vict. c. 17, s. 88 & 89. (*b*) Sir R. Bethell.

determined so far back as 1795 to be the rule in Scotland, by the judgment of this House reversing the decision of the Court of Session in *The York Buildings Company* v. *Mackenzie* (*a*), a case which was argued by the most eminent lawyers then at the bar. The rule was applied by Lord Eldon in bankruptcy, with perhaps a stricter jealousy than in the administration of ordinary trusts in the Court of Chancery. The case of *Ex parte James* (*b*) shows this. But in Scotland the true rule holds, a rule derived from the civil law. The trustee is there disqualified and incapacitated from entering into the contract, which therefore is absolutely void.

[The LORD CHANCELLOR: It ought not to be void, if it be beneficial. I have doubts whether there is any real difference on this point between the civil law and the law of this country. And I also doubt whether Lord Eldon meant to distinguish between cases in bankruptcy and cases of ordinary trusts.]

The *Solicitor-General:* The House will now develope the true principle. In *Ex parte James,* Lord Eldon said: "The doctrine as to purchases by trustees stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases." Then as to the point whether a trustee can exclude the operation of the principle by divesting himself of the fiduciary character. This topic is considered by Lord Eldon in *Ex parte James,* where that great lawyer said: "With respect to the question whether I will permit Jones to give up the office of solicitor, and to

(*a*) 8 Bro. Par. Ca. 42.

(*b*) 8 Ves. 337. See also *Ex parte Lacey,* 6 Ves. 625.

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bid, I cannot give that permission. It would lead to all the mischief of acting up to the point of sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor, and buying the property." Lord Eldon, commenting on the case of *Fox* v. *Mackreth* (*a*), said "the question was not whether the price was fair, 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, and bargained for the right to purchase. It was a question, therefore, of prudence for the creditors and the person entitled to the surplus to decide for themselves whether they would permit him to buy; and no Court could say, *ab ante*, that they would permit this, for circumstances might exist at the time of the second sale that the Court could not know."

[Lord BROUGHAM: You hold that the rule would be better to say that the mere cesser of the relation should not be sufficient to enable a trustee to deal with the trust estate.]

The *Solicitor-General:* It would be more consistent with principle.

[The LORD CHANCELLOR: Perhaps the more accurate rule would be, that while the relation subsisted, there could be no such dealing; but that after cesser of the relation, the party should be permitted to show fairness in the transaction.]

The *Solicitor-General:* That we conceive is the rule in England, with the exception that in bankruptcy there is a positive disability, and the transaction is absolutely void. In *Hamilton* v. *Wright* (*b*), on an appeal from Scotland, a transaction was held null from the

(*a*) 2 Bro. C. C. 400.

(*b*) 1 Bell App. Ca. 574.

knowledge which the party's position, while he had been trustee, enabled him to employ.

Then as to the point on the statute, which in this case is of very subordinate importance. The Court below have held that the consequence of the clause is simply that the party shall cease to be a Director. This construction encourages the commission of a breach of trust, and facilitates a violation of duty.

Mr. *Gordon* followed the *Solicitor-General*, and cited *Jeffrey* v. *Aitken* (*a*), *Hamilton* v. *Wright* (*b*), *Collins* v. *Carey* (*c*).

Mr. *Rolt* for the Respondents: The general question was not raised in the Court below. No objection was there rested on the supposed fiduciary character of Mr. Blaikie. The argument was confined to the statute upon which alone the contract was impeached by the pleading.

[Lord BROUGHAM: It might be vulnerable on general principles, but more especially on the Act.]

[The LORD CHANCELLOR: Suppose the contract to be *ob turpem causam*, is the Court, merely for defect of pleading, bound to execute it? If what the Appellants urge is right, the contract here is bad on general principles. Now, is there anything in the statute which compels the Court to decree performance?]

By the law of Scotland, we say a partner may sell to the Company; and he may bring his action against it. When the Directors of a Railway Company are appointed, it is known that this is the law. It is because they *can* enter into such contracts, that the penalty for doing so is annexed by the statute. Even the law of England does not say that the contract is absolutely null. *Fox* v. *Mackreth*, *Coles* v. *Trecothick* (*d*). The question

(*a*) 4 Shaw, 722. (*b*) 1 Bell App. Ca. 574. (*c*) 2 Beav. 128.
(*d*) See White and Tudor's Leading Cases, 72, where the authorities are collected.

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involved in this appeal has already been decided by the Court of Common Pleas in *Foster* v. *The Oxford, Worcester, and Wolverhampton Railway Company* (*a*), where it was decided that similar sections in the English Companies Clauses Consolidation Act, although they disabled the contractor from continuing a Director, did not avoid the contract.

Mr. *Macfarlane* followed Mr. *Rolt*, and contended that the Appellants were concluded by homologation or acquiescence.

The *Solicitor-General* in reply: Whoever deals with the Directors of a Railway Company, knowing that the contract exceeds their power or violates their duty, must expect to have such contract found illegal and void. No homologation or acquiescence can get over this. The whole body of the assembled shareholders could not impart validity to the contract now sought to be enforced. Their vote would not give it efficacy, though carried by acclamation. In *Foster* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, the Court acted according to the light it possessed, as a tribunal of common law, incompetent to enforce or appreciate fiduciary principles, on which alone this case must be determined.

The LORD CHANCELLOR (*b*):

Lord Chancellor's opinion.

From the time of the formation of the Appellants' Company, in July, 1845, down to the 24th February, 1846, Thomas Blaikie was a Director, and, from the 16th September, 1848, was Chairman of the Board of Directors of the Company.

On the 24th February, 1846, he resigned his situation as Director.

On the 12th March, 1849, Messrs. Blaikie, Brothers,

(*a*) 13 C. B. Rep. p. 200.
(*b*) Lord Cranworth.

the Respondents, raised an action in the Court of Session against the Appellants, alleging that on the 6th February, 1846, an agreement was come to by which the Respondents bound themselves to supply the Appellants a large quantity of iron chairs for the use of the railway. The contract as set out in the summons is thus:

Whereas Alexander Gibb, acting as resident engineer for or on behalf of the Aberdeen Railway Company—Defenders, having prepared a specification of chairs required for the permanent road of the line of railway undertaken to be constructed by the said Company, and having, on or about 19th January, 1846, being the date of said specification, communicated the same to John Blaikie, as acting for and on account of the Pursuers, with a view to the Pursuers contracting for the manufacture and supply of the said chairs, the said John Blaikie, acting as aforesaid, on the 6th day of February, 1846, addressed an offer to the said Alexander Gibb to furnish the permanent chairs for the Aberdeen Railway agreeably to the plan and specifications, for the sum of 8*l.* 10*s.* per ton: That, on the same day, the said Alexander Gibb addressed to the said John Blaikie, on behalf of the Pursuers, the following acceptance of the said offer:—"As authorised by the Directors of the Aberdeen Railway Company, I hereby accept of your offer," &c.: That the said specification bears that the whole chairs shall be delivered in eighteen months from this date, the first delivery to commence at the end of three months from this time, and the whole quantity required to be delivered in fifteen equal portions during the remaining fifteen months; That, from the state of the works on the said line of railway, the chairs for which the Pursuers had contracted as aforesaid were not required to be furnished so rapidly as the said Alexander Gibb appears to have contemplated when he prepared the said specification; and the Pursuers, though able and willing to furnish and deliver the same in terms of the letter of the contract, were willing to give the Defenders every reasonable accommodation in the matter, by furnishing and delivering the chairs in such quantities at a time, and at such periods as, from the state and progress of their works, when fairly and reasonably conducted, they should find convenient: That, on 9th June, 1846, before any of the said chairs had been required by the Defenders, or furnished by the Pursuers, the said Alexander Gibb, who was then in London, addressed a letter to Mr. David Blaikie, one of the Pursuers and the managing partner of the firm of Blaikie, Brothers, stating that Mr. Cubitt, the Defenders' principal

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engineer, was anxious that in executing the said contract the Pursuers would adopt Ransome and May's patent mode of casting the chairs, and requesting that they would do so: That on the 12th June, 1846, the said David Blaikie wrote to the said Alexander Gibb agreeing to adopt the said patent mode of casting the chairs.

The summons then goes on to state that the Respondents, in pursuance of this contract, supplied chairs to the amount of 2710 tons, but that 1440 tons more, or thereabouts, remained to be supplied; which, however, the Appellants refused to accept. And it therefore concludes that the Appellants ought to be decreed to implement their part of the contract by accepting delivery of the remaining portion of the chairs, and paying for the same at the rate of 8*l.* 10*s.* per ton; or else to pay to the Respondents 7000*l.* by way of damages.

To this summons the Appellants put in defences.

The Appellants afterwards brought an action of Reduction and Repetition against the Respondents, in which they sought to reduce a variety of contracts and transactions between themselves and the Respondents, including that which formed the subject of the Respondents' action, and it was agreed by the parties that the action of Reduction, so far as related to the contract libelled, should be held as repeated in the original action.

In this state of the record the *Lord Ordinary* appointed the parties to prepare and lodge issues. This they did, and the *Lord Ordinary* then referred the case to the Court.

The Court, thinking (as was most reasonable) that before the proposed issue was tried the third plea ought to be disposed of, permitted the Appellants to print the letters and other documents which raised the question on that plea.

This was done, and the Court, not thinking that these

documents showed a case which sustained the defence raised by the third plea, proceeded to settle the terms of the issue by their Interlocutor of the 15th of November, 1851.

Against this Interlocutor the Railway Company has appealed, contending that the third plea in defence was a complete bar to the claim of the Respondents, and so that they the Appellants ought to have been assoilzied in the action brought against them.

The ground relied on by the Appellants is, that Mr. Thomas Blaikie holding, as he did, the situation of Chairman of the Board of Directors, was a trustee for the Company, or at all events that, as between himself and the Company, he was subject to the same obligations as those which affect a trustee in his relation to the cestui que trust, whose interests he is to protect; and so that he could not make any contract for his own benefit, in relation to the affairs of the Company.

Messrs. Blaikie, on the other hand, contended first that no such defence is set up by the pleas in defence; for that the third plea is not founded on any general doctrine as to the duties of trustees, but on the special provisions of the Companies' Clauses Act, and that those clauses do not support the proposition contended for. And secondly they say, even supposing any general question to be properly raised by the plea, still that no such general rule exists in Scotland which would prevent a Director from entering on behalf of the Company, whose affairs he is managing, into a contract with a firm of which he is a member.

Disregarding for the present the statute, I will proceed to consider the more general question which divides itself into two branches.

First: Is any such question raised by the plea? and secondly, if it is, then what is the law of Scotland on this subject?

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The language of the third plea is as follows:

Under the Companies' Clauses Act, any such contract or agreement to which the Pursuer, Mr. Thomas Blaikie, was a party while he remained a Director of the Company, was illegal and cannot be enforced.

The Respondents contend that this plea raises no question as to the invalidity of the contract arising from Mr. Blaikie's situation as Director, except so far as that invalidity is created by the statute, and so that the general law on this head is not properly in controversy.

But is this so?

In order to test the accuracy of this argument we must assume the law to be such as the Appellants contend for; namely, that as a general rule no Director can enter into a contract on behalf of the Company with a firm in which he is a partner.

What the plea insists on is that the contract entered into by Mr. Blaikie when he was Director, is incapable of being enforced, because it is avoided by an Act of Parliament. The proposition itself, *i.e.* the invalidity of the contract by reason of the character which Mr. Blaikie sustained, is distinctly brought forward. The objection ex hypothesi is valid, but a wrong reason is alleged in its support.

I confess this seems to me to be immaterial. The object of pleading is to compel the litigant parties to state distinctly the facts on which their title to relief rests.

If this is done, the Court is bound to apply the law.

The only error (assuming the law to be such as the Appellants contend it to be), is that the words "*Under the Companies' Clauses Act,*" with which the third plea commences, ought to be struck out. But surely this cannot invalidate the plea, so as to prevent the Court

from applying the law to the facts which correctly appear.

I am aware that Lord *Fullerton* appears to have been of opinion that the question as to the validity or invalidity of the contract, irrespective of the statute, was not raised by the pleas in law.

With all deference to the opinion of that very learned judge, I cannot concur in the opinion (perhaps I ought rather to say the doubt), which he there expressed,—an opinion which, in the view which he took of the general question, was in truth uncalled for.

I must advise your Lordships to hold that if on general principles of law the contract was one incapable of being enforced, there is sufficient on the pleadings to enable your Lordships to decide in conformity with those principles.

This, therefore, brings us to the general question, whether a Director of a Railway Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner.

The Directors are a body to whom is delegated the duty of managing the general affairs of the Company.

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal (*a*). And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

(*a*) See Mr. Hudson's case, 16 Beav. 485.

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It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain.

It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better.

But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

The principle was acted on by Lord King in *Keech* v. *Sandford* (*a*), and by Lord Hardwicke in *Whelpdale* v. *Cookson* (*b*), and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very learned and able judge in *Ex parte James*.

It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land.

Was then Mr. Blaikie so acting in the case now before us?—if he was, did he while so acting contract on behalf of those for whom he was acting with himself?

Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a Director, but (if that was necessary) the Chairman of the

(*a*) Select Cases, temp. King, p. 61. (*b*) 1 Ves. Sen. 8.

Directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the Company.

While he filled that character, namely, on the 6th of February, 1846, 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 these 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, and I here see nothing whatever to prevent its application.

I observe that Lord *Fullerton* seemed to doubt whether the rule would apply where the party whose act or contract is called in question is only one of a body of Directors, not a sole trustee or manager.

But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-Directors, and through them to the Company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle.

The same observation applies to the fact that he was not the sole person contracting with the Company; he was one of the firm of Blaikie, Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the Company as he could induce them to make.

It cannot be contended that the rule to which I have

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referred is one confined to the English law, and that it does not apply to Scotland.

It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to the case of *The York Buildings Company* v. *Mackenzie*, decided by your Lordships in 1795.

There the respondent, Mackenzie, while he filled the office of "Common Agent" in the sale of the estates of the appellants, who had become insolvent, purchased a portion of them at a judicial auction; and though he had remained in possession for above eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet this House held that filling as he did an office which made it his duty both to the insolvents and their creditors to obtain the highest price, he could not put himself in the position of purchaser, and so make it his interest that the price paid should be as low as possible.

This was a very strong case, because there had been acquiescence for above eleven years; the charges of fraud were not supported, and the purchase was made at a sale by auction. Lord Eldon and Sir William Grant were counsel for the respondent, and no doubt everything was urged which their learning and experience could suggest in favour of the respondent.

But this House considered the general principle one of such importance and of such universal application, that they reversed the decree of the Court of Session, and set aside the sale.

The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage: "Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt" (*a*).

(*a*) Dig., Lib. xviii., t. 1, c. 34, s. 7.

In truth, the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system of law in which it would not be found.

It was argued that here the contract ultimately acted on, was not entered into while Mr. Blaikie was Director; for that, though a contract had been entered into in February, yet that contract was afterwards abandoned and new terms agreed on in the following month of June. This, however, is not a true representation of the facts. The contract of February was, it is true, afterwards modified by arrangement between the parties; but this cannot vary the case. If indeed the contracting parties had in June unconditionally put an end to the original contract, so as to release each other from all obligation, the one to purchase, and the other to sell at a stipulated price, the case would have assumed a different aspect. But this was not done. The contract of June was not a contract entered into between the parties on the footing of there being no obligation then binding on them; but an agreement to substitute one contract for another supposed to be binding. Messrs. Blaikie did not say to the Directors in June: We have no binding contract with you, but we are now willing to contract.

What they said amounted in fact to this: We have a contract which was entered into in February, but we are ready, if you desire, to modify it. To hold that this in any manner cured the invalidity of the original contract, would be to open a wide door for enabling all persons to make the rule in question of no force.

It was further contended that whatever may be the general principle applicable to questions of this nature the Legislature has in cases of corporate bodies like this Company modified the rule.

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The statute, *i.e.* the Companies' Clauses Act, it was argued, has impliedly if not expressly recognised the validity of the contract, by enacting that its effect shall be to remove the Director from his office; indicating thereby that a binding obligation would have been created, which would render the longer tenure of the office of Director inexpedient; and your Lordships were referred to the case of *Foster* v. *The Oxford, Worcester, and Wolverhampton Railway Company*. That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your Lordships) to purchase from them a quantity of iron. The defendants pleaded that, at the time of the contract, one of the plaintiffs was a Director of their Company, and to this plea there was a general demurrer.

That such a contract would in this country be good at common law is certain. The rule which we have been discussing is a mere *equitable* rule, and therefore all the Court of Common Pleas had to consider was how far the contract was affected by the statute. The decision was that the statute left the contract untouched, and that its operation was only to remove the Director from his office. The 85th and 86th sections of the English statute 8th and 9th Vict., c. 16, on which the Court proceeded, are in the same words as the 88th and 89th sections of the Scotch statute, and the Counsel at your Lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All that the Court of Common Pleas decided was that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting

parties of an office. This decision will not help the Respondents unless they can go further and show that the statute has had the effect of making valid a contract which is bad on general principles, that is to say, principles enforceable here only in equity, but not recognised in our Courts of common law.

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I can discover no ground whatever for attributing to the statute any such effect.

Its provisions, however, will still be applicable to the case of Directors who become interested in contracts, as representatives or otherwise, and not by virtue of contracts made by themselves.

I have therefore satisfied myself that the Court of Session came to a wrong conclusion.

I therefore move your Lordships that this Interlocutor be reversed.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, the opinion, or rather the doubt,—at the very utmost the inclination of opinion,—upon the third plea, indicated by my Lord *Fullerton*, I quite agree with my noble and learned friend in thinking ought not to weigh in this case; and, therefore, we have only to dispose of the general question. I also arrive at exactly the same conclusion with my noble and learned friend, that the law of Scotland differs in no respect from the law of England upon this matter; as to which it is very important to have it understood, that there is really no difference between the two systems of jurisprudence.

The cases of *Whelpdale* v. *Cookson*, and *Ex parte James*, clearly lay down what the law of England upon this point is. And it is observable that Lord Eldon, both in *Ex parte James* and in *Ex parte Lacey*, goes even further than Lord Hardwicke did in *Whelpdale* v. *Cookson*, and considers (though he expresses it, no doubt, with the respect due to that eminent judge,

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rather as a grave doubt than as a well-matured opinion), that Lord Hardwicke had scarcely given full effect to the principle, when he said that it was possible that the assent of the creditors might validate the sale (*a*).

How far the two systems of law are the same upon this very important question appears, not only from the case of *The York Buildings Company* v. *Mackenzie*, which is the ruling case upon this subject, and which was decided upon an appeal from Scotland, and according to the principles of Scotch law, in this House; but it also appears, from the fact that in that case a distinct reference was made to the English law authorities, and to the very case, before Lord Hardwicke, of *Whelpdale* v. *Cookson*. The case of *Ex parte James*, indeed, could not have been there cited, because it was not decided till 1803; but the case of *Whelpdale* v. *Cookson* is referred to in the argument at the Scotch Bar, and in the printed Appeal Cases; and so likewise is the passage from the Pandects, which my noble and learned friend has read.

It is also to be observed, that not only were the English cases cited in Scotland, in that instance, but, conversely, the Scotch case of *The York Buildings Company* v. *Mackenzie*, has been referred to since, in the English cases, repeatedly at the Bar, and once or twice, I think, by Lord Eldon himself, in disposing of English cases.

My Lords, the judgment in *The York Buildings Company* v. *Mackenzie* was, after eleven years of possession,—and it is remarkable, too, that there was no fraud whatever found imputable to Mr. Mackenzie, the purchaser. I think that in the account of the subsequent proceedings, though not in the Court below, it

(*a*) What Lord Hardwicke said, was the "*majority* of the creditors;" and this was apparently what Lord Eldon dissented from. 6 Ves. 628.

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appears that so entirely *bonâ fide* was Mr. Mackenzie's possession found to have been, that the rule of the civil law, happily the rule in Scotland, though most unfortunately never introduced into our jurisprudence, namely, that "Fruges bonâ fide perceptæ et consumptæ" are held to be the property of the party who is ultimately found not to have the title, was applied in the case of Mackenzie. So entirely free from all imputation of fraud was he found to be, that he was allowed to remain in undisputed and undisturbed possession of the rents and profits of the estate during those eleven years, that is, up to the period of the judgment on the appeal, because the rule applies not only to the extent that the *bona fides* avails the party in possession up to the time of a decree against him in the Court below, but his right to the possession of the "fruges bonâ fide perceptæ et consumptæ" is held to enure up to the final decision in the Court of Appeal. And accordingly Mr. Mackenzie's *bona fides* was found to have been so unimpeachable in the case, and his conduct in the whole transaction was found to have been so entirely without fraud, that not only did the Court below find the other party liable to costs because they had charged him with fraud, but afterwards he was adjudged to have the whole of the expenses allowed him to which he had been put in ornamental improvements upon the estate (*a*). That is certainly one very strong instance of the application of the rule; perhaps it is stronger than any other within our recollection, because in that case it clearly shows that so entirely was the opinion of the Court in favour of the rule, that even while they held that the transaction could not be sustained, but that the purchase was invalid, they nevertheless decreed the purchaser

(*a*) It appears that there were three more appeals by the Company against Mr. Mackenzie, in all of which they were unsuccessful.

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possession of the rents and profits, and also to be allowed for the expenses of ornamental improvement.

In that case, my Lords, I must also observe that it was not merely the decision of this House which set the Court below right upon a point of Scotch law, as it has once and again done; but the Scotch law appears to have been by no means distinctly and uniformly maintained by the Court below to be, as it was ultimately found *not to be*, by your Lordships' decision. It was an Action of Reduction for setting aside the sale; and, in the first instance, the Court below decided against the Pursuers, and repelled the reasons for reduction. On a Reclaiming Petition, however, the Court, by a narrow majority, sustained the reasons of reduction, and set aside the sale. Then again came both parties to reclaim against this second decision; and by a narrow majority again, the Court assoilzied the Defender, and found, as I have already stated, that, in respect of the charge of fraud, the Defender, Mr. Mackenzie, was entitled to his expenses. Therefore, it cannot be said to have been at all the understanding of the Court of Session that the law was clearly in favour of such purchases at the time, when you find these two conflicting decisions in the Court below, and each by such a very narrow majority. At that time, unfortunately, the course of reporting in Scotland was, that the Judges' opinions were not given; and it is only accidentally and rarely that you find any reference made to what passed upon the Bench; but, in this case, it is stated in the Report, that several of the Judges expressed a strong opinion against the validity of the purchase, and the reasons are given. And the very ground which had been urged for sustaining the purchase, and the validity of the transaction, namely that in judicial sales it had been a very usual practice for common agents to become the purchasers, and that though in eighteen out of

one hundred and thirty-five instances they became the purchasers, yet no instance had been found of an attempt made, or certainly of an attempt succeeding, to set aside such a purchase (but the report would rather go the length of stating that no instance had been found of an attempt made to set aside any such purchase)—the learned Judges, I say, who held such purchases illegal, were of opinion that the occurrence of them in practice was a ground which afforded all the stronger reason for the Court laying down what the law of honesty, and what the law of common sense was, in disapproving of such transactions (*a*).

(*a*) The case of the *York Buildings Company* v. *Mackenzie*, so far as its legal principle is concerned, is better known and more attended to in England than in Scotland. The argument at the bar of the House of Lords (during *two* sessions of Parliament, 1794 and 1795) lasted sixteen days. Judgment was given on the seventeenth. Lord Loughborough was indeed Chancellor then; but the tradition (there is no report) is that Lord Thurlow (who had decided *Fox* v. *Mackreth* very shortly before) took the chief part in the hearing and deliberation. He is recorded in the journals of the House as present every day. The judgment pronounced is not a mere reversal, but is followed by elaborate prospective and retrospective directions, drawn up after the fashion of a Chancery decree. Lord Eldon and Sir W. Grant, 3 Ves. 746, designate it as the great case of *York Buildings Company* v. *Mackenzie;* and Lord St. Leonards, in his Vend. and Pur., vol. iii. p. 240, calls it likewise the *great* case, and refers to it repeatedly. Messrs. White and Tudor cite it in their Leading Equity Cases, vol. i. pp. 72, 109; but Mr. Ross omits it in his similar work on Scotch Law; a circumstance which is mentioned not as impeaching that most useful collection, but simply as showing that this case, which has always been regarded as a ruling authority in England, is comparatively forgotten in the country from whence it came. Mr. Forsyth, indeed, in his learned work on the "Law of Trusts in Scotland," gives somewhat of a legislative character to the *York Buildings Company* v. *Mackenzie* by observing that "it *introduced* a principle into the Scotch Law from that of England,"—which is all he has to say of it, and which shows how little the case has been adverted to in the Court of Session. And yet the "borrowing of principle," to which Mr. Forsyth refers, has been by the Law of England, which till the decision of this Scotch appeal was very barren on the point in

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My Lords, I also agree with my noble and learned friend that the decision in the case of *Foster* v. *The Wolverhampton Company* in the Common Pleas, upon which great reliance was placed, and which appears, to a certain degree at least, to have been the ruling decision in the Court below, does not apply to this case; because there the transaction was, past all doubt, valid at common law though not in equity—but had the Court of Common Pleas had an equitable jurisdiction as well as a common law jurisdiction, the anomaly never could have happened, of a transaction being found legal and valid in that Court which could not stand an examination on the other side of Westminster Hall. It has not often occurred to me to see a stronger question, as may be seen from the meagre case of *Keech* v. *Sandford*, decided by Lord King in 1736, *suprà*, p. 472. See Browne's Parl. Cases, vol. viii. p. 42, and Morr. Dict. 13,337.

The counsel in *The York Buildings Company* v. *Mackenzie* were, for the Appellants, *R. Dundas*, *James Mansfield* (afterwards Chief Justice of the Common Pleas), and *J. Mackintosh*; and for the Respondents, the *Attorney-General* (*Scott*, afterwards Lord *Eldon*), *R. Blair* (afterwards Lord President), *W. Grant* (afterwards Master of the Rolls), *W. Millar* and *W. Adam*.

The York Buildings Company had purchased from the Crown certain estates which had been confiscated for the rebellion of 1745. They carried on certain works on these, and in process of time became bankrupt and were sequestrated. Their estates, or some of them, were sold by public auction under the management of Mr. Mackenzie, a writer to the Signet, as common agent for the creditors. At one of the sales he was himself the purchaser. The decision is that he ought not to have been so, having regard to his fiduciary position.

In the last century sixteen days' hearing in the House of Lords meant sixteen *half* days. The Lord Chancellor went first to his own Court, and did not take his place on the Woolsack till one or two o'clock. It was generally two before business began.

Since writing the above, I receive from Mr. David Robertson a note, saying: "I have a strong recollection of the very impressive speech of Lord Thurlow on the appeal *York Buildings Company* v. *Mackenzie*. I was present. Lord Loughborough, the Chancellor, spoke after Lord Thurlow."

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instance of the great inconvenience, to say the very least of it, of that division between the two sides of Westminster Hall, I will not say that impassable barrier between them, for, on the contrary, the barrier is constantly, and must be for the sake of justice constantly, passed—but I have seldom seen a more striking instance of the inconvenience of the existence of that division, and of not allowing the Court to exercise both jurisdictions, at all events whenever a case arises in which entire justice cannot be done without the exercise of both jurisdictions.

My Lords, upon the whole I entirely agree with my noble and learned friend that there has been here a miscarriage in the Court below, and that the Interlocutor in this case should be reversed.

LORD CHANCELLOR: I shall not propose to your Lordships to allow costs, because I think the Company misled the other party by putting the plea upon a wrong issue.

Lord BROUGHAM: There cannot be costs here.

LORD CHANCELLOR: I ought to mention to your Lordships that some time in the course of the vacation there was sent to my house a sort of printed report of a case which had been decided in the Court of Session since, which is decided in the same way as that in which I now propose to your Lordships to decide this case. And there was coupled with it an anonymous letter, expressing the hope that your Lordships would allow this case to be re-argued in consequence of that decision. I had overlooked it, but in looking at the case the other day, after I had prepared the observations which I have made to your Lordships, it occurred to me to be quite unnecessary, as it appeared to be in truth a decision in the same sense.

Lord BROUGHAM: Not that it would be any reason

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for allowing this case to be re-argued if it had been otherwise.

Mr. *Solicitor-General:* Then your Lordships declare that the Defender ought to be assoilzied from the action, but with expenses?

LORD CHANCELLOR: No, without expenses; because although I think the plea properly raised the facts and the question of law, yet the Defender misled the Pursuers by putting it upon a wrong issue.

IT IS ORDERED and adjudged that the said Interlocutor of the 15th November, 1851, complained of in the said appeal, be, and the same is hereby, reversed. And it is declared that the third plea in the defences lodged by the Defenders in the action in the Court below (Appellants here) was a sufficient answer to the case of the Pursuers (Respondents here), and that the said Defenders (Appellants) ought to be assoilzied from the said action, but without expenses: and it is further ordered, that, with this Declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this Judgment and Declaration.

DAVIDSON.—DODDS & GREIG.