[HIGH COURT OF AUSTRALIA.]

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY . . . APPELLANT;
PLAINTIFF,

AND

JOHNSON AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, 1937, *Sept.* 20-24, 27.

MELBOURNE, 1938, *Mar.* 25.

Latham C.J., Dixon and McTiernan JJ.

Company—Appointment of agents—Remuneration—Amalgamation of agents and formation of company to take over rights and obligations of agency—Directors of both companies—Fraud—General account.

A company carrying on the business of coal-mining appointed two other companies joint agents for the sale of its coal for bunkering and export at a remuneration of 2s. 6d. a ton sold and upon terms that the joint agents would bear all commissions to oversea agents and sub-agents. It was found desirable to allow particular selling agents in London a commission of 1s. a ton, and, notwithstanding the terms of the joint agents' remuneration, the board of directors of the colliery company resolved that the accounts of these agents for sub-commissions paid by them to secure bunkering for the company, not exceeding 1s. a ton, be recognized during a specified twelve months. The colliery company's board of directors included the managing directors of the respective companies which were joint agents. By an article of association of the colliery company it was provided that "no director shall be disqualified by his office from entering into any contract or arrangement with the company either as vendor, purchaser, broker, banker, solicitor, commission agent or otherwise, but no such director shall vote in respect of any such contract or arrangement in which he is so interested as aforesaid, or if he does his vote shall not be counted." 1s. a ton was paid to the selling agents in question out of the funds of the colliery company and was not borne by the joint selling

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agents or by a company formed by way of amalgamation by the joint selling agents, which during the twelve months covered by the resolution took over the agency.

Held, in an action in which this company and one of the two managing directors were defendants, that for the twelve months covered by the resolution neither of the defendants was liable to repay the 1s. a ton to the colliery company :—

By *Latham* C.J., on the grounds (1) that it did not appear that the allowance of the additional 1s. was a mere gift dishonestly made to the company or companies of the two directors, and (2) that the validity of the resolution of the board had not been attacked by the plaintiff's pleadings, and, in any case, an agreement arising out of such resolution would be voidable, not void, and could not after the lapse of a long time be avoided.

By *Dixon* and *McTiernan* JJ., on the grounds (1) that it was not shown that the resolution amounted to the conferring of a voluntary gift upon the selling agents, and (2) that upon the true interpretation of the article of association it extended to and validated contracts to which a director was not personally a party but in which he acted as representative of another party whose interests were in conflict with his duty to the company.

Transvaal Lands Co. v. *New Belgium (Transvaal) Land and Development Co.*, (1914) 2 Ch. 488, considered.

In an action brought by a shareholder of the colliery company against the company, a director and another company, which acted as managing agent of the colliery company and of which the director was also managing director, the plaintiff shareholder alleged that the second company had been illegitimately afforded the use of offices and other facilities and advantages. After action brought, the director and the managing company offered a sum of money to the colliery company in full satisfaction of the liability put in suit by the shareholder, and the board of directors accepted the same. In respect of another liability based on breach of duty the same course was followed. The parties had not put in issue the question whether the shareholder had any *locus standi* to sue.

Held that the bringing of the action did not suspend the authority of the board of directors, and, as it did not appear that they had acted *mala fide* or otherwise than in the interests of the colliery company, the settlement extinguished the liability in each case.

Under the selling-agency agreement the selling agent was entitled to a remuneration of 2s. 6d. a ton upon " the sale of bunker coal and coal for export from Western Australia."

Held that coal sold to certain Western Australian harbour authorities and used for fuelling dredges and tugs fell outside the description.

The company acting as managing agents of the colliery company bought some mining machinery, and some of it was resold to the colliery company.

The machinery was not bought on behalf of the colliery company but was bought as a speculation with a view to selling it piecemeal. Rescission and *restitutio in integrum* being no longer possible, it was claimed that the managing agent was liable to account for the profit.

Held that, as there were no circumstances making the managing agent a trustee of the machinery for the colliery company on its purchase by the former, the colliery company was not entitled to an account of profits.

Re Cape Breton Co., (1884) 26 Ch. D. 221 ; (1885) 29 Ch. D. 795, *Burland* v. *Earle* (1902) A.C. 83, and *Cook* v. *Deeks*, (1916) 1 A.C. 554, followed.

Held, further, that the common managing director of the two companies was not liable in damages, it not being shown that the colliery company made a loss on the whole transaction.

The company acting as managing agent for the colliery company was the representative in Perth of an insurance company whose branch it managed under a power of attorney, being remunerated by a percentage calculated on premium income. Insurances were effected with this insurance company at its Perth office on behalf of the colliery company.

Held that the managing agent was not accountable to the colliery company in respect of the percentage upon such insurances, on the ground that the board of the latter company sanctioned and authorized the insurances well knowing of the position of the managing agent.

Because in respect of the matters appearing above and other matters acts of misconduct were committed by or on behalf of the selling agents and managing agents of the colliery company, it was claimed that the remuneration otherwise payable under the managing- and selling-agency agreements of 3d. and 2s. 6d. a ton of coal had been forfeited.

Held that there was no forfeiture of the remuneration, which was payable under a continuous contract of employment by reference to the regular production and sale of coal and was not like an entire remuneration payable for a single service.

Application of the rule that a dishonest agent is not entitled to remuneration considered.

Principles upon which an order for accounts should be made against an agent considered.

Decision of the Supreme Court of Western Australia (*Northmore* C.J.) varied.

APPEAL from the Supreme Court of Western Australia.

Amalgamated Collieries of W.A. Ltd. (hereinafter referred to as Amalgamated Collieries) carried on coal-mining at Collie, Western Australia, and had its head office in Perth. Walter Johnson was a director and had the management of Johnson & Lynn Ltd.

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He was a director also of Amalgamated Collieries as well as the managing director thereof. Johnson & Lynn Ltd. was a shareholder also of Amalgamated Collieries. On 24th January 1920 an agreement was made between Amalgamated Collieries and Walter Johnson and Robert John Lynn (both of whom were directors of the said company) under which Johnson and Lynn were appointed managers of Amalgamated Collieries for a period of ten years from 16th January 1920 at a remuneration or commission of 3d. per ton on all coal sold and delivered by Amalgamated Collieries, with complete control and general management of the business, subject to directions given from time to time by the board. Johnson and Lynn acted as managers until the death of Lynn on 12th September 1928. Johnson then acted under the terms of the agreement as sole manager of the business until 16th September 1929, when Johnson & Lynn Ltd. was substituted for Johnson in the manager's agreement and acquired all the rights and undertook all the obligations thereunder. By an agreement of 18th March 1920 two companies, namely, W. Johnson & Co. Ltd. and R. J. Lynn Ltd., were appointed sole agents of Amalgamated Collieries for the sale of coal and briquettes for bunkering or export from Western Australia for a specified term. In January 1921 the company of Johnson & Lynn Ltd., which was an amalgamation of the previous companies, took over the rights and duties of these two companies with the consent of Amalgamated Collieries.

The Peninsular and Oriental Steam Navigation Co., which was a shareholder of Amalgamated Collieries, commenced an action in the Supreme Court of Western Australia against Walter Johnson, Johnson & Lynn Ltd. and Amalgamated Collieries to obtain the enforcement of rights said to exist in Amalgamated Collieries against Walter Johnson and Johnson & Lynn Ltd. The writ in the action was issued by the plaintiff on behalf of itself and all the shareholders of Amalgamated Collieries, with the exception of Walter Johnson and Johnson & Lynn Ltd., as representing that class and as a proper party to protect the interests of Amalgamated Collieries. The statement of claim contained no allegation of want of bona fides in the board of directors (as at the commencement of the action) of Amalgamated Collieries or that they would not protect the interests of

the company against Walter Johnson and Johnson & Lynn Ltd.; on the other hand, no point was made in the defence of the want of such an allegation. It was claimed that the defendants Walter Johnson and Johnson & Lynn Ltd. had acted fraudulently and in breach of their duty, that they wrongly paid away moneys belonging to Amalgamated Collieries and wrongly received commission from people dealing with Amalgamated Collieries, had wrongly sold their own property to Amalgamated Collieries at a large profit without disclosing that it was the property of Johnson or Johnson & Lynn Ltd., and had charged large amounts of money for various matters when there was no justification, and they were charged with general misconduct in management and in the course of the agency. At the trial an amendment was made and a claim was added for a general account of all commissions and other moneys received by the defendants Walter Johnson and Johnson & Lynn Ltd. under the agreements mentioned or otherwise. The defendants other than Amalgamated Collieries, by their defence, resisted all claims and justified the various payments which they had made or refunded to Amalgamated Collieries, and in a further defence relied upon payments to and the acceptance by Amalgamated Collieries of various sums of money in satisfaction of certain claims made and the sufficiency of the moneys paid to discharge the liability in respect of other claims. *Northmore* C.J. disregarded the settlements made with Amalgamated Collieries and found fraud in relation to one particular matter but not in relation to others. Certain particular accounts were ordered, but the claim for a general account was rejected.

From this decision the plaintiffs appealed to the High Court. Johnson and Johnson & Lynn Ltd. cross-appealed.

Amalgamated Collieries was represented by counsel at the trial, but did not appear on the hearing of the appeal.

Keenan K.C., *F. Villeneuve Smith* K.C., *E. Leake* and *J. J. Daly*, for the appellant. *Northmore* C.J. was in error in limiting the account ordered to be taken in respect of the Lindsay Blee transactions to the years following 1921. The resolution of 19th November 1920 which purported to give a further 1s. per ton as

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commission was *ultra vires* as being tantamount to a gift by the directors to Johnson and Lynn, themselves directors, who were bound by the terms of their agreement. They had, for valuable consideration, indemnified the company against the very expense intended to be covered by the resolution (*In re George Newman & Co.* (1)). Further, the 1s. per ton commission had been taken and fraudulently taken prior to the date of the resolution, which by its terms had only a prospective operation. On the evidence the trial judge was wrong in refusing to find fraud against Johnson in respect of the charge of 2s. 6d. per ton for land sales of coal. This was clandestinely carried out by means of journal entries in breach of the managers' agreement; in the absence of explanation it amounted to fraud, on the principle *res ipsa in se dolum habet* (*Best* on *Evidence*, 10th ed. (1906), p. 359). But, in addition, all the badges of fraud were present: secrecy of the appropriations, breach of express duty defined by the managers' agreement, and suppression from the board of directors of the payments. On the true construction of the sales agreement, the commission of 2s. 6d. per ton was confined to coal and briquettes for bunkering overseas vessels, and for export from Western Australia. Within Western Australia the sales of coal were rewarded by the 3d. per ton commission provided for by the managers' agreement. The agency agreement was legislating for special services *dehors* the services rendered in Western Australia, i.e., for services in respect of overseas vessels and export coal. Further, the course of dealing from 1920 to 1928 shows that this was the construction put upon it by all parties until Johnson, surreptitiously and without disclosure to the board and without its consent, suddenly and retrospectively altered the rate of commission. It follows that the words in the agreement have been explained and interpreted by the course of dealing of the parties (*Bourne* v. *Gatliff* (2); *Burland* v. *Earle* (3)). With respect to the insurance commissions, the learned judge was misled by the circumstances that the defendants, besides being the agents of Amalgamated Collieries were also the attorneys and principal representatives of the London Assurance Corporation. But this fact, so far from destroying, heightens the duty of full disclosure. In

(1) (1895) 1 Ch. 674.
(2) (1844) 11 Cl. & Fin. 45; 8 E.R. 1019.
(3) (1902) A.C. 83.

the court below reliance was placed on *G. W. Insurance Co.* v. *Cunliffe* (1), but that case is clearly distinguishable, for there the agent was not a director of the plaintiff company and the court found that there had been disclosure or that it had been dispensed with by the principal with full knowledge of all the circumstances. Here the defendant Johnson was the managing director, receiving payment for his services, and his accepting the position of attorney for the London Assurance Corporation deliberately placed his interest in conflict with his duty. This matter is concluded against him by *Benson* v. *Heathorn* (2); and see *Seton* on *Decrees, Judgments and Orders*, 6th ed. (1901), vol. II., p. 1377; *Kerr* on *Fraud*, 5th ed. (1920), p. 182. The fact that Johnson & Lynn Ltd., and not Walter Johnson, received the commission makes no difference (*Transvaal Lands Co. Ltd.* v. *New Belgium* (*Transvaal*) *Land and Development Co.* (3)). At the date of the purchase of the Ravenscroft machinery Johnson was both the managing director of the vendor, Johnson & Lynn Ltd., and of the purchaser, Amalgamated Collieries. He thus occupied the inconsistent position of buyer and seller and is answerable to the Amalgamated Collieries for any profit resulting to the vendor company of which he was the proprietor, at least as to a moiety of its shares. The vendor company is also answerable to Amalgamated Collieries on the ground of having received the profit with notice (derived through its managing director, Johnson) of Johnson's fraud. Art. 65 affords no escape to Johnson, since it does not apply to cover transactions with a company or firm in which the director is interested (*Transvaal Lands Co.'s Case* (3)). Further, there was not only no disclosure, but evidence of a wilful suppression of the whole transaction amounting to fraud (*Imperial Mercantile Credit Association* v. *Coleman* (4); *Dunne* v. *English* (5)). On any of the three aspects from which the facts may be examined, both Johnson and Johnson & Lynn Ltd. are liable to account:—(1) On the footing that defendant Johnson being the agent for purchase of Amalgamated Collieries could not make a profit out of the execution of his agency without

(1) (1874) 9 Ch. App. 525.
(2) (1842) 1 Y. & C.C.C. 326; 62 E.R. 909.
(3) (1914) 2 Ch. 488.
(4) (1873) L.R. 6 H.L. 189.
(5) (1874) L.R. 18 Eq. 524.

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full disclosure (*Aberdeen Railway Co.* v. *Blaikie* (1); *Costa Rica Railway Co.* v. *Forwood* (2); *Parker* v. *McKenna* (3); *Hay's Case* (4); *Furs Ltd.* v. *Tomkies* (5)). On this view art. 65 is irrelevant (*Boston Deep Sea Fishing Co.* v. *Ansell* (6)). (2) On the footing that Johnson occupied the incompatible positions of buyer and seller whilst being a fiduciary of both companies (*King Viall and Benson* v. *Howell* (7); *Armstrong* v. *Jackson* (8)). (3) On the footing that Johnson, whilst being the fiduciary of Amalgamated Collieries to buy machinery, bought Ravenscroft machinery from Dunstan for Johnson & Lynn Ltd., which for present purposes is himself. The relief claimed is against both Johnson and Johnson & Lynn Ltd. as the recipient of the illegal profit taken with notice of the fraud (*Imperial Mercantile Credit Association* v. *Coleman* (9); *Cook* v. *Deeks* (10)). The Chief Justice held on the facts that Johnson "purchased the material for Johnson & Lynn Ltd. as a speculation on the inventory supplied by Dunstan." Assuming this to be so, it makes no difference, for Johnson, having authority to buy for Amalgamated Collieries merchandise of that class, is conclusively held to have bought it for Amalgamated Collieries (*In re Cape Breton Co.* (11); *Cavendish Bentinck* v. *Fenn* (12)). The Chief Justice relied on *Burland* v. *Earle* (13). But that case is clearly distinguishable since the acquisition by the director in that case was entirely outside and independent of the course of his agency. Here the whole transaction was buried in the mind of Johnson acting as director of the vendor company and of the purchaser company (*Jacobus Marler Estates Ltd.* v. *Marler* (14); *Lydney and Wigpool Iron Ore Co.* v. *Bird* (15); *Panama and South Pacific Railway Co.* v. *India Rubber, Gutta Percha and Telegraph Co.* (16); *Cook* v. *Deeks* (17)). The appellants, having established fraud as found by the trial judge, are entitled to a general account; the fraud has been coextensive with the whole of the operations of the company

(1) (1854) 1 Macq. 461.
(2) (1901) 1 Ch. 746, at p. 761.
(3) (1874) 10 Ch. App. 96.
(4) (1875) 10 Ch. App. 593.
(5) (1936) 54 C.L.R. 583.
(6) (1888) 39 Ch. D. 339, at p. 355.
(7) (1910) 27 T.L.R. 114.
(8) (1917) 2 K.B. 822.
(9) (1873) L.R. 6 H.L., at pp. 203, 208.
(10) (1916) 1 A.C., at pp. 561, 565.
(11) (1885) 29 Ch. D. 795.
(12) (1877) 12 App. Cas. 652.
(13) (1902) A.C. 83.
(14) (1913) 85 L.J. P.C. 167, n.
(15) (1886) 33 Ch. D. 85.
(16) (1875) 10 Ch. App. 515.
(17) (1916) 1 A.C., at pp. 561-565.

from its incorporation down to the issue of the writ (*Allfrey* v. *Allfrey* (1); *Oldaker* v. *Lavender* (2); *Williamson* v. *Barbour* (3); *Gething* v. *Keighley* (4); *Clarke* v. *Tipping* (5)). The right to such an account is not defeated by the protection given by par. 7 of the managers' agreement (*Holgate* v. *Shutt* (6)). In this account the defendant Johnson cannot claim credit for commission earned, since "it is only an honest agent who is entitled to any commission" (*Salomons* v. *Pender* (7); *Andrews* v. *Ramsay & Co.* (8); *Hippisley* v. *Knee Bros.* (9)).

Downing K.C. and *E. F. Downing*, for the respondents Walter Johnson and Johnson & Lynn Ltd. The directors' resolution of the 19th November 1920 authorizes the payment of the extra 1s. per ton in connection with Lindsay Blee & Co.'s commission to 31st December 1921, and the defendant Johnson & Lynn Ltd. accounted for all the commission paid since that date. Clause 62 of the articles of association of Amalgamated Collieries gives the directors full authority to authorize the extra payment (*Costa Rica Railway Co.* v. *Forwood* (10); *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (11)). In any event there can be no question in this action as to the payment of the extra commission prior to the 12th January 1921, because the defendant Johnson & Lynn Ltd. did not come into existence until that date. The findings of *Northmore* C.J. absolutely negative any allegation of fraud, and there is no evidence to suggest that Johnson personally caused payments to be made (*Imperial Mercantile Credit Co.* v. *Coleman* (12)). With regard to the claim relating to the commission charged on coal supplied to the tug boats, dredges, &c., of the harbour authorities, the evidence of the appellant's own witness, Walker, shows that the commission charged was made in respect of coal supplied to the Fremantle Harbour Trust right from the inception. The conversation between the witness, Walker, and the defendant, Johnson, far from suggesting fraudulent intent on Johnson's part showed that he was merely

(1) (1849) 1 Mac. & G. 87; 41 E.R. 1195.
(2) (1833) 6 Sim. 239; 58 E.R. 583.
(3) (1877) 9 Ch. D. 529.
(4) (1878) 9 Ch. D. 547.
(5) (1846) 9 Beav. 284; 50 E.R. 352.
(6) (1884) 27 Ch. D. 111.
(7) (1865) 3 H. & C. 639; 159 E.R. 682.
(8) (1903) 2 K.B. 635.
(9) (1905) 1 K.B. 1.
(10) (1900) 1 Ch. 756; (1901) 1 Ch. 746.
(11) (1914) 2 Ch. 488.
(12) (1873) L.R. 6 H.L. 189.

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contending that the coal supplied to the Geraldton and Bunbury Harbour authorities for use in their boats was exactly on the same footing and that therefore Johnson & Lynn Ltd. should have received the stipulated commission. The term "bunker coal" does not connote coal used in ocean-going ships. Any receptacle on a vessel whether ocean-going or used for towing or dredging is called a "bunker." Johnson & Lynn Ltd. was therefore entitled to retain the commission paid to it under this heading; the judgment of *Northmore* C.J. was wrong on this point, and the cross-appeal should succeed. There is, however, no justification for disturbing his finding that there was no fraud nor any evidence of fraud in making the charge. As to the commissions paid by the Texas Oil Co. Ltd. and Lloyds Ltd., Johnson & Lynn Ltd. does not now dispute its liability to account, and before the hearing of the action it refunded the amounts with interest. The appellants contend, however, that the commission which the defendants received under the managers' agreement at the rate of 3d. per ton for all coal sold should also be refunded. As this commission has been paid over a period of seventeen years, the refund claimed amounts to an enormous sum. *Andrews* v. *Ramsay* (1) is not an authority in support of the appellant's proposition. The receipt of these commissions is collateral to the agency work done by Johnson & Lynn Ltd. in the sale of coal. It is, therefore, entitled to retain these commissions (*Salomons* v. *Pender* (2); *Hippisley* v. *Knee Bros.* (3); *Nitedals Taendstikfabrik* v. *Bruster* (4); *MacNamara* v. *Martin* (5)). *Northmore* C.J. was wrong in ordering an account in respect of the moneys which, after the action had been commenced, Amalgamated Collieries accepted from the other defendants in full settlement of claims. No reply was delivered to the amended defence, which set up the plea of acceptance in full settlement. The appellants as shareholders cannot recover more than the company itself could have recovered (*Burland* v. *Earle* (6); *Clarkson* v. *Davies* (7)). The respondents' cross-appeal on this point should succeed. The remuneration received from the London Assurance Corporation is on an entirely different basis, and the

(1) (1903) 3 K.B. 635.
(2) (1865) 3 H. & C. 639; 159 E.R. 682.
(3) (1905) 1 K.B. 1.
(4) (1906) 2 Ch. 671.
(5) (1908) 7 C.L.R. 699.
(6) (1902) A.C. 83, at p. 93.
(7) (1923) A.C. 100, at p. 111

judgment of the Chief Justice refusing an account should not be disturbed. As to the sale of the machinery by Johnson & Lynn Ltd. to the company, which was purchased at Ravensthorpe, the judgment of *Northmore* C.J. is right, and should not be interfered with. It is not claimed that the sale should be rescinded nor is it alleged that the price obtained was not fair and reasonable. It is sought to make Johnson & Lynn Ltd. account for the profit. The effect of this would be to force on them a contract to sell at another price (*Jacobus Marler Estates Ltd.* v. *Marler* (1)). The distinction between the two classes of case is explained in *Cook* v. *Deeks* (2). The principle laid down in *Burland* v. *Earle* (3) is approved in *Furs Ltd.* v. *Tomkies* (4). *Northmore* C.J. was right in refusing to order a general account. Such an account was not claimed until the statement of claim was amended at the commencement of the trial. Johnson and Johnson & Lynn Ltd. are not accounting parties. There is no evidence of the receipt by them of any moneys on behalf of Amalgamated Collieries. The claim put forward is that they have received commissions to which they are not entitled. In the cases of *Williamson* v. *Barbour* (5) and *Gething* v. *Keighley* (6), the object of the suits was to open settled accounts, and in each case it was shown that the agent was an accounting party, that is, an agent spending or collecting money on behalf of his principal, and therefore the agent alone was in the position of having to justify the disposal of the money. Certain transactions are picked out as being of a nature which disentitled the defendants to receive or retain commission. Accounts in those matters were properly asked for, but it is quite another thing to open up or attempt to open up another series of transactions to which the commissions objected are in no way relevant (*Allfrey* v. *Allfrey* (7)).

F. Villeneuve Smith K.C., in reply. [He referred to *Panama and South Pacific Railway Co.* v. *Indian Rubber, Gutta Percha and Telegraph Co.* (8) ; *Bourne* v. *Gatliff* (9) ; *Burland* v. *Earle* (10).]

(1) (1913) 85 L.J. P.C. 167, n.
(2) (1916) 1 A.C. 554, at p. 563.
(3) (1902) A.C. 83.
(4) (1936) 54 C.L.R., at p. 599.
(5) (1877) 9 Ch. D. 529.
(6) (1878) 9 Ch. D. 547.
(7) (1849) 1 Mac. & G. 87.
(8) (1875) 10 Ch. App., at p. 526.
(9) (1844) 11 Cl. & Fin. 45, at pp. 70, 71; 8 E.R. 1019, at pp. 1028, 1029.
(10) (1902) A.C., at pp. 100, 101.

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With regard to the Ravensthorpe machinery.—An agent cannot make a profit out of his position; he cannot be a buyer and a seller. He buys on behalf of his company (*Benson* v. *Heathorn* (1)). Johnson was a director and sold to the company; the other directors did not know of the contract, and there is no record of how, when or with whom it was made. The *Statute of Limitations* is available to a constructive trustee (*Taylor* v. *Davies* (2); *Soar* v. *Ashwell* (3)).

Cur. adv. vult.

1938, Mar. 25. The following judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Chief Justice of Western Australia in an action in which the plaintiff sues on behalf of itself and all other shareholders in the defendant company, Amalgamated Collieries of W.A. Ltd., except the defendants Walter Johnson and Johnson & Lynn Ltd. The defendant company, as its name shows, carries on the business of mining and selling coal. The defendants, Walter Johnson and the company, Johnson & Lynn Ltd., have acted in the management of the trading as distinct from the mining business of the company, and also as agents for the selling of the company's coal, under written agreements. Before dealing with the specific matters which arise upon this appeal it is necessary to state more particularly what the relations of the parties were.

The defendant Walter Johnson has at all material times been a member of the board of directors of the colliery company. The company carried on coal mining at Collie, Western Australia, and had a head office in Perth. On 24th January 1920 what has been called the manager's agreement was made between the colliery company on the one hand and the defendant Walter Johnson and one Robert John Lynn (who was also a director of the colliery company) on the other hand, under which Johnson and Lynn were appointed managers of the company for a period of ten years from 16th January 1920. The agreement provided that they should be

(1) (1842) 1 Y. & C.C.C. 326; 62 E.R. 909.
(2) (1920) A.C. 636.
(3) (1893) 2 Q.B. 390, at p. 394.

entitled to a remuneration or commission of 3d. per ton on all coal sold and delivered by the company. The managers were given complete control of "the general management of the business of the company," subject to any directions given from time to time by the board. Johnson and Lynn acted as managers until the death of Lynn on 12th September 1928. Johnson then acted under the terms of the agreement as sole manager of the business until 16th September 1929. On that date the colliery company and a company entitled Johnson & Lynn Ltd. agreed that the latter company should act as sales manager of the colliery company and that Johnson should act as managing director of the colliery company without remuneration. Johnson & Lynn Ltd. was substituted for Johnson in the manager's agreement and acquired all his rights and undertook all his obligations thereunder. Johnson was a director of and a shareholder in Johnson & Lynn Ltd. These arrangements continued up till the time of action brought.

Under another agreement made on 18th March 1920, which has been called the agency agreement, two companies, namely W. Johnson & Co. Ltd. and R. J. Lynn Ltd. were appointed sole agents of the colliery company for the sale of coal and briquettes for bunkering or export from Western Australia for a specified term. These two companies are not parties to this litigation. In January 1921 the company of Johnson & Lynn Ltd. took over the rights and duties of the two companies with the consent of the colliery company. Therefore from this date the defendant Johnson & Lynn Ltd. was entitled to the benefits of and bound by the obligations of the agency agreement.

The litigation arises out of various acts done by the defendant Johnson and by the defendant Johnson & Lynn Ltd. in connection with the business of the company. It is claimed that they acted fraudulently and in breach of duty, that they wrongly paid away moneys of the company, wrongly retained moneys of the company, wrongly received commission from people dealing with the company, wrongly sold their own property to the company at a large profit without disclosing that it was their property, and made pecuniary charges against the company for which there was no justification. Accounts of various specific dealings are sought, with payment of

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the sums found due as a result of such accounts. By an amendment made at the trial, a claim was added for a general account of all commissions and other moneys received by the defendants Johnson and Johnson & Lynn Ltd. under the agreements mentioned or otherwise, and also of all payments made by those defendants and each of them for and on behalf of the colliery company under those agreements or otherwise. The colliery company did not defend the action. The other defendants in their first defence resisted all the claims and justified the challenged payments or receipts. Subsequently, by leave, the defendants delivered a further defence, and in this defence, as to certain of the claims, they relied upon matters arising after the first defence was delivered, namely, upon the payment to and the acceptance by the colliery company of certain sums of money in satisfaction of certain claims made, and upon the payment to the company of certain sums as sufficient to discharge any liability in respect of other claims.

The learned Chief Justice disregarded the settlements made with the company upon which the defendants relied; he found fraud in relation to one particular matter but not in relation to other matters. Certain particular accounts were ordered, but the claim for a general account was rejected. Upon this appeal it has been contended that the defendants, on account of their fraudulent or other misconduct, should forfeit and repay to the company all the remuneration which they have received from the company for those services. This claim was not made in the statement of claim and, though mentioned in argument, was not considered in the court below. In order to deal with the matters arising upon the appeal it is necessary to consider them separately.

(1) *Lindsay Blee & Co. Ltd.*—Under the agency agreement the defendants Johnson and Johnson & Lynn Ltd. were entitled to a commission of 2s. 6d. per ton for all coal and briquettes supplied by the colliery company for bunkering or export in Western Australia. They were entitled to retain this commission out of the moneys in their hands. The agreement provided that the agents should bear and pay all commissions to oversea agents. Lindsay Blee & Co. Ltd. were oversea agents.

The evidence on this matter is very sketchy, but it appears that a commission of 1s. a ton was paid to Lindsay Blee & Co. Ltd. out of the moneys of the colliery company in respect of orders obtained by Lindsay Blee & Co. Ltd. in 1920 and all subsequent years. A resolution of the directors passed on 19th December 1920 authorized the payment of this commission to Lindsay Blee & Co. Ltd. "for a period of twelve months to the 21st December 1921." The commission has, however, in fact been paid in respect of the year 1920 and all subsequent years up to the time of action brought. In respect of the period after 1921 the learned Chief Justice ordered an account of moneys paid to Lindsay Blee & Co. Ltd. There is no cross-appeal against this order.

The appellant, however, contends that the account should have covered the year 1920 also. There is no evidence to show when or by whom the payments made in respect of the year 1920 were made. In 1920 the selling agents of the company were W. Johnson & Co. Ltd. and R. J. Lynn Ltd., and these companies are not parties to the litigation and, indeed, have ceased to exist. The present defendants cannot be required to account for payments made by their predecessors. There is no evidence that payments in respect of the year 1920 were made by either Johnson or Johnson & Lynn Ltd. Accordingly there is no proper basis for extending this order of the Chief Justice by ordering any account in respect of that year.

It was next contended for the appellant that there was no authority for the payments after the expiration of the period mentioned in the resolution, that is to say, after the year 1921. The learned judge has accepted this view, and the defendants have in effect accepted it by making a payment to the company after action brought, which payment is relied upon in their second defence as being sufficient in amount. It was not accepted by the colliery company in satisfaction of the claim.

The principal contention of the appellant, however, is that the learned judge should have found that the payments were fraudulent. The appellant desires to obtain a finding of fraud in order to justify some form of extended order for an account. As I am of opinion, for reasons which I will subsequently state, that there ought to be an order for an account more general than that ordered by the Chief

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Justice, it is not necessary for me to deal in detail with the contention that a finding of fraud should have been made against the defendants in respect of this particular matter. It is sufficient to say that it is apparent that substantial sums of money were paid without authority in fact, even if the persons concerned may have believed that the payments were properly made. The defendants pleaded that the payments, though not formally authorized, were known to the directors other than Johnson and Lynn, but neither the defendant Johnson nor any other director was called to prove that this was the case. The circumstances raise a certain amount of suspicion, but the continuance of the payment after 1921 is consistent with the carrying on of an arrangement which had been found to work satisfactorily and to be justified in practice. In the absence of more definite evidence than has been given in this case and in view of the contrary finding of the learned Chief Justice, I do not feel justified in saying that this court should now determine that there was fraud in connection with these particular transactions.

It is, however, contended by the appellant that even in relation to the year 1921 the payments made on account of the Lindsay Blee commission were not authorized, because the resolution authorizing them was invalid. In the first place it is put that the resolution was fraudulent because there was a contract existing under which the agents were bound to pay all commissions to oversea agents, so that the additional 1s. per ton was, it is said, merely a gift dishonestly made to the agents, who were directors of the company. But, as I have already said, I am unable to discover any satisfactory evidence of fraud either in the transaction generally or more particularly in relation to the resolution. There may have been reasons which made it wise and desirable to secure the services of Lindsay Blee & Co. Ltd. for the colliery company by making a special payment out of the funds of the company. Further, there is nothing to show that the payment of the Lindsay Blee commission was made to Johnson personally. Johnson & Lynn Ltd., the company, was not a director of the colliery company.

Another ground of attack upon the resolution was based upon the principle that any contract made by a company with another company in which one of the directors of the former company was

a shareholder is voidable at the instance of the former company unless it is sanctioned by the articles of association and made in conformity with these articles (*Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (1); *Costa Rica Railway Co. Ltd.* v. *Forwood* (2)). Johnson and Lynn were directors and shareholders of Johnson & Lynn Ltd., and they were directors of the colliery company. They did not vote on the resolution in question. Art. 65 of the articles of association is as follows: "No director shall be disqualified by his office from entering into any contract or arrangement with the company either as vendor, purchaser, broker, banker, solicitor, commission agent or otherwise, but no such director shall vote in respect of any such contract or arrangement in which he is so interested as aforesaid, or if he does his vote shall not be counted." It is contended that this article does not cover the case of a director being a shareholder in a company and that therefore the general principle applies.

The resolution was in the following terms: "That Lindsay Blee & Co.'s accounts for sub-commission paid by them to secure bunkering business for the company at a price not exceeding one shilling per ton be recognized for a period of twelve months to 31st December 1921."

I do not propose to examine in detail the various questions raised in relation to this resolution. If it be assumed, in the plaintiff's favour, that it in some way operated to make a contract between the company and either Johnson (a director of the company) or Johnson & Lynn Ltd., such a contract would be voidable at the option of the company. The company, however, allowed the other defendants to act on the faith of the resolution with respect to the period to which it related, and the company cannot now avoid it after many years have passed. But further, the resolution was expressly relied upon by the defendants in their defence, and the plaintiff did not challenge its validity in its reply. In my opinion the plaintiff ought not now, upon appeal, to be allowed to challenge the resolution after the lapse of so long a period.

(2) *Office Services.*—This is a claim against the defendant Johnson, not against Johnson & Lynn Ltd.

(1) (1914) 2 Ch. 488.

(2) (1900) 1 Ch. 756; (1901) 1 Ch. 746.

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The colliery company had offices in the same building as several other companies in which Johnson and Johnson & Lynn Ltd. were interested as shareholders. The statement of claim alleged that Johnson caused the colliery company to pay for accommodation which the other companies used, to pay municipal rates payable by those companies, and to pay for the electric light and power which they used, as well as for cleaning their premises. It was also alleged that the colliery company, under the direction of Johnson, provided stationery (except printed stationery) used by the other companies, and that the clerical work of one of the companies was all done by the staff of the colliery company. It was alleged that these things were done by the direction of Johnson with the purpose and with the motive of advantaging himself in relation to the companies in which he was interested, and in fraud of the colliery company.

The first defence, after alleging that the plaintiff company was largely interested in one of the other companies referred to and had its nominee on the board of that company, alleged that the concessions, if any, given to those companies were, in the opinion of the defendants, necessary and conducive to the interests of the colliery company and were at all times known to and approved by the directors of that company. In the second defence, while denying allegations of fraud, the defendants relied upon the acceptance by the colliery company of a sum of £2,458 18s. 8d. in full settlement of the claim. The learned Chief Justice declined to find fraud against the defendant company, expressed a strong view that the plaintiff company knew what was being done and did not object, and, disregarding the settlement made between the defendant Johnson and between the company, ordered an account. No evidence was called to support the allegations made in the first defence.

The defendant Johnson has now admitted that it was wrong to use moneys of the colliery company to meet liabilities of other companies and that he did so use such moneys. It is plain that there was no authority for what was done. No director of the colliery company was called to say that the directors knew and approved of these payments being made. Plainly the procedure was loose and reprehensible. It is necessary, however, to show more than this in order to establish fraud. It frequently happens

that the business of companies is controlled by two or three individuals as if the business were their own business, co-directors and shareholders are not consulted or are given only formal information, and persons who are in fact in charge of the business are unconscious of the fact that, however many shares in a company they may own or control, the conditions upon which incorporation is granted to a company prevent them from dealing with the moneys of the company as if they were their own moneys. But such irregularity does not in itself establish fraud. In my opinion this court would not be justified in making a positive finding of fraud upon the evidence before it.

The learned Chief Justice refused to give effect to the settlement made by the company, saying that "it was not competent for the nominal defendant by agreement with the real defendants to defeat the plaintiff's claim." In my opinion this proposition is too broadly stated. The colliery company is not in liquidation, and the powers of the directors to manage the business of the company and to control its affairs are not in any way impaired by the fact that a shareholder, either in his own name or using the name of the company, is suing the company for the purpose of challenging past acts of the directors. Thus, as a matter of law, it was competent for the directors of the colliery company to bind the company by accepting an ascertained sum in discharge of the liability of Johnson for an uncertain amount for breach of duty in wrongly expending the moneys of the company and failing to protect its interests. This act of the directors is, prima facie, as valid as any other act of the directors. If, however, it were shown that the directors had not acted in good faith in the interests of the company, but had acted for the purpose of protecting Johnson or of stifling the litigation or for some other improper reason, their act could be challenged and could be set aside by the court. (See *Richard Brady Franks Ltd.* v. *Price* (1).) But the plaintiff has not made a case which makes it possible to apply this principle. No evidence whatever has been given to show that the settlement made after the writ issued was not a bona-fide settlement or even that it was not in fact in the interests of the company. The court cannot assume without any evidence that the directors were acting

(1) (1937) 58 C.L.R. 112.

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dishonestly. In view of the fact that this litigation was proceeding at the time when the settlement was made, it is, I think, unlikely that the directors would accept a settlement which could be shown to be disadvantageous to the company. However this may be, the onus is on the plaintiff to show that the particular act of the directors in making the settlement was not done bona fide in the interests of the company, and the plaintiff has not discharged this onus.

I am, therefore, of opinion that the settlement of the claim for office services which was made by the directors of the colliery company and which is relied upon in the second defence is an answer to the claim for an account in relation to these matters and that the judgment of the learned Chief Justice should, accordingly, be varied by striking out the order for an account in relation to these matters.

(3) *Bunker Coal.*—Under the agency agreement Johnson & Lynn Ltd. acted as sole agents "for the sale of bunker coal and coal for export from Western Australia and briquettes for bunkering or export as aforesaid." Among the customers of the colliery company were the Fremantle Harbour Trust and authorities which have been referred to as the Fremantle, Geraldton and Bunbury Harbour Works. These authorities in fact used the coal which they bought from the colliery company either on land or at sea in tugs or dredges. None of it was exported or put into ships travelling from Western Australia. The sales of coal which was in fact used on land have been referred to as "land sales." The question which arises under this head is whether Johnson & Lynn Ltd. were entitled under the agency agreement to retain 2s. 6d. per ton commission on all or any of the sales to the various authorities mentioned.

The evidence is that at all times the charge of 2s. 6d. per ton was made on all coal supplied to the Fremantle Harbour Trust and Fremantle Works. Until August 1928 the 2s. 6d. per ton had not been charged in respect of coal supplied to the Geraldton and Bunbury authorities. A witness, Walker, who from 1920 to 1936 was the accountant and secretary to the colliery company, gave evidence on behalf of the plaintiff. In April 1936 he left the employment of the company and became a member of the staff of a company which is associated with the interests supporting the plaintiff in this litigation. He gave evidence that in August 1928 he was

directed by Johnson to make a retrospective charge of 2s. 6d. per ton on coal supplied to the Bunbury and Geraldton authorities. This was done, and the result was that Johnson & Lynn Ltd. received a sum of £2,000. Thereafter 2s. 6d. per ton was charged on all coal supplied to all the authorities until 1933, when it was reduced, for no stated reason, to 6d. per ton on Johnson's instructions. This practice continued until the end of 1935, when, according to Walker's evidence, the charge of commission ceased, at least on the Geraldton and Bunbury sales. There is no evidence that any other directors than Johnson and Lynn knew anything of these proceedings.

The first defence admitted the payment to Johnson & Lynn Ltd. of the moneys in question, but alleged that the coal on which the commission was charged was for use in tugs and other vessels belonging to the several authorities and was bunker coal, and that the defendant Johnson & Lynn Ltd. was therefore entitled to make the charge under the agency agreement. Later, however, this contention was abandoned, and it was admitted that some of the sales upon which commission had been charged were land sales. After discussion and negotiation a sum of £3,212 17s. 2d. was paid by Johnson & Lynn Ltd. to the colliery company, representing a refund of commission charged on land sales together with interest. This sum was accepted by the company in respect of the land sales, and a receipt was given accepting the sum mentioned in satisfaction of the claim for commission on coal sold to all the authorities which was not used in ships' bunkers. Thus, the matter came before the court upon the basis that the claim in respect of land sales had been settled, but that it was for the court to determine whether or not the coal used in tugs and dredges was bunker coal within the meaning of the agreement. The learned Chief Justice did not refer in his judgment to the subject of land sales (which were obviously not within the agency agreement) and held that the rest of the coal was not bunker coal within the meaning of the agreement. He therefore held that the charge of commission on the latter coal was not justified and ordered an account as to such commission. The learned Chief Justice refused to make a finding of fraud, because, as he said, the contention that the sales in dispute were sales of bunker coal was at least arguable, and there was no evidence of fraud.

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I respectfully agree with the view of the Chief Justice that the coal which was used in the tugs and dredges of the harbour authorities was not bunker coal within the meaning of the agency agreement. The parties operated under two agreements—the managers' agreement under which a commission of 3d. per ton was payable to the managers on all coal sold, and the agency agreement under which a commission of 2s. 6d. per ton was payable in respect of bunker coal. It is plain that the additional commission was paid to the agents on account of additional work associated with the sale of bunker coal which was not expected to be required in connection with the sale of other coal. Coal purchased by any customer could of course have been used for any purpose to which the customer chose to apply it. It is plain that the agency agreement does not give the agents a right to charge extra commission on all coal which in fact happened to be placed in ships' bunkers or to be exported from Western Australia. The clause which gives the agents the right to retain the commission provides that the remuneration of the agents shall be "a sum equal to two shillings and six pence per ton for all coal and briquettes *supplied* by the principal" (that is, the colliery company) "*for* bunkering or export from Western Australia." Thus, the commission of 2s. 6d. per ton is payable, not when coal is in fact used for bunkering or export, but when it is supplied by the colliery company for that purpose. In fact all the coal supplied to the harbour authorities was supplied free on rail at Collie as in the case of ordinary sales of coal by the company. There is no evidence that it was supplied for the purpose of bunkering or export. Thus, in my opinion, the contention of the plaintiff is right, and there should accordingly be an order for an account of the moneys retained by Johnson & Lynn Ltd. as commission at 2s. 6d. per ton or at any other rate over 3d. per ton on all coal used by the harbour authorities in tugs or dredges.

The question arises whether the account should be limited to those sales or whether, on the other hand, it should include the land sales. The company, as I have already stated, has accepted the settlement in respect of land sales. This, however, is really only a settlement in part payment of moneys due in connection with the sales to the harbour authorities. As I have already said, there should

be an inquiry and account as to the sales of coal which in fact was used in tugs and dredges. It might be very inconvenient on taking an account to encumber the proceedings with controversies as to whether a particular consignment of coal was included within the category of land sales, as to which a settlement had already been made, or whether it was a consignment which had been used in tugs or dredges. As the amount accepted by the company was accepted only on account of the liability to repay commissions taken on the sale to all the authorities, it is, in my opinion, proper that a full account should be taken of all those sales without reference to the part settlement made.

(4) *Scholarship.*—Lynn presented a scholarship to the Roman Catholic Archbishop of Perth. The endowment of the scholarship consisted of shares which belonged to Johnson & Lynn Ltd. and which were dishonestly taken by Lynn and used for the purpose of endowing the scholarship. When these facts became known to Johnson after Lynn's death, Johnson simply reimbursed the funds of Johnson & Lynn Ltd. by drawing a cheque for £2,000 (the then value of the shares) upon the account of the colliery company and thus replacing from the funds of the colliery company the amount which Lynn had, in the exercise of his benevolent intentions, dishonestly removed. There can be no possible justification for such dishonest and fraudulent conduct, and the learned Chief Justice so held. This finding of fraud against Johnson is important in relation to the claim that all accounts between the parties should be opened.

There is a cross-appeal in relation to this matter. The defendants contend that the learned Chief Justice should have given effect to a settlement arrived at between the defendants and the company under which a sum of £2,000 together with £805 4s. 1d. for interest at five per cent was repaid to the company. This amount was accepted in satisfaction of the liability of the defendants. His Honour ordered that the amount should be repaid with six per cent interest instead of with five per cent interest. In my opinion the judgment of the Chief Justice cannot be supported on this matter. I have already stated my view that the litigation did not interfere with the exercise of their powers by the directors and that, in order to set aside a settlement made by them, it would be necessary to establish that

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the transaction was *ultra vires* (which is plainly not the case) or that the directors had not arrived at their decision honestly in what they regarded as the interests of the company. I am accordingly of opinion that the settlement pleaded is an answer to the claim of the plaintiff with respect to this part of the case and that the judgment of the Supreme Court should be varied by striking out the order for an account in relation to this sum of £2,000 and interest.

(5) *Ravensthorpe Machinery &c.*—A claim is made for the profit arising out of this transaction. Johnson & Lynn Ltd. bought certain machinery &c. at Ravensthorpe and resold part of it to the colliery company at what is admitted (in the defence) to be a substantial profit and (in the correspondence) to be a profit of 100 per centum. The plaintiff claims an account of these profits and payment thereof and also claims damages in general terms.

In December 1929 Johnson & Lynn Ltd. purchased some machinery &c. from one Dunstan (a director of the colliery company) who was acting as receiver for a certain partnership which was being wound up. Later Johnson & Lynn Ltd. sold to the colliery company part of the material which they had purchased. The whole transaction was conducted by Johnson, who was a director of both Johnson & Lynn Ltd. and of the colliery company. Johnson at the time was managing director of the colliery company. Johnson & Lynn Ltd. was the manager of the company under the managers' agreement and had full powers of purchasing goods for the company as well as of selling the company's products. Neither Johnson nor Dunstan disclosed the transaction to the board of directors, and *a fortiori* the interest of Johnson and Johnson & Lynn Ltd. in the transaction was never disclosed. The payments representing the purchase price were placed before the directors only under a general heading, "Stores." The transaction can only be regarded as most reprehensible in character. The question which arises, however, is whether any remedy, and, if so, what remedy, is available to the company in respect of this transaction.

In my opinion it is clear that, if *restitutio in integrum* were possible, the transaction could be avoided in the interests of the company, but such restitution is admittedly not possible, and therefore this remedy, which would involve the return of the machinery &c. to

Johnson & Lynn Ltd. and the repayment by them of the purchase money received from the colliery company, is not available.

It is urged that the learned Chief Justice should have ordered an account of the profits made by Johnson & Lynn Ltd. In order to support such a contention it would be sufficient to show that Johnson & Lynn Ltd. bought the machinery on behalf of the colliery company and purported to resell it to the company. Johnson & Lynn Ltd. carried on the business of merchants dealing in goods of various kinds, including such machinery &c. as was the subject matter of this transaction. There is no evidence to show that the machinery was bought on behalf of the colliery company. The evidence, on the other hand, shows that the machinery was bought as a speculation, with the intention of selling it at a profit to any willing purchasers. It was resold to various purchasers, including among others the colliery company. Thus, the case cannot be treated as if the machinery &c. was really the property in equity of the colliery company *ab initio* as in *Jacobus Marler Estates Ltd.* v. *Marler* (1).

What I have said covers also the claim based on the principle that an agent for the purchase of property cannot sell his own property to his principal without disclosing his interest. In such a case there may be rescission and an account of profits, but where rescission is impossible no account of profits is given because (it is said) the result would be really to make a new contract between the parties (*In re Cape Breton Co.* (2); *Burland* v. *Earle* (3)). Therefore the only remedy available is a remedy in damages for breach of duty by Johnson as general manager and by Johnson & Lynn Ltd. as managers under the managers' agreement. But in order to support such a claim it is necessary to show that the colliery company actually suffered damage. If the company got value for its money, then no damage has been suffered. There is no evidence at all with respect to this matter, and therefore the claim for damages cannot be supported. The learned Chief Justice dismissed this claim with costs, and, as the matter must be dealt with upon a strictly legal basis, I consider that his judgment was right.

(1) (1913) 114 L.T. 640, n.
(2) (1884) 26 Ch. D. 221; (1885) 29 Ch. D. 795.
(3) (1902) A.C. 83.

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(6) *Commission on Oil, Pipes, &c.*—Johnson & Lynn Ltd. received commissions from the Texas Co. (Australia) Ltd. and from Stewart & Lloyd Ltd. on oil, pipes, and other articles sold by them to the colliery company. The plaintiff claims the amount of these commissions as secret commissions wrongfully obtained by Johnson & Lynn Ltd. In the first defence it was alleged that the company paid the usual price for these articles. Such an allegation is quite irrelevant. An agent cannot justify the taking of a secret commission by showing that his principal would not have been able to obtain more favourable terms if he had not taken the commission. It was also alleged in the first defence that the directors knew that the commissions were being received. The learned Chief Justice in his judgment says that there was no secrecy about the matter. This was so as between the vendors and Johnson & Lynn Ltd., as correspondence between them shows. There is, however, no evidence to show that any disinterested directors of the colliery company knew anything about the receipt of these commissions by Johnson & Lynn Ltd.

In the second defence the defendants retreated from the position taken up in the first defence, and relied upon a payment made to the colliery company on account of the liability, which was no longer denied. This payment was not accepted in satisfaction of the claim. The Chief Justice ordered that an account of the commissions be taken, the account being ordered against both Johnson and Johnson & Lynn Ltd. It would appear, so far as the evidence now goes, that the moneys received were actually received by Johnson & Lynn Ltd. and not by Johnson, but this is a matter which can be determined more satisfactorily upon the taking of the account. In my view the decision of the learned Chief Justice was right and should be affirmed.

The learned Chief Justice, however, found that there was nothing fraudulent in the transaction. I find myself unable to agree in this view so far as Johnson and Johnson & Lynn Ltd. are concerned. As I have already stated, there is no evidence—or, at least no evidence that I have been able to discover—to show that any disinterested director was ever aware that these commissions were being taken. In my opinion the taking of the commissions without disclosure to the board of the colliery company was a dishonest act. The rule is

well expressed by *Scrutton* L.J. in *Rhodes* v. *Macalister* (1): "An agent must not take remuneration from the other side without both disclosure to and consent of his principal." In the same case *Atkin* L.J. refers to the high standard of conduct on the part of agents which is required by the court. He states:—"It is a standard of conduct which I am afraid sometimes conflicts with the standard of conduct adopted for themselves by commercial men—not by honourable men in commerce, but by a great many men engaged in mercantile transactions. I entirely agree with what has been said as to the importance of repeating and letting it be known as widely as possible what the standard of conduct expected from an agent is at law" (2). Thus, in my opinion, it ought to have been held that Johnson and Johnson & Lynn Ltd. were guilty of fraud in taking these commissions.

(7) *London Assurance Corporation.*—Johnson & Lynn Ltd. were the representatives and attorneys of the London Assurance Corporation. In this capacity they received a commission which depended upon the amount of business done. The colliery company insured with the corporation, and thus Johnson and Lynn Ltd. received a commission on business done by the colliery company with the corporation. The learned Chief Justice rejected the claim for an account of these commissions on the ground that they were received by Johnson & Lynn Ltd. as agent for the London Assurance Co. Ltd., and not as agent for the colliery company. I do not regard this fact as constituting a sufficient ground for refusing to order an account. If A is dealing with B through A's agent C, that agent cannot, without disclosure to A, take and retain a commission received by him from B in respect of that dealing. It is immaterial that he takes it as agent for B. But, if A knows that the agent is obtaining a commission from B and consents, the position then is different. The evidence shows plainly that the fact that Johnson & Lynn Ltd. were agents for the London Assurance Corporation was notorious, and nobody would have believed that they were acting as such agents without receiving a remuneration. In my opinion the evidence shows that the directors of the colliery company knew quite well that Johnson & Lynn Ltd. were receiving these

(1) (1923) 29 Com. Cas. 19, at p. 27. (2) (1923) 29 Com. Cas., at p. 29.

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commissions and must be held to have consented to them doing so. Accordingly I am of opinion that the judgment of the learned Chief Justice in refusing to order an account of these commissions was right.

(8) *Remuneration of Agents.*—It is contended for the plaintiff that, because Johnson and Johnson & Lynn Ltd. were both guilty of fraud in the course of their agency, they are bound to forfeit all the remuneration received from the colliery company in respect of any of their services and to repay it to the company. No claim of this character was specifically made in the pleading of the plaintiff, and it is doubtful whether it is open to the plaintiff to ask, upon appeal, for a specific order relating to it. I prefer however to deal with the matter upon its merits.

There is plain authority for the general proposition that a dishonest agent is not entitled to remuneration (*Andrews* v. *Ramsay & Co.* (1); *Price* v. *Metropolitan House Investment and Agency Co. Ltd.* (2)). It is easy to apply this rule where there is a single transaction in respect of which the agent is dishonest. But the rule does not involve the consequence that an agent who is guilty of a number of isolated acts of dishonesty in the course of his employment forfeits the whole of his remuneration as agent. In the present case the defendants were in charge of the whole business of the company, and they received remuneration for their services upon a commission basis calculated upon the number of tons of coal sold. The acts of actual dishonesty proved (Lynn scholarship and Texas Co. and Stewart & Lloyd's) did not relate to sales of coal. They were fraudulent breaches of duty for which remedies are available as already stated. But these breaches of duty would not, where there was no fraud in the performance of other duties, "involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties" (See *Hippisley* v. *Knee Bros.* (3)). It would, further, appear to be unreasonable to deprive the defendants of all remuneration over a period of fifteen years or thereabouts because in some particulars they have been guilty of dishonest conduct, and I do not think that the law requires that

(1) (1903) 2 K.B. 635. (2) (1907) 23 T.L.R. 630.
(3) (1905) 1 K.B., at p. 9.

that should be done. See per *Atkin* L.J. in *Rhodes* v. *Macalister* (1): "It is dishonest of an agent to take a bribe from the other side, and for that act of dishonesty he is, if he is discovered, liable to be summarily dismissed by his employer, and he is precluded from recovering any remuneration for his conduct as agent in respect of the transaction in which he in fact acted dishonestly, and, if his employment is a general employment, any remuneration for that conduct in respect of which he has committed his breach of trust." This principle is stated in relation to the taking of bribes, but the principle must be equally applicable in any case of fraudulent misconduct. The application of the principle would result in the agent being deprived of commission in relation to the transaction in which the dishonesty had occurred. Where, however, the commission, though measured in relation to separate transactions (each ton of coal sold), is a reward for conducting the whole of a trading business and there is no dishonesty in any of those separate transactions, it appears to me that the principle cannot be applied in the same way as if the reward were applicable to separate transactions separately. Thus, I find it difficult to specify any particular remuneration of which the agent should be deprived because of what I regard as dishonest conduct in connection with the commissions received from the Texas Co. and Stewart & Lloyd Ltd. Nor is there any transaction to which the dishonesty with respect to the Lynn scholarship can be attributed. Accordingly, I am unable to hold that the agents should be deprived of their commission by reason of fraudulent conduct.

(9) *General Account.*—The plaintiff, by an amendment allowed at the trial, claimed a general account of all the dealings and transactions of Johnson and Johnson & Lynn Ltd. under the managers' agreement and the agency agreement. This claim was rejected by the learned Chief Justice. The appellant contends that all accounts should have been opened and a general account ordered. Before this court it has been urged for the defendants that they are not accounting parties and that in any event the court in its discretion should not order the general account sought.

(1) (1923) 29 Com. Cas., at p. 29.

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In considering this matter I limit myself to the period beginning on 12th September 1928, the date of Lynn's death. If the view which I have taken of the Lindsay Blee matter is correct, there is no evidence which establishes any dishonesty or misconduct or impropriety on the part of Johnson or on the part of Johnson & Lynn Ltd. before that date. From that date to 16th September 1929 Johnson was the sole manager of the company's business under the managers' agreement. On that date Johnson & Lynn Ltd. became manager and Johnson became managing director. Johnson & Lynn Ltd. has at all material times been acting as agent under the agency agreement.

A director as such, whether he be a managing director or not, is not an accounting party. Merely in his capacity of director he is not a trustee for the shareholders (*Percival* v. *Wright* (1)). But in the exercise of his powers he is a trustee for the company and is in a fiduciary relation to the company (*Imperial Mercantile Credit Association* v. *Coleman* (2)). If in fact he does have control of property of the company, he is a trustee of that property and must account to the company for it (*Flitcroft's Case* (3)). When an account is claimed, each case must be considered in relation to all its circumstances : " It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts " (*Blackstone's Commentaries*, Book III., c. 27, p. 437). This statement is even more applicable in the twentieth century than in the eighteenth century. Any person who, as agent or manager or director, has in fact the disposition or control of the moneys or other property of another person is a person who may be ordered to bring in an account. In this case the whole management of all the trading business of the company was in the hands of Johnson and Johnson & Lynn Ltd. Johnson was not merely a director of Johnson & Lynn Ltd. He was, first, manager, and then managing director, of the colliery company. The evidence shows that it was he who really conducted the business of the colliery company. Clause 4 of the managers' agreement was as follows : " The managers shall exercise and carry out all such powers and

(1) (1902) 2 Ch. 421.
(2) (1873) L.R. 6 H.L., at p. 204.
(3) (1882) 21 Ch. D. 519.

duties and shall observe all such directions and restrictions as the board of directors may from time to time confer or impose upon them but in default thereof the managers shall control the general management of the business of the company and shall have power to appoint and dismiss all clerks and servants of the company and to enter into any trade contracts on behalf of the company in the ordinary way of business and to do all other acts and things which they may consider necessary or conducive to the interests of the company." Clause 4, in actual practice, gave Johnson personally (after Lynn's death) complete control of the relations between the company and Johnson & Lynn Ltd. as well as between the company and other persons to whom it sold or from whom it bought anything. Clause 5 (*a*) of the managers' agreement provided that during their employment it should be the duty of the managers to keep proper record books and books of account and to make (*inter alia*) therein true entries of all moneys received or paid by them in the course of the business of the company. Thus, it is plain that under the managers' agreement there is an obligation resting upon Johnson in respect of the period while he was manager, that is, up till 16th September 1929, and of Johnson & Lynn Ltd. at all subsequent times, to render true accounts of their dealings in and about the moneys of the company. Further, clause 5 also provides that it shall be the duty of the managers to pay all moneys except petty cash into the West Australian Bank daily to the credit of the account of the company there and to make every payment in excess of £1 requiring to be made in the business by cheque drawn upon that account. This obligation was not performed. By the direction of Johnson a system of journal entries was used which made it possible to pass credits to Johnson & Lynn Ltd. or to Johnson or to other persons in such a way that the list of cheques drawn which was submitted to the board of directors would convey no idea whatever of the real transactions which lay behind the figures which alone the directors were permitted to see. Accordingly, an examination of the minutes of directors' meetings and of the lists of cheques drawn which were submitted to them and approved by them does not make it possible to obtain any just or proper view of the actual transactions of the company.

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It is urged that, if an account is ordered in respect of the period during which Johnson & Lynn Ltd. was the manager and Johnson the managing director of the colliery company, it should be ordered only against Johnson & Lynn Ltd. and not against Johnson, who during that period was the managing director. But Johnson occupied a peculiar double position. He was one of the principal directors of Johnson & Lynn Ltd. and apparently controlled the business of that company. He was also the managing director of the colliery company. He owed duties directly to the latter company as well as to the former company. If in fact he has dealt with no money on account of the colliery company, he will be put to no trouble by rendering an account. If he, as distinct from Johnson & Lynn Ltd., did control or handle any of the property of the colliery company, then that company is entitled to know about it. It is so impracticable to distinguish between Johnson and Johnson & Lynn Ltd. in the transactions relating to the colliery company that if an order for an account is made it should go against both parties. As I have said, Johnson & Lynn Ltd. is very plainly an accounting party and, in my opinion, justice requires that an order for an account should be made also against Johnson. Johnson must accept the consequences of failing to distinguish between his positions as an individual, as a director of Johnson & Lynn Ltd., and as manager and managing director of the colliery company.

Order XXXII., rule 2, of the *Rules of the Supreme Court* of Western Australia provides as follows : " The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary way." Subsequent rules make it possible to mould an order to suit the circumstances of a particular case.

In this case, in my opinion, justice can be done only by a thorough inquiry into the dealings of Johnson and Johnson & Lynn Ltd. under the managers' agreement and the agency agreement. The plaintiff is not in a position to make complete and precise allegations as to the particular suspected defaults. Some defaults have been

proved. The circumstances are such as to suggest that there may be others, and accordingly there should be an appropriate order for a general inquiry with a full disclosure of all relevant documents. Fraud has been definitely proved against Johnson and against Johnson & Lynn Ltd. The circumstances are such as to justify the application to this case of what was said in *Clark* v. *Tipping* (1): "No credit is due to the agent's accounts and the principal is not bound to abide by them." In *Williamson* v. *Barbour* (2) it was held that "where accounts are impeached and it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify." *Jessel* M.R. said in his judgment that "where fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, there the court opens the account and does not merely surcharge and falsify" (3). In *Allfrey* v. *Allfrey* (4) an administrator's account which had been settled was opened because an entry was shown to have been fraudulently made, notwithstanding a lapse of forty years since the death of the intestate and seventeen years since the settlement of the account. I therefore have no doubt that the court has power to direct the whole of the accounts to be opened in the present case. The fullest inquiry should be made possible, but only so far as necessary.

Doubtless there will be many matters which will be quite clear and undisputed, and, if a complete account in the ordinary form were ordered in respect of the period since September 1928, the preparation and examination of such an account would result in very great delay and expense. The order should provide for full power to call for and examine all books and documents belonging to the colliery company or to Johnson or to Johnson & Lynn Ltd. and power also to examine witnesses upon oath. There should be power to make inquiries and to require particular accounts to be

(1) (1846) 9 Beav., at p. 292; 50 E.R., at p. 356.
(2) (1877) 9 Ch. D. 529.
(3) (1877) 9 Ch. D., at p. 533.
(4) (1849) 1 Mac. & G. 87; 41 E.R. 1195.

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rendered by the defendants in respect of any dealings or transactions under the managers' agreement or the agency agreement since 12th September 1928. The order, subject to the variations which I have already suggested, should provide for accounts in relation to the specific matters already dealt with, namely, Lindsay Blee commissions, sales of coal to harbour authorities, commissions received from the Texas Co. and Stewart & Lloyd Ltd.

This is a case in which the provisions of sec. 50 of the *Supreme Court Act* may with advantage be utilized. Minutes of an order have been prepared for the purpose of giving effect to the judgment of this court, and the parties will be given an opportunity of speaking to the minutes.

In my opinion success and failure upon the appeal and cross-appeal are fairly evenly divided between appellant and respondents, and there should be no order as to the costs of the appeal or the cross-appeal. There is no reason for disturbing the order of the Supreme Court as to the costs of the action. The costs of further proceedings will be dealt with by the Supreme Court.

An application was made by the plaintiff to transfer the hearing of the appeal to Sydney or Melbourne. The costs of this application were reserved to be dealt with by the court on the hearing of the appeal. The application failed, and the ordinary rule should apply. The appellant should pay the costs of this application to the respondents.

DIXON J. In dealing with this appeal it is important to keep in mind the frame of the action out of which it arises. The plaintiff is a shareholder in a limited company called "Amalgamated Collieries of W.A. Limited." The defendant, Walter Johnson, is a director of that company who is now the general manager. The defendant, Johnson & Lynn Ltd., is another company of which he has the management and of which he is a director. It also is a shareholder in the Amalgamated Collieries company. The plaintiff sues on behalf of itself and all other shareholders of that company who do not stand on the other side of the record. The Amalgamated Collieries company is joined as a defendant.

The purpose of the action is to obtain the enforcement of rights said to exist in the latter company against the defendants Walter Johnson and Johnson & Lynn Ltd.

The company itself is, prima facie, the proper plaintiff in an action to enforce rights vested, not in the shareholders, but in the company. An action cannot be maintained by a shareholder for the purpose of securing the enforcement of rights against others, vested not in himself but in the company, unless, speaking broadly, the failure of the company itself to pursue its alleged rights is attributable to an attempt on the part of the directors to further some interest at the expense of the company's or to some other mala-fide, fraudulent or *ultra-vires* conduct on their part or on the part of members of the company in a position to exercise control (See per *James* L.J. in *Gray* v. *Lewis* (1) and in *MacDougall* v. *Gardiner* (2), and per Lord *Davey* in *Burland* v. *Earle* (3)).

A curious feature of the present case is that the statement of claim contains no allegation of the facts constituting the plaintiff's title to put in suit causes of action vested in the company, and, on the other hand, the defence raises no objection that, in the absence of such facts, the action cannot be maintained by the plaintiff. The writ was issued on 9th June 1936, and at a meeting of the directors of the Amalgamated Collieries company held on the following day a member of the board who acted also as the company's solicitor is reported by the minutes as having " explained that the P. & O. S. N. Co. had commenced proceedings in their own name on behalf of all the shareholders of the company with the exception of Walter Johnson and Johnson & Lynn Ltd., and had nominated themselves as the proper party to protect the interests of this company. It appeared that this action was taken on the assumption that the present board of directors would not protect their interests against Walter Johnson and Johnson & Lynn Ltd. whereas the board had never been consulted. As he will be involved in this action as a director, he was of opinion that it would not be proper to act as legal adviser, and thought it advisable that the independent members of the board should decide what action the company

(1) (1873) 8 Ch. App. 1035, at p. 1050. (2) (1875) 1 Ch. D. 13, at p. 21.
(3) (1902) A.C., at p. 93.

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should take in any litigation that might take place." A sub-committee was then formed to obtain legal advice and to do whatever might be necessary in the interests of the company. According to the record put before this court the Amalgamated Collieries company delivered no defence, although at the trial it appeared by counsel.

But from beginning to end no question was raised as to the plaintiff's right to sue or as to the reasons why the plaintiff considered it necessary or proper to bring the action itself, at all events without first exhausting the possibility of the company's bringing the action or allowing the use of its name. No doubt the parties had each of them some good reason for, so to speak, ignoring this preliminary question, but, unfortunately, as the cause proceeded, another question arose which is scarcely distinguishable. For after the defendants Walter Johnson and Johnson & Lynn Ltd. had delivered their defence they proceeded to compute the amounts for which they or one or other of them would be liable to the Amalgamated Collieries company upon the greater number of the various causes of action set forth in the statement of claim and to offer payment to that company. Ostensibly at least, the board or a sub-committee caused an independent examination to be made of the amount of the liabilities of those defendants and then accepted various sums from them. Of these payments some were received merely on account of the causes of action to which they related, but, in other cases, particularly where the amount was not ascertained but depended on estimation, the amount was agreed upon and accepted as a full discharge, that is, as an accord and satisfaction.

The defendants, Walter Johnson and Johnson & Lynn Ltd., delivered a supplementary defence in which they relied upon this transaction as a matter arising pending the action. They contend that, unless the directors acted mala fide and not in the interests of the company, it would operate as a discharge. For the plaintiff's right to maintain the action can be no greater than the company's (See *Burland* v. *Earle* (1)). Nevertheless the bona fides of the board was still left outside the field of pleading and of express proof.

The effect of the payments made by the defendants Johnson & Lynn Ltd. and Walter Johnson and their acceptance by the directors

(1) (1902) A.C., at p. 93.

must be considered later, after the nature and extent of the liabilities to the Amalgamated Collieries company of the two defendants in question have been examined. But, unless the peculiar form of the proceedings is first understood, a just appreciation cannot be obtained of the real bearing of a discussion of the relations between the Amalgamated Collieries company and the other two defendants. In other words, if the basal character of the litigation is not first noticed, it is easy to fall into the error of dealing with the many contentions raised by the parties without a clear and steady perception of their application to the relief obtainable at the instance of the plaintiff appellant.

I turn to the facts of the case. Amalgamated Collieries of W.A. Ltd. was incorporated on 14th January 1920. Its capital is divided into 200,000 preference shares of £1 each and 50,000 shares of £1 each, and it has all been issued. Preference shares carry no right to vote except in relation to specified classes of questions involving the rights of preference shareholders. When the writ was issued the plaintiff was registered proprietor of 17,000 ordinary and 85,000 preference shares and the defendant Walter Johnson held 26,075 ordinary shares and Johnson & Lynn Ltd. 4,800 ordinary shares. There is nothing in evidence to show how the rest of the share capital is held. The plaintiff, shortly after the issue of the writ, transferred a large part of its holding to the Australian Machinery and Investment Co. Ltd., and it is sufficiently obvious that the conduct of the action and the appeal has been under the direction of the latter company or of those interested in it.

The Amalgamated Collieries company, on its formation, took over some coal mines at Collie, and it has carried on the business of a colliery proprietor. From its inception its business was managed and conducted in a somewhat unusual manner. The company was provided with a board of directors, at first six in number and then, from 29th September 1920, eight. Of its first directors, two under the articles of association held office so long as they retained a stated minimum number of shares. These were Robert John Lynn, a shipping manager, and the defendant Walter Johnson, a merchant. By an agreement taking effect as from a date two days after the registration of the Amalgamated Collieries company, that company

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employed these two gentlemen as managers of its business for ten years, and thereafter until the expiry of six-months' notice on either side. They were bound under the agreement to carry out such duties and to observe such directions as the board might give them, but, in default thereof, they were to control the general management of the business of the company and they were empowered to appoint and dismiss the servants of the company, to contract on behalf of the company in the ordinary way of business and to do all other things which they might consider necessary or conducive to the interests of the company. Among the duties imposed upon the two managers by the provisions of the agreement was that of keeping proper books of account, of allowing the company's auditors to examine them, of paying all moneys received by them into the company's bank and of making all payments by cheque drawn thereon in the name of the company per procuration except payments of not more than £1. The two managers were given equal powers, and any conflict between them was to be submitted to the board of directors. On the death of either, the survivor was to become the sole manager. Their remuneration, which was to be divided in equal shares, consisted in a commission of 3d. a ton on all coal sold and delivered by the company, but coal was not to be sold below prices fixed by the board of directors.

By another agreement, taking effect as from the same day, the company appointed two companies its sole agents for the sale of bunker coal and coal for export from Western Australia. These companies were W. Johnson & Co. Ltd. and R. J. Lynn Ltd., and they were, of course, companies respectively controlled by one or other of the two managers of the Amalgamated Collieries company. The term of this agreement also was ten years and thereafter until the expiry of six months' notice on either side. Of the obligations expressly imposed by the agreement upon the agents those which are material required them to provide offices at Fremantle, Bunbury and Albany, to use their best endeavours to sell the coal, to employ agents in all principal countries outside Western Australia, and to bear the expenses connected with the subsequent disposal of coal delivered at the three named ports by the Amalgamated Collieries

company as well as all commissions to oversea agents and to sub-agents and all expenses attached to obtaining orders. The two agent companies were to be remunerated by retaining out of moneys in their hands as such agents a sum equal to 2s. 6d. a ton for all coal and briquettes supplied by the Amalgamated Collieries company for bunkering or export from Western Australia. No sales of coal or briquettes were to be made at prices less than the board of directors fixed. The agreement provided that the agency should be joint and that the agents should make their own arrangements for dividing the remuneration and sharing the expenses. It also provided that the agents should be entitled to transfer the agency to any company formed for the purpose of amalgamating their businesses. The Amalgamated Collieries company, on its side, undertook the cost of delivering at Fremantle, Bunbury or Albany, as the case might be, coal and briquettes consigned to or through the agents for bunkering or export purposes, or in fulfilment of bunkering or export orders. Apparently the parties did not contemplate the export or bunkering of coal from any other than the three ports mentioned. The agreement provided that the Amalgamated Collieries company should not appoint any other agent for the sale of coal for bunkering or export purposes, nor directly or indirectly sell coal or briquettes to any person in Western Australia with the knowledge that the coal would be used for bunkering or exported.

The two agent companies soon availed themselves of the right to assign the agreement to a company formed to amalgamate their two businesses. At the end of little less than a year, namely, on 12th January 1921, the defendant Johnson & Lynn Ltd. was registered, and as from that date the new company became the sole agent under the agreement. No express transfer or assignment was put in, but, on the pleadings, it must be taken as admitted that "the duties of the agents under the agency agreement and their benefits thereunder were undertaken by and transferred to Johnson & Lynn Ltd." As both the management agreement and the selling-agency agreement were made with parties standing within the equitable rule against conflicts of fiduciary and private duty, namely, with directors of the Amalgamated Collieries company, in the one case, and, in the other, with companies controlled by such directors, some special

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article was needed to protect the agreements from voidability. Art. 65 in fact provided that "no director shall be disqualified by his office from entering into any contract or arrangement with the company either as vendor, purchaser, broker, banker, solicitor, commission agent or otherwise, but no such director shall vote in respect of any such contract or arrangement in which he is so interested as aforesaid, or if he does his vote shall not be counted." This article, no doubt, justifies the management agreement, and although, for another purpose, it is contended on the authority of the decision of *Astbury* J. in *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (1) that the article has no application to contracts with a company in which a director of the Amalgamated Collieries company is interested, no one impugned the selling-agency agreements.

One source of difficulty, or rather of confusion, is the changing identity of the parties carrying out from time to time the two agreements. It is material to notice that from 16th January 1920 to 12th January 1921 the two companies which are not parties to the action were responsible for the performance of the selling-agency agreement. During that period the two individuals, Lynn and the defendant Walter Johnson, were executing the duties of joint managers under the management agreement. Each agreement established a fiduciary relation between the Amalgamated Collieries company and, in the one case, the selling agents, and, in the other, the joint managers. If, as the agreement appears to have contemplated, the selling agents received payments on behalf of the company, the two companies were accounting parties. In the same way, in so far as moneys of the company were received on its account by the joint managers, they became accounting parties. But, as in the ordinary course of business the servants of the company received its moneys and kept its books, although subject to the direction of the managers, it is, no doubt, open to question how far the managers were accounting parties, prima facie liable, upon an account of their dealings being ordered, to bring in an account and discharge themselves by showing a proper application of the moneys so received. Lynn and the defendant Walter Johnson occupied another position involving

(1) (1914) 2 Ch., at pp. 497-499.

a fiduciary relation, namely, that of directors. But directors are not accounting parties, at all events, unless it appears that they have taken funds of the company into their own possession.

From 12th January 1921 until the issue of the writ the defendant company Johnson & Lynn Ltd. carried out the duties of selling agents under the agency agreement. Lynn and the defendant Walter Johnson continued as joint managers until 12th September 1928, when Lynn died. From that date until 16th September 1929, almost exactly twelve months, the defendant Walter Johnson alone carried out the management agreement. Then by a novation between him, the Amalgamated Collieries company and the defendant Johnson & Lynn Ltd. the latter company agreed to act as general sales manager of the company for the period, at the remuneration and subject to the terms and conditions, in so far as they should apply, of the original management agreement. The defendant Walter Johnson undertook to act as managing director of the Amalgamated Collieries company without remuneration during the employment of the defendant Johnson & Lynn Ltd. as general sales managers so long as the former company desired his services in that capacity. This arrangement continued until shortly after the issue of the writ, when, the management agreement having been terminated by notice, the defendant Walter Johnson was appointed general manager at a salary of £3,000 a year. Thus, from 16th September 1929 until the beginning of the action the defendant Johnson & Lynn Ltd. occupied the dual position of general sales managers at a remuneration of 3d. a ton of all coal sold and delivered by the Amalgamated Collieries company and of selling agents of coal for export and bunker coal at a remuneration of 2s. 6d. a ton. During this period the defendant Walter Johnson was a director and a servant of the company. He also was chairman of the board of directors, a position he appears to have occupied from the beginning of the company.

The Amalgamated Collieries company from the beginning occupied offices in the same building as Johnson & Lynn Ltd. or the parent companies of the latter company. Some of the officers of the former company were directors or officers of the latter, notably, Walker, Lumb and Coleman. In 1935 and 1936 there was a defection by these

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gentlemen from the "interests" of the defendant Walter Johnson and an adherence to those of the Australian Machinery and Investment Co. Ltd. or of the persons associated with that company, which, without doubt, was the exciting cause of the present litigation. For some six years before the death of Lynn the defendant Walter Johnson had lived out of Western Australia and had paid only occasional visits. But from that time he personally directed the business from Perth.

The greater number of the matters of which the plaintiff complains in the statement of claim occurred after Lynn's death. But two of them took their beginning at an early period and it is convenient to deal with these first.

(1) It appears that in November 1920, if not before, a question arose as to the payment to some coaling and shipping agents in London named Lindsay Blee & Co. Ltd. of a commission of 1s. a ton on coal for export or bunkering sold upon their orders. The evidence affecting the matter is exiguous and vague. Apparently Lindsay Blee & Co. Ltd. stood in some special position making it desirable to pay them such a commission and distinguishing them from the ordinary sub-agents whose remuneration was a charge which, under the selling-agency agreement, R. J. Lynn Ltd. and Walter Johnson & Co. Ltd. were required to bear. At all events, on 19th November 1920, the board of directors resolved "that Lindsay Blee & Co.'s a/cs for sub-commissions paid by them to secure bunkering business for the company at a price not exceeding one shilling per ton be recognized for a period of twelve months to 31st December 1921." The selling agency devolved upon the defendant Johnson & Lynn Ltd. on 12th January 1921, and that company, during the twelve months ending 31st December 1921, appears to have debited the Amalgamated Collieries company in the accounts between them with 1s. a ton on coal with the sale of which Lindsay Blee & Co. Ltd. were connected. The defendant Johnson & Lynn Ltd. did not cease doing this at the end of 1921 but continued the practice indefinitely notwithstanding that no further authority was obtained from the board of directors. The defendants Walter Johnson and Johnson & Lynn Ltd., after the delivery of their first statement of defence, calculated the amount

so paid to them on account of the commission paid to Lindsay Blee & Co. Ltd. from 31st December 1921 at £2,457 8s. 8d. and repaid this sum to the Amalgamated Collieries company together with interest at five per cent per annum, amounting to £1,537 0s. 11d., and upon this they relied in their further defence as a discharge by payment. The repayment meant that the two defendants did not dispute the view that under the selling-agency agreement such a commission as that paid to Lindsay Blee & Co. Ltd. should have been borne by Johnson & Lynn Ltd. The judgment of *Northmore* C.J., who heard the suit, declared that the defendants Walter Johnson and Johnson & Lynn Ltd. were liable to account for and pay to the Amalgamated Collieries company all commissions and payments made by that company to Lindsay Blee & Co. Ltd. or to the defendant Johnson & Lynn Ltd. or to any other person or company in respect of commissions payable to Lindsay Blee & Co. Ltd. in respect of orders secured by them for coal or briquettes for bunkering or export as and from 31st December 1921 and ordered an account accordingly. There is no cross-appeal against any part of this declaration and order, but I do not see why the defendant Walter Johnson should be liable to account for the sums wrongly received or retained by Johnson & Lynn Ltd. (*Wilson* v. *Bury* (1)) unless on the ground that he was knowingly concerned in a breach of fiduciary duty, using his own fiduciary position to aid it. But the learned Chief Justice expressly said that there was no justification for the allegation that the payments were made fraudulently.

The plaintiff appeals against so much of the declaration and order in question as fixes 31st December 1921 as the beginning of liability and claims that an account should be taken from the time the agency agreement first took effect. For two reasons the plaintiff also attacks the finding that the retention of the sums on account of the commission payable to Lindsay Blee & Co. Ltd. was not fraudulent. The first reason is that the plaintiff desires to obtain an order for a general account of all the dealings of every kind between the Amalgamated Collieries company, on the one hand, and the defendants Walter Johnson and Johnson & Lynn Ltd., on the other. The second reason is that in the taking of that account or otherwise the

(1) (1880) 5 Q.B.D. 518.

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plaintiff seeks the disallowance of all remuneration paid or payable to or retained by the defendant Johnson & Lynn Ltd., on the ground of misconduct in the course of the agency.

The finding of no fraud has yet another relevance. It affects the claim for an account of moneys paid to or on account of Lindsay Blee & Co. Ltd. for the period ending 31st December 1920, the date as from which the resolution of the board of directors was expressed to operate. For during that earliest period Johnson & Lynn Ltd. did not exist, and the parent companies, which are not parties to the suit, would alone be liable to account unless the defendant Walter Johnson is responsible on the ground of *particeps criminis*.

In respect of the period of twelve months, ending 31st December 1921, which is covered by the resolution of the directors, the plaintiff claims that Johnson & Lynn Ltd. remain accountable upon the ground that it was beyond the power of the directors gratuitously to confer a benefit on that company, more especially as one of their number was interested and that the resolution amounted to doing so. Further, the plaintiff says that the resolution is ineffective because the article of association authorizing agreements and arrangements in which a director is interested does not on its construction extend to the case of another company in which a director is interested as shareholder or concerned as director. It appears from the shorthand notes of the reply on the plaintiff's behalf at the trial that it was not until that stage that the efficacy of the resolution was impugned, and *Northmore* C.J. then said that it ought to have been opened in order to give the defendants' counsel an opportunity to reply. This may account for the inadequacy of the proofs adduced upon the whole question of Lindsay Blee & Co. Ltd.'s commission. The defendant Walter Johnson was called upon in respect of at least one other branch of the case to answer for conduct which might make his counsel feel that his interests were best served by refraining from calling him as a witness. As from 31st December 1921, the liability to repay the amount received on account of the commission to Lindsay Blee & Co. Ltd. had, in effect, been confessed. In the absence of some attack on the resolution, there was no particular reason for advancing or eliciting evidence in

detail upon certain matters which otherwise would assume an importance, viz., the precise nature of the services performed by Lindsay Blee & Co. Ltd., the reasons why that company should be regarded as different from an ordinary sub-agent and the circumstances which might account for Johnson & Lynn Ltd. continuing to debit the Amalgamated Collieries company with their commission after 31st December 1921. However this may be, the burden rested upon the plaintiff of showing (1) that the conduct in this matter of the defendant Walter Johnson or of the defendant Johnson & Lynn Ltd. was fraudulent, and (2) that the resolution was beyond the powers of the board of directors because amounting to a gratuitous advantage to one or both of these defendants.

In my opinion neither burden has been discharged.

In support of the first of these matters the plaintiff relied upon the facts that an authority of the board was obtained and the authority was limited to twelve months, that the recoupment of the 1s. a ton was done in account and not by cheques brought before the board and that the minutes of the board disclose no subsequent reference to the matter by or before the directors. On the other hand, the debits were clearly shown, the company's auditors must have known all about them and there is no reason for thinking the auditors were not independent. The facts by reason of which their allowance in 1921 was sanctioned do not appear to have changed, and none of the circumstances needed in order to understand the true commercial position has been laid before the court. Indeed, if the facts which appear do not actually suggest, they are at least consistent with, the existence of a good business reason for the company's bearing Lindsay Blee & Co. Ltd.'s charges or a part of them. The selling-agency agreement did not require the selling agents to employ any particular sub-agents; Lindsay Blee & Co. Ltd. evidently occupied a position of special importance; the resolution speaks of sub-commissions paid by Lindsay Blee & Co. Ltd.; the charge of 1s. a ton is plainly no small one, covering as it apparently did no charges or disbursements otherwise included in the 2s. 6d. payable to the selling agent. In these conditions it is not difficult to understand that the board of directors should agree to find the extra 1s. a ton in order to induce

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the selling agents to enlist the services and support of Lindsay Blee & Co. Ltd. The failure to obtain a formal extension of the board's limited authority may well have been an oversight. In such things business men are very often guilty of lapses which lawyers regard as singular, if not significant. At all events, I do not think that any safe foundation can be discovered in the facts laid before the court for a finding that in this matter there was fraud or guilty knowledge. The transaction itself is not such as to argue an intentional breach of duty, and the fact that at a later time at least one other transaction took place which is found to have been dishonest does not show dishonesty in that now under discussion. What I have said goes a long way to dispose of the second of the two matters the onus of proving which lies, as I have said, upon the plaintiff. For it is not shown that the resolution did amount to a voluntary benefit to the selling agents. It seems not at all unlikely that it was part of an arrangement by which the selling agents did what they would not have done at their own cost and were not obliged to do, namely, employ the services of Lindsay Blee & Co. Ltd.

There remains the contention that the resolution is ineffective because the defendant Walter Johnson was a director of the Amalgamated Collieries company and of W. Johnson & Co. Ltd. or of Johnson & Lynn Ltd. Lynn was also a director of the Amalgamated Collieries company as well as no doubt of his own company R. J. Lynn Ltd. and afterwards of Johnson & Lynn Ltd. In accordance with the article of association neither Walter Johnson nor Lynn voted. The article of association, which is numbered 65, has already been set out. It does not expressly validate contracts but says that no director shall be disqualified by his office from entering into a contract with the company. This means, as is well understood, that the contract shall be binding on the company notwithstanding that he is a director. The article refers to various capacities in which a director shall be qualified to enter into a contract or arrangement with the company and then ends with a completely general "or otherwise." One of the capacities is that of broker, another banker, and a third commission agent. Now, it is not logically impossible that the contract made in any of these three capacities

to which the article refers is one in which the director contracts as a principal only. On this view it would cover the contract involved in employing a broker or commission agent but not the contract which he negotiated or made acting for an opposite contracting party. Such a contract might be voidable (See *Haywood* v. *Roadknight* (1)). But it seems more reasonable to read it as including cases in which the director acts as agent or servant of the other principal to the contract. Indeed, such a construction seems to be demanded by the word " banker." There have been few examples in Australia of banks conducted by individuals as proprietors, and it is long since any have been known. Unless " banker " includes the officer of a banking company, it could have no practical application, and, if it does so, it is clear that contracts made by a director as the representative of the other principal to the contract are included in the article. Some support for the view that the article extends to such a case is given by the expression " in which he is so interested " : it suggests the inclusion of remoter interests than that of a contracting party.

In my opinion, therefore, the article covers contracts or arrangements to which the director is not personally a party but in which he acts as representative of another party whose interests raise a conflict with his duty to the company. So interpreting it, I see no reason why the words " or otherwise " should not extend to the position of a director and shareholder of another company which contracts with the Amalgamated Collieries company. It appears reasonable to give this construction to an article which expressly refers to the more immediate conflicts between interest and duty created by contracting as a principal ; for example, as vendor to or purchaser from the Amalgamated Collieries company. It may be said that the strict reading given by *Astbury* J. in *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (2) tends against the view I have adopted ; but it must be noticed that the Court of Appeal in that case preferred to place their judgment on entirely different grounds. I think the resolution was not voidable or inefficacious. But, even if the resolution might have been disregarded in the beginning by the Amalgamated Collieries

(1) (1927) V.L.R. 512; 49 A.L.T. 29.

(2) (1914) 2 Ch., at pp. 497-499.

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company as affected by the interest of Lynn and the defendant Walter Johnson, I doubt very much whether it could be treated as ineffective after it had been acted on by the defendant Johnson & Lynn Ltd. That company, on the faith of the resolution, undertook to Lindsay Blee & Co. Ltd. a liability to pay it 1s. a ton on coal sold. Simply to disregard the resolution is like rescission when *restitutio in integrum* is impossible. It should be added that the defendants objected that it was not open to the plaintiff either on the pleadings or the conduct of the case to impeach the validity of the resolution, and it was further said that, if by amendment or otherwise the plaintiff were permitted to take the point, the defendants ought to be allowed to rely on lapse of time as an answer. There is, I think, a good deal to be said for this contention, but in the view I take it is unnecessary to do more than mention it.

In my opinion the judgment given by *Northmore* C.J. upon the question of Lindsay Blee & Co. Ltd.'s commission is correct.

(2) The second subject of complaint which took its inception before the death of Lynn relates to the mode in which the cost of office accommodation and the like was thrown upon the Amalgamated Collieries company in exoneration of Johnson & Lynn Ltd. and some companies in which the latter company or the members thereof held shares. The offices of the Amalgamated Collieries company, until October 1933, were upon the upper floor of a building owned by Johnson & Lynn Ltd. in Pier Street, Perth. The lower floor was let to another tenant or occupied for the purposes of another business. The offices of Johnson & Lynn Ltd. and of two other companies were upon the upper floor also. In one of these two companies, the Collie Power Co. Ltd., the plaintiff was the principal shareholder and nominated a director to its board. Both in this company and in the other company, called the Worsley Timber Co. Ltd., Johnson & Lynn Ltd. or Walter Johnson was substantially interested. It appears that the water and municipal rates in respect of the upper floor were paid by the Amalgamated Collieries company. Up to about 1931 or 1932, it is said that all the electric light and power used on the floor was paid for by that company, at all events from 1928. The cleaning was paid for in like manner, and some of the stationery used by or on behalf of the other companies was provided

by the Amalgamated Collieries company. In October 1933 all the companies moved to Occidental House in St. George's Terrace. What happened then in relation to similar charges is very obscurely stated in the evidence, but it is alleged that throughout much clerical work has been done on behalf of Johnson & Lynn Ltd. at the cost of the Amalgamated Collieries company.

After the delivery of the first defence, the solicitors for the defendants Walter Johnson and Johnson & Lynn Ltd. in a letter to the solicitors for the Amalgamated Collieries company, who had been instructed by the sub-committee of the board of directors already referred to, dealt as follows with the paragraph of the statement of claim complaining of the use thus made of the Amalgamated Collieries company and the advantages gained at its expense :— "There has been some difficulty in placing a value on what was an extremely small portion of the space occupied by our clients, and the other companies mentioned, and estimating what portion of the water and municipal rates was applicable thereto ; also in apportioning the cost of electric light, power, cleaning and stationery. Our clients have made a liberal allowance in respect of the matters mentioned, and have included in the cheque enclosed a sum of £1,902 7s. 7d. representing an allowance for rent, rates, electric light, power, cleaning, stationery, &c., and the further sum of £556 11s. 1d. for interest thereon to date ; total £2,458 18s. 8d."

The solicitors of the Amalgamated Collieries company sent a copy of the letter to the plaintiff's solicitor and made the following observations upon the portion set out above :—"Mr. Cook, the secretary of our client company, calculated the amount refundable by Johnson and Johnson & Lynn Ltd. for rates, taxes, electric light, &c., and he advises that £1,702 7s. 7d. is the correct figure as nearly as it is possible to find out but at the same time he states that his calculations were really in the nature of a guess. He did not allow anything for rent which should have been paid by the Collie Power Co. Ltd. but the defendants have added £200 to cover that item. The directors think the amount is a liberal allowance and covers the claim in respect of which it is tendered." They then suggested the consideration and mutual discussion of the course to be taken. A fortnight or more later the solicitors for the Amalgamated Collieries

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company informed the plaintiff's solicitors that the directors had dealt with the various payments offered and in respect of that in question had decided to accept the sum of £2,458 18s. 8d. in settlement of the claim set out in the particular paragraph of the statement of claim. They accordingly gave a receipt to the defendants Johnson & Lynn Ltd. expressed to be in satisfaction of that claim.

Northmore C.J. decided that there was no evidence that the throwing of all the charges mentioned on the Amalgamated Collieries company had been by the direction of the defendant Walter Johnson for the purpose of advantaging himself and Johnson & Lynn Ltd. or of defrauding the Amalgamated Collieries company, but that the settlement of the claim in the manner described did not afford any obstacle to the plaintiff's claim for relief. He declared that the defendants Walter Johnson and Johnson & Lynn Ltd. were liable to refund to the Amalgamated Collieries company all moneys paid by it in respect of rent, electric light, power, water and municipal rates, stationery, cleaning and clerical work which should have been paid by the defendant Johnson & Lynn Ltd. or the Collie Power Co. Ltd. or the Worsley Timber Co. Ltd. and ordered an inquiry and an account to determine the amount. I find it difficult to understand the basis of this declaration and order. If the defendant Walter Johnson had been found guilty of a breach of his duty as a director of the Amalgamated Collieries company consisting in the procuring or causing the discharge of the outgoings and expenses in question for the benefit of Johnson & Lynn Ltd. or either of the two other companies, he clearly would have been liable in damages the measure of which would perhaps be consistent with the declaration. But he does not appear to have been found guilty of a breach of duty. The liability of the defendant Johnson & Lynn Ltd. in respect of the period after 16th September 1929 might conceivably be put upon the ground that, as general sales manager governed by the terms, so far as applicable, of the managers' agreement, the obligation fell upon it of supervising and controlling expenditure upon matters like office accommodation and services and it had been guilty of a breach of duty. Before that date I cannot see how it would be liable except possibly in a common count

for money paid to its use for disbursements really made on account of that company as distinguished from the other two companies.

The ground taken by the notice of cross-appeal against this part of the Chief Justice's judgment is that he was wrong in holding that it was not competent for the Amalgamated Collieries company, *scil.*, for its directors, to accept the sum of £2,458 18s. 8d. in full settlement of the claim. Prima facie it is in the power of the board of directors to fix a sum as the appropriate amount to discharge an unascertained liability and to accept it by way of accord and satisfaction discharging the cause of action vested in it. The pendency of suit does not take the management of the affairs of the company out of the hands of the directors. It does not operate like a common decree for administration in relation to an executor or administrator. In a suit in which a shareholder or a minority of shareholders alleged an abuse of power on the part of the directors or a majority of shareholders and a mala-fide attempt to act not in the interests of the company but for the private advantage of a person under a liability to the company, the court could and, prima facie, would intervene to restrain such a settlement *pendente lite* as that now relied upon until the issue had been tried. If before the court could intervene such a settlement were entered into and it appeared that the directors had acted mala fide, the court would set aside the attempted settlement or treat it as void in granting the relief claimed by the plaintiff. But the peculiarity of this case is that notwithstanding the nature of the action no allegation has been made or evidence tendered for the purpose of impeaching the good faith of the directors. The correspondence in which the settlement was arrived at bears on its face all the appearance of an attempt to arrive fully and fairly at the amount properly payable in respect of the liability of the defendants Walter Johnson and Johnson & Lynn Ltd. or either of them to the Amalgamated Collieries company in respect of this and the other matters of which the plaintiff's statement of claim complains. So far as the defendant Walter Johnson is concerned it is not hard to believe, in all the circumstances of the case, that, in his anxiety to cut the ground from under the plaintiff's feet and for the very purpose of obtaining an answer to the action, he or his advisers should prefer to take a course the bona fides and correctness of which

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would withstand all attack and therefore to ascertain as accurately as possible the full amount payable in respect of any cause of action they were not prepared to contest upon the merits. So far as the solicitors of the Amalgamated Collieries company are concerned, there is no reason to doubt that they sought to arrive at a just and proper conclusion and examined the facts and caused the figures to be investigated to that end. From the point of view of the directors, there can be no doubt that an acceptance of what appeared to be really due might well be considered to be in the best interests of a company the business of which was not likely to prosper the better for the litigation in which its affairs were enveloped. But, as against these considerations, there stand two facts which cannot but cause disquiet. The first is that, notwithstanding disclosures much to his discredit, the defendant Walter Johnson has been appointed general manager of the company at a substantial salary for a term of two years certain. The second is that, according to the minutes, he was present when the full board of directors resolved upon the acceptance of the settlement of this and two other causes of action. No doubt the board acted on the advice of the sub-committee and their solicitors, but the two things together suggest that the board is not independent of the defendant Walter Johnson. The question is probably of very little practical importance whether an inquiry or account of the amount payable under this head should be ordered; that is, as distinguished from some form of general inquiry and account. But the question appears to depend on an issue which was never pleaded or made the subject of proof at the trial, namely, whether the directors acted bona fide in the interests of the company in accepting the sum of £2,458 18s. 8d. in satisfaction of the particular cause of action. I think it lay with the plaintiff to prove that they did not. This the plaintiff failed affirmatively to do. I therefore am of opinion that the order for inquiry and account ought not to have been made.

(3) In 1928, probably just before the death of Lynn, the defendant Walter Johnson decided that Johnson & Lynn Ltd. as selling agents should charge the commission of 2s. 6d. a ton upon sales of coal which up to that time had not been regarded as falling under the selling-agency agreement as coal supplied for bunkering or export

from Western Australia. The Fremantle Harbour Trust bought coal from the Amalgamated Collieries company, and that company also supplied departments called the Bunbury, the Geraldton and the Fremantle Harbour Works. Some of this coal was required for fuelling dredges and other craft, including, probably, tugs. The evidence discloses little or nothing as to the nature of the craft except that they were dredges and tugs.

The contention of the defendant Walter Johnson was that all the coal supplied to these various bodies was bunker coal and therefore ought to bear the commission of 2s. 6d. a ton in addition to the commission of 3d. a ton chargeable under the sales-management agreement. He accordingly caused a debit of 2s. 6d. a ton to be made for the future against the Amalgamated Collieries company in respect of coal so supplied, and for the past he caused some amount, said to be more than £2,000, to be similarly debited. In respect of a large part of this coal there was no colour whatever for the contention of Walter Johnson. It was not used for fuelling any craft and it certainly was not exported from Western Australia. The retention by Johnson & Lynn Ltd. of the moneys to answer all the debits mentioned constitutes one of the plaintiff's complaints in the statement of claim. The defendants Johnson & Lynn Ltd. and Walter Johnson relinquished any attempt to support these debits in their entirety, but they maintained the position that coal supplied to the bodies in question and used for fuelling their craft was liable to the commission of 2s. 6d. a ton. They calculated or estimated the amount wrongly retained on this basis at £2,291 9s. 8d., and this sum, together with interest at five per cent per annum, amounting to £922 7s. 6d., they paid to the Amalgamated Collieries company. The payment was accepted by the solicitors for the Amalgamated Collieries company on terms which appear from the following paragraph from their letter to the solicitors of the defendants Walter Johnson and Johnson & Lynn Ltd. :—" The amount payable according to your offer is a total of £3,213 17s. 2d. This is satisfactory and would be sufficient to settle the whole of the plaintiff's claim excluding that portion which deals with coal supplied to the Fremantle Harbour Trust, Fremantle Harbour Works, Bunbury Harbour Board, Bunbury Harbour Works and Geraldton Harbour Works which went

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into bunkers of vessels used by those bodies. Our clients' acceptance of the amount mentioned would be made without prejudice to the plaintiffs' right to proceed with their action in respect of the excluded items." The phrase "that went into bunkers of vessels used by these bodies" may perhaps be thought to require a definition of "bunker." But, in my opinion, upon the construction of the selling-agency agreement none of the coal supplied to the bodies in question was subject to the commission of 2s. 6d. a ton. The agreement appears to me to be dealing with two related or kindred descriptions of sales of coal, sales for export, necessarily involving loading colliers at one or other of the ports named, and sales for bunkering, necessarily involving the coaling of ships at those ports. Trade of this character is quite different from the supply to manufacturers, to railways and to other wholesale consumers for industrial purposes within the State. It is doubtless because of its special and separate character that a commission of 2s. 6d. was made payable—a commission out of which various charges must be borne after the colliery proprietor has delivered the coal at the named ports at its own cost. The coal in question was sold to the departments free on rails at Collie. No distinction was made between the coal they would consume on vessels and that to be consumed on shore. The departments coaled their craft out of their own supplies so obtained. The dredges doubtless consumed the greater part of the coal they took, not in navigation, but in dredging. The selling-agency agreement does not, in my opinion, contemplate an investigation of the use to which a customer, supplied with coal for general purposes, put the coal after delivery. It is based on the obvious distinction between general supplies for use in the State and coal taken on board ship by or at the instance of the purchaser. The provision that the Amalgamated Collieries company will not sell coal to any person with the knowledge that the same will be used for bunkering or exported, no doubt, was inserted to prevent the avoidance or evasion of the commission of 2s. 6d., but it shows that for it to become payable it is not enough that in the result the coal is actually used for bunkering or for export. I find it difficult to believe that the defendant Walter Johnson honestly supposed that his company

was entitled to the commission on all coal supplied to the bodies mentioned, and my incredulity is increased by the fact that, so far as appears, he did not apprise the board of his claim to charge the commission either retrospectively or prospectively.

The Chief Justice ordered an account of all sums paid as commission to the bodies in question, disregarding the settlement in respect of coal not used in bunkers. This order, I think, should stand, because I do not think that the money was paid and accepted in respect of a severable cause of action. The attempt to distinguish between sums retained by the defendant Johnson & Lynn Ltd. according to the use to which the coal was applied fails to recognize that the liability is to recoup money received or retained without right or authority. The sums so retained from time to time were entire and not divisible or distributable in respect of every ton of coal made the pretext of their retention. I think, however, that the formal order should be varied by inserting the words " or retained by " before the names of the defendants.

(4) After Lynn's death, the defendant Walter Johnson learned that a charitable gift or benefaction which Lynn had made in his lifetime for educational purposes really consisted of shares in the Amalgamated Collieries company which belonged, not to Lynn, but to Johnson & Lynn Ltd. The value of the shares was taken to be £2,000. The defendant Walter Johnson for the purpose of replacing this asset of Johnson & Lynn Ltd. caused a cheque for the amount to be drawn by the Amalgamated Collieries company and debited to an account upon which under the management agreement he was at liberty to draw. This cheque was paid to Johnson & Lynn Ltd. and another cheque was drawn by that company and paid to the Amalgamated Collieries company and credited to the account of Johnson & Lynn Ltd. in the books of the Amalgamated Collieries company. By this means Johnson & Lynn Ltd. obtained a credit of £2,000 to which it was not entitled. The payment is said to have taken place on 25th October 1928. There was no possible colour of justification for the course so taken, which was clearly dishonest. The misapplication of the money is one of the grounds of complaint upon which the plaintiff relied in its statement of claim.

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The defendants Walter Johnson and Johnson & Lynn Ltd., after the delivery of their first defence, repaid the sum of £2,000 together with interest at five per cent per annum, amounting to £805 4s. 1d. This was accepted by the directors of the Amalgamated Collieries company in full satisfaction of the liability.

The judgment of the learned Chief Justice declares that the defendant, Walter Johnson, wrongfully and in fraud of the Amalgamated Collieries company caused the sum of £2,000 to be paid and ordered that defendant and the defendant, Johnson & Lynn Ltd., to repay the same with six per cent per annum interest, taking credit for £2,805 4s. 1d.

The defendants, by their notice of cross-appeal, complain that the acceptance of £2,805 4s. 1d. in satisfaction operated as a discharge, and in this I agree for the reasons already given in relation to the settlement of the office expenses. The point is a small one, and it is the only matter calling for decision in relation to this transaction. It means that the order for repayment should not have been made. What is of much more importance is that the transaction exhibits conduct on the part of Walter Johnson unmistakably fraudulent. The plaintiff relies upon it both as colouring other transactions and as supporting the plaintiff's claim for a general account of the dealings of himself and his company with the Amalgamated Collieries company. But that is a question which must be discussed later when the remaining specific complaints of the plaintiff have been dealt with. They are two in number.

(5) The more important is a claim that the defendants Johnson & Lynn Ltd. and Walter Johnson are accountable for the profit made on the sale by that company of certain mining machinery to the Amalgamated Collieries company. A director of the Amalgamated Collieries company, named Dunstan, was acting in 1929 as receiver of a partnership which had carried on mining operations at Ravensthorpe in Western Australia. On 14th December 1929 Johnson & Lynn Ltd. bought from him the assets of the undertaking *in situ* at Ravensthorpe. They consisted of machinery, plant, tools, houses, and material. The price was £1,500. Ravensthorpe is a distant and inaccessible place, and when the machinery and other plant and articles were resold by Johnson & Lynn Ltd. the total

cost borne by that company in the purchase, handling, transportation and delivery of the assets sold by the receiver appears to have been £7,643. In the early part of 1930 Johnson & Lynn Ltd. attempted to resell various parts of the machinery they had bought by communicating with persons whom they regarded as possible buyers, including secondhand-machinery merchants in Melbourne. The evidence is not very distinct as to the nature or quantity of the machinery sold to strangers nor as to the amount realized nor the time of such sales. But it appears that a considerable sum was ultimately obtained by Johnson & Lynn Ltd. by sales to strangers. At or towards the end of 1930, however, a larger quantity of the machinery which Johnson & Lynn Ltd. had bought from the receiver was resold by that company to the Amalgamated Collieries company. The transaction was never brought before the board of directors of the Amalgamated Collieries company, at all events in any formal manner. The transaction was conducted on both sides entirely by the defendant Walter Johnson, with the help of Lumb, who, at that time, was an officer and director of Johnson & Lynn Ltd. as well as a director and assistant general manager of the Amalgamated Collieries company. In the cross-examination of Lumb on the part of the defendants, a suggestion was made that the superintendent of the Amalgamated Collieries company's mine approved of the purchase and of the value placed upon the machinery by Dunstan, presumably on the resale. But this gentleman was not called as a witness to support the suggestion. Lumb gave evidence to the effect that he was sent down to Ravensthorpe to inspect the machinery before Johnson & Lynn Ltd. bought it and that the defendant, Walter Johnson, told him that it was to be sold or resold to the Amalgamated Collieries company and, on another occasion, that Dunstan was to receive some part of the profit. It is apparent, however, that the learned Chief Justice attached little credit to Lumb's evidence and, as the shorthand notes show, his statement that he had gone to Ravensthorpe before the purchase in December 1929 was completely rejected.

I think that upon the facts it must be taken that Johnson & Lynn Ltd. bought the assets of the mine at Ravensthorpe as a speculation with the object of selling them to best advantage and not for the

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definite purpose of reselling them or any of them to the Amalgamated Collieries company. At the same time the defendant Walter Johnson was doubtless then alive to the possibility of reselling them to the Amalgamated Collieries company.

The evidence is very defective upon a number of matters in connection with the machinery, as, for instance, the actual value which it possessed for the Amalgamated Collieries company, the use to which it was put, and, indeed, as to the price which that company paid for it. In January, February and March 1931 the directors passed payments amounting to £10,034 1s. 6d. to Johnson & Lynn Ltd. under the head of "stores," but there is no distinct proof that these sums all represented the price of the Ravensthorpe machinery. The statement of claim alleges that the total profit made by Johnson & Lynn Ltd. from the resale to the Amalgamated Collieries company and to others of the assets bought from the receiver amounted to £6,000, and the defence admits "a substantial profit," but the amount was not proved.

It is conceded that the machinery could not be restored to Johnson & Lynn Ltd. and, therefore, that *restitutio ad integrum* is out of the question. It is, of course, quite plain that, if rescission were possible, the sale of the machinery to the Amalgamated Collieries company could not stand. The defendant Walter Johnson was a fiduciary agent of that company and with Lumb, who was also a fiduciary agent, assumed to effect a sale to their principal of property belonging to a company of which they were both directors and in which the defendant Walter Johnson was very largely interested. The defendant Walter Johnson acted in the transaction as buyer and seller for his respective principals. There was no disclosure of his interest to any disinterested directors of the Amalgamated Collieries company so far as appears and certainly no independent determination by the board to acquire the assets. The sale was, therefore, in its inception clearly voidable at the option of that company (*Salomons* v. *Pender* (1); *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (2)). But, as *restitutio in integrum* has become impossible, the transaction cannot be rescinded, and the question is whether any and what other relief should be given. If

(1) (1865) 3 H. & C. 639; 159 E.R. 682. (2) (1914) 2 Ch., at p. 503.

at the time when Johnson & Lynn Ltd. bought the plant of the Ravensthorpe mine from the receiver the purchase could be considered as made on behalf of the Amalgamated Collieries company or for any other reason the assets bought could be impressed with an equity in favour of the latter company, there would be no difficulty in making Johnson & Lynn Ltd. accountable for the profit made upon the transaction. But, in my opinion, no facts have been established which would support the conclusion that Johnson & Lynn Ltd. acquired the assets from the receiver in such circumstances that they became trustees thereof for the Amalgamated Collieries company. Shortly before the time of the purchase, the defendant Walter Johnson had been appointed, at all events *de facto*, managing director of the Amalgamated Collieries company and Johnson & Lynn Ltd. had become " general sales manager " of that company. No doubt it was within the scope of the managing director's authority to buy secondhand mining machinery for the company if he considered that it was required. If, therefore, he had determined that the Ravensthorpe machinery was needed and should be acquired by the Amalgamated Collieries company and had caused Johnson & Lynn Ltd. to buy simply for the purpose of intercepting an intermediate profit upon the acquisition of the machinery by the former company upon which he had so determined, it may well be that, inasmuch as Johnson & Lynn Ltd. were represented in the transaction by the defendant Walter Johnson, they would be saddled with a constructive trust arising from his abuse of his authority as managing director of the Amalgamated Collieries company. But there is no satisfactory proof, direct or circumstantial, that in December 1929 the defendant Walter Johnson had determined that the machinery should be acquired by the Amalgamated Collieries company, and there is some ground for the view that he then intended that it should be resold in other quarters. Johnson & Lynn Ltd. were perfectly at liberty to buy and sell secondhand machinery, and the mere fact that their managing director, the defendant Walter Johnson, was also managing director of the Amalgamated Collieries company could impose no fetter upon the former company's right of doing so. Once the view is adopted that Johnson & Lynn Ltd. were at liberty to resell the machinery to

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whomsoever they chose and were not bound to hold it for the benefit of Amalgamated Collieries company, the title of the latter company to call upon the former to account for the profit made on the transaction falls to the ground. This position is made very clear by a passage from the opinion of the Privy Council in *Cook* v. *Deeks* (1), delivered by Lord *Buckmaster*. Referring to the judgment of the Supreme Court of Ontario, their Lordships say that in their opinion that court "has insufficiently recognized the distinction between two classes of case and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company. The cases of *North-West Transportation Co.* v. *Beatty* (2) and *Burland* v. *Earle* (3) both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the court to make a new contract between the parties. 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 recognized by Lord *Davey* in *Burland* v. *Earle* (3) and is the foundation of the judgment in *North-West Transportation Co.* v. *Beatty* (2), and is clearly explained in the case of *Jacobus Marler Estates* v. *Marler*, House of Lords, April 14, 1913, a case which has not hitherto appeared in any of the well-known reports." Lord *Parker's*

(1) (1916) 1 A.C., at p. 563.
(2) (1887) 12 App. Cas. 589.
(3) (1902) A.C. 83.

judgment in the last-mentioned case is now reported (1). In *Re Cape Breton Co.* (2), which is perhaps the foundation authority upon this matter, *Cotton* L.J. says:—"The principle of 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 for and 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." The reference to estoppel must not be misunderstood. It is based upon the assumption that to purchase the property otherwise than for the company would have been a breach of the director's duty to the company. It appears to me to have no application to the position of a director or a general agent, who is at perfect liberty to purchase property on his own account and does so without any breach of duty and without raising any conflict between his duty and interest. For instance, suppose the general manager of an industrial company bought vacant land as a speculation without any thought of its acquisition by his company but after holding it for many years, sold it to the company as a factory site without disclosing his interest. No one could doubt that the transaction would be voidable at the option of the company; but, on the other hand, the company could not affirm the transaction and recover the profit on the resale on the ground that the general manager was precluded from denying that he bought originally on behalf of the company.

There remains the question whether the defendant Walter Johnson is not liable in damages for breach of duty. That it was a breach of his duty as managing director to act as he did in causing the machinery to be transferred from Johnson & Lynn Ltd. to the Amalgamated Collieries company at an advanced price, I feel no doubt. But running through the line of authorities which are now accepted is the principle that "the court will not fix a new price

(1) (1913) 114 L.T. 640, n.

(2) (1885) 29 Ch. D., at p. 803.

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between the parties. In such a case the measure of damage will be the principal's loss in the whole transaction. If he has suffered no such loss, there can be no damages" (per Lord *Parker*, *Jacobus Marler Estates Ltd.* v. *Marler* (1)). This statement supposes, of course, that the question arises between a vendor who is a fiduciary agent, e.g., a director, and a purchaser who is his principal. But it explains why the principal cannot recover the difference between the price paid for the property and its estimated value. In *Re Cape Breton Co.* (2) *Fry* L.J. says: "It appears to me that to allow the principal to affirm a contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand." To allow a measure of compensation based on the difference between the estimated value of the property when acquired and the price given is to go back to the dissenting judgment of *Bowen* L.J. (3), which, however cogent it may appear, has not been accepted. But in the measure of damages it is hard to suppose that a distinction can be made between cases where the vendor is the agent himself and cases where the vendor is a company in which the agent is interested. In each case it must be "the loss on the whole transaction."

In the present case no attempt has been made to show that the Amalgamated Collieries company made a loss on the whole transaction. Indeed, payment of the profit made on the resale or, alternatively, an account is the only relief claimed in the prayer of the plaintiff's statement of claim. In my opinion no relief should be given in respect of the sale of the plant, machinery and other things bought from the receiver of the assets of the Ravensthorpe mine.

(6) The last of the complaints raised by the plaintiff's statement of claim with which the appeal is concerned arises out of the receipt

(1) (1913) 114 L.T. 640, n.
(2) (1885) 29 Ch. D., at p. 812.
(3) (1885) 29 Ch. D., at p. 809.

by Johnson & Lynn Ltd. of some profits which are said to arise out of that company's agency and to be unauthorized and undisclosed. The profits consist, first, in commissions obtained by Johnson & Lynn Ltd. upon the purchase of supplies for the Amalgamated Collieries company and, secondly, in a percentage remuneration derived by Johnson & Lynn Ltd. as representatives in Western Australia of the insurance company with which the insurances of the Amalgamated Collieries company were effected. As for the first, the unauthorized or undisclosed commissions, I do not think that it is necessary to state the facts. Two different suppliers of commodities allowed the defendant Johnson & Lynn Ltd. rebates or commissions on goods that company ordered on behalf of the Amalgamated Collieries company. The defendants Walter Johnson and Johnson & Lynn Ltd., after the delivery of their first defence, repaid to the Amalgamated Collieries company what they calculated as the amount of the commissions received, together with interest, but the directors did not see fit to accept the payment in discharge of the cause of action. The judgment of the Chief Justice declared that the two defendants were liable to account for such commissions and ordered an account to be taken. In his reasons the Chief Justice acquitted the defendants of fraud. He took the view that the receipt of the rebates or commissions had not been concealed and that many commercial men were unaware that they were unlawful. The question whether Walter Johnson was aware or considered that the rebates or commissions were improper does not seem to me very material. They clearly were improper. In any event, I do not think that he would be deterred from allowing his company to receive such a profit by any such consideration of moral principle.

The question which calls for decision under the head of complaint now in hand is whether the defendants Walter Johnson and Johnson & Lynn Ltd. are accountable for any profit in relation to the insurances. It appears that at the end of the year 1928 Johnson & Lynn Ltd. were appointed by the London Assurance Corporation chief representatives of the corporation for Western Australia. As I understand it, the duties of the chief representative included the regular conduct of a branch insurance business under the direction

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of the head office in Australia of the corporation. Johnson & Lynn Ltd. were paid £250 a year for office expenses and a remuneration consisting of a commission or percentage of the net premiums on insurance introduced by Johnson & Lynn Ltd. and accepted by the corporation. The percentage rate varied with different classes of insurance. After the appointment of Johnson & Lynn Ltd. the insurance of the Amalgamated Collieries company, except workers'-compensation insurance on miners, was effected with the London Assurance Corporation and, of course, the premiums were taken into account in calculating the remuneration of Johnson & Lynn Ltd. It is to be inferred that the directors individually were aware that the insurances were made with the London Assurance Corporation and that Johnson & Lynn Ltd. were the representatives in Western Australia. It is, of course, well known that such representatives are remunerated by a percentage on net premium income. If the board of directors had formally resolved upon insuring with the London Assurance Corporation through Johnson & Lynn Ltd., I should have thought that the transaction would have been covered by article 65. That article, however, does not do more than authorize a director to act in the transaction and protect it from voidability on the ground that it was entered into by a director. If an undisclosed or unauthorized profit is received in connection with the transaction, it remains recoverable by the Amalgamated Collieries company. Further, in the present case the question arises whether the position of Johnson & Lynn Ltd., as general sales managers, may under the terms of the managing agreement applicable involve that company in a fiduciary duty *in hac re*. If this question should be answered that insurance fell within the powers of the general sales manager, then I should think that the profit would be recoverable from it, unless the transaction were sanctioned by the directors with sufficient knowledge. The rule against a fiduciary agent receiving or retaining an undisclosed and unauthorized profit by means of his position cannot admit of exceptions. But, if the matter depends altogether on the fact that Walter Johnson was a director and general manager, I feel some difficulty in seeing how Johnson & Lynn Ltd. can be made accountable for the full profit of that company in respect of the insurances. However, I have reached

the conclusion that the board of directors did sanction and authorize the insurances with the London Assurance Corporation, knowing full well that Johnson & Lynn Ltd. obtained the commission or percentage on premiums as their remuneration. It appears clearly from the shorthand notes of the cross-examination of Walker that the directors passed accounts for quite large sums for the premiums and also passed the corresponding cheques. They all knew that Johnson & Lynn Ltd. were the representatives carrying on the insurance business, and the mode of remuneration is so notorious that a vehement presumption arises that they were well aware that the premiums would be reflected in the remuneration of Johnson & Lynn Ltd. (Cf. *Great Western Insurance Co.* v. *Cunliffe* (1)). I agree, therefore, in the decision of the Chief Justice that no liability in respect of profits on insurance rested on either the defendant Walter Johnson or the defendant Johnson & Lynn Ltd.

I have now dealt with all the specific complaints contained in the plaintiff's statement of claim with which this appeal is concerned. It remains to state my opinion upon the two contentions advanced as to the consequences in the relief which should be granted to the plaintiff.

It is first contended that misconduct is disclosed which deprives the defendant Johnson & Lynn Ltd. of its right to the remuneration of 3d. a ton since 16th September 1929, when it succeeded to the position of general sales manager, and of 2s. 6d. a ton since 12th January 1921. These dates express, of course, the extreme contention of the plaintiff, which depends upon the gravity of each alleged piece of misconduct and so acquires strength with the progress of time up to the last piece of misconduct proved. It is also contended that the defendant Walter Johnson should lose his or his and Lynn's remuneration of 3d. a ton before 16th September 1929.

In my opinion this contention presses the law laid down in *Andrews* v. *Ramsay & Co.* (2) altogether too far and misunderstands its application. In a general employment involving continuous services specific acts of misconduct do not go to the entire consideration. In the present case the remuneration is dependent under each agreement upon the quantity of coal sold. In *Hippisley*

(1) (1874) 9 Ch. App. 525.

(2) (1903) 2 K.B. 635.

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v. *Knee Bros.* (1) and *Nitedals Taenstikfabrik* v. *Bruster* (2) the principle is explained under which an entire remuneration for an inseparable service is forfeited for misconduct in the course of an agency. Before the remuneration can be held forfeited, an interdependence must be found to exist between the act of misconduct and the performance of the work or the fulfilment of the condition upon which the right to remuneration arises. In the present case the only matter in which such an interdependence or connection may plausably be suggested is in the overcharge of 2s. 6d. a ton upon coal sold to the various harbour authorities. But even there the connection does not appear sufficiently close. The overcharge is, so to speak, an *ex post facto* attempt to obtain an excessive remuneration from the principal after the real remuneration of 3d. a ton has been earned. In my opinion the plaintiff has not shown that either of the two defendants has forfeited any of his or its remuneration. In any case I do not think the statement of claim covers the forfeiture of remuneration.

The second contention remaining is that there should be an order for a general account. The plaintiff has not made clear what precisely it means by this claim for relief. As I have already pointed out, the defendant Walter Johnson, as a director and a general manager, is not an accounting party. Under the management agreement up to 12th September 1928 he and Lynn were accounting parties and then, until 16th September 1929, he became one. Thereafter Johnson & Lynn Ltd. was the accounting party. Under the selling-agency agreement, it had been an accounting party since 12th January 1921. The suggestion is that such a case of dishonest practice has been made out that some form of general inquiry is required into the dealings of the defendant Walter Johnson and Johnson & Lynn Ltd. with the affairs of the Amalgamated Collieries company. If that company by a proceeding in its own name applied for such an account, I think that, subject to the discretion of the court as to the manner of taking the account and the terms upon which it should be ordered, the circumstances are such as, prima facie, to entitle the company to some order which would result

(1) (1905) 1 K.B., at p. 9.
(2) (1906) 75 L.J. Ch. 798, at p. 799; (1906) 2 Ch. 671.

in an inquiry of a judicial nature into the dealings of the managing agents and selling agents, at all events over some portion of the period. The company would be, prima facie, entitled to such relief because there would have been proved a sufficient number of instances of improper dealings on the part of the fiduciary agents, at any rate after the period in which the defendant Walter Johnson undertook the sole direction of the two agencies, to justify an inquiry. The prima facie title of the company itself to relief of the nature stated might be met by evidence that investigation by way of independent audit or inquiry had already been had, putting the company in possession of all the facts and information which the relief is designed to elicit, if that were so. But in a proceeding by the company, until the contrary appeared, it would be presumed that those responsible for the conduct of its affairs bona fide believed that in the interests of the company it was necessary or desirable to invoke the process of the court. The present action, however, is not instituted by the company, and the same considerations do not determine the question whether any general account should be ordered at the suit of a shareholder. The *locus standi* of a shareholder to obtain the redress of wrongs suffered by the company or the enforcement of liabilities incurred to it by its officers or fiduciary agents or others depends upon what Lord *Cottenham* described as "the reason why the corporation does not put itself in motion to seek the remedy" (*Mozley* v. *Alston* (1)). Its inaction must arise from a control exercised by the directors or a majority of the shareholders not lawfully and bona fide in the supposed interests of the company, but *mala fide* and for the protection of the person liable in his appropriation of property or advantages belonging to the company or in his failure to pay what is due to it or otherwise for the furtherance of his interests or for some fraudulent, improper, or *ultra-vires* purpose. The shareholder's ability to maintain an action in such circumstances is described by Lord *Davey* as "a mere matter of procedure in order to give a remedy for a wrong which otherwise would escape redress" (*Burland* v. *Earle* (2)). It is apparent that, when the relief sought by a shareholder is a general account or inquiry

(1) (1847) 1 Ph. 790, at p. 800; 41 E.R. 833, at p. 837.
(2) (1902) A.C., at p. 93.

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for the purpose of investigating the dealings of an agent of the company who has been shown in particular instances to have been guilty of improprieties, a determining consideration in granting or refusing the relief would be the court's view of the conduct of the board of directors in relation to the accounting party. If it appeared that at the time of the action the directors were not stifling investigation where it was demanded, were not refusing to cause examination and inquiry where ordinary prudence suggested that a scrutiny of past dealings should be made, and were not guided by a desire to assist in the suppression of further improprieties where they might be suspected or feared, the court might refuse a general account, notwithstanding that in respect of one or more specific matters the plaintiff had shown a state of affairs giving him a *locus standi* to put the company's rights in suit. But it is just at this point that, owing to the course taken by the parties, the court is left almost entirely in the dark. Whether after the matters dealt with earlier in this judgment became known to the directors of the Amalgamated Collieries company any and what steps have been taken by that company to investigate the dealings and transactions of Johnson & Lynn Ltd. with it nowhere appears. The shorthand notes contain some chance references to inquiries by at least one Royal Commission which seems to have touched upon the relations of the companies, and they contain also a statement in argument by counsel that an offer was made on behalf of the Amalgamated Collieries company to allow an inspection of its books by the plaintiff which was not accepted. But no evidence was given that any sufficient investigation of the dealings of Johnson & Lynn Ltd. with the Amalgamated Collieries company had taken place out of court or that facilities for one had been offered. The minute book of the proceedings of directors was put in evidence, but it discloses nothing to suggest that an examination or inquiry was authorized or even mooted. As has already been stated, the whole question of the reason why the company did not put itself in motion to seek redress against the defendants Walter Johnson and Johnson & Lynn Ltd. has been by common consent excluded from pleading and proof in spite of its materiality to the plaintiff's title to maintain the action.

The claim to a general account was added by amendment at the trial, but none of the defendants was denied an opportunity to raise or prove any matter which might be considered to be made relevant by the amendment or to have become important. No objection, however, was taken that, until proof of some wrongful conduct on the part of those in control of the company in failing to seek an account, no order for a general account should be made at the suit of the plaintiff.

In all these circumstances it is not easy to decide what course the court should take in exercising what in some measure is a discretionary power. But the facts which have been proved or admitted in reference to the misapplication of the £2,000 on 25th October 1928, the charging prospectively and retrospectively of 2s. 6d. a ton on coal sold to the harbour authorities and the sale of the Ravensthorpe mining machinery to the company, when considered with the commissions taken on the purchase of commodities and the unfair allocation of rates, power, lighting and water charges and office expenditure, leave me with a strong impression that the interests of the Amalgamated Collieries company and its shareholders call for an inquiry into the dealings of the agents under the sales-management agreement and the selling-agency agreement since, on the death of Lynn, Walter Johnson took control.

To take a general account of those dealings before the Master in the ordinary way would, I think, involve a very cumbersome and, perhaps, an oppressive proceeding, a great part of which would serve little or no useful purpose. Special directions given under Order XXXII., rule 3, of the *Rules of the Supreme Court* of Western Australia might, perhaps, be framed which would lessen this difficulty. But the case appears to be one where the power given by sec. 50 of the *Supreme Court Act* 1935 might suitably be exercised. I should be disposed for my part to refer to a qualified auditor and accountant to be appointed by the court for inquiry and report the question whether in the course of, in connection with, in consequence of, or incidentally to, the execution of the powers, duties and functions (*a*) belonging to them under the management agreement, the defendant Walter Johnson from 12th September 1928 until 16th September 1929 and the defendant Johnson & Lynn Ltd. thereafter,

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and (*b*) belonging to the defendant Johnson & Lynn Ltd. under the selling-agency agreement after 16th September 1928, those defendants or either of them have obtained, received, retained or procured any moneys, credits or other benefits to which such defendants or defendant were not entitled as against the Amalgamated Collieries company without duly accounting therefor to the company, except the matters specifically dealt with by the declarations and orders contained in the judgment of the Chief Justice of Western Australia. If this course were adopted, directions might be given authorizing the referee to take an account or accounts if he thought necessary but without verification or vouching except where for special reasons he should so direct and, in any case, to proceed by an inspection and examination of the books of account of the three defendants, which should be prima facie evidence of the matters therein contained. The referee should be appointed from among persons proposed by the respective parties, and the order should authorize him to take evidence on oath and require the attendance of witnesses and the production of documents. The report would be made to the Supreme Court, to which the cause would be remitted to deal with all questions arising thereout, including any question depending on lapse of time in relation to any fresh liability disclosed.

Subject to such an order, I think that the result of the appeal and cross-appeal should be as follows :—

(1) The order for an account and payment contained in the judgment under appeal in respect of the rates, power, lighting and water charges and office expenses &c. thrown upon the Amalgamated Collieries company and the order for payment in respect of the £2,000 misapplied on 25th October 1928 with interest should be discharged. To this extent the cross-appeal should be allowed and otherwise dismissed.

(2) Either an order such as suggested or some other order for an account ; and to this extent the appeal should be allowed, but otherwise dismissed.

The declaration relating to the commission on coal supplied to the harbour authorities should be amended by inserting the words " or retained by " after the word " to " and before the words " the defendants Walter Johnson and Johnson & Lynn Ltd." If a referee

is appointed, I would also vary the orders for the particular accounts by substituting him for the Master as the person to take them.

The question of costs is one of difficulty. On the whole, I think the best exercise of our discretion, having regard to the extent to which each side should, in my opinion, fail and succeed in the appeal, is to make no order as to the costs of the appeal. The costs of all further proceedings would, of course, be disposed of by the Supreme Court.

McTIERNAN J. I agree that the appeal should be allowed in part and that the cross-appeal should be allowed in part, and that the judgment of the Chief Justice of Western Australia should be varied in the manner stated in the order to be read by the Chief Justice. The judgments of the Chief Justice and my brother *Dixon* have elaborately dealt with all the questions with which the appeal and cross-appeal are concerned, and the divergence between them is not such as leads them to different conclusions as to the order to be made. There is nothing that can be usefully added, and, as I agree substantially with the reasons of my brother *Dixon*, it is not necessary for me to add another judgment to the two preceding judgments, which are necessarily lengthy.

LATHAM C.J. The members of the court all think that the circumstances of this case show that the very divergent interests of the various parties to the suit have this at least in common: their interests will, although for different reasons, be much better served than they would by proceedings in the Master's office, if a skilled auditor and accountant be appointed as referee with sufficient power to make an adequate investigation of the matters which, according to our decision, must be inquired into. During the hearing of the appeal in Perth we suggested the possibility of it becoming desirable to appoint such a referee, but it appeared that some difficulty in the selection of an acceptable person was apprehended.

The minutes of an order will be read which the court is prepared to make in default of immediate agreement by the parties upon a person or upon some other course. But we all think that it is desirable to afford the parties an opportunity both of agreeing upon

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the referee and of speaking to the minutes before they are pronounced as a final decree.

At some suitable time and place the court will hear the parties upon the form of decree and will be prepared to adjourn into chambers the discussion of any details which the parties would prefer to deal with in chambers.

Allow appeal in part. Allow cross-appeal in part. Judgment of Northmore C.J. varied as follows :—(a) In the declaration contained in the judgment relating to the commission charged on coal supplied to the Fremantle, Bunbury and Geraldton Harbour Works and the Fremantle Harbour Trust insert the words "or retained by" after the word "to" and before the words "the defendants Walter Johnson and Johnson & Lynn Ltd." (b) Discharge that part of the judgment which orders payment to the defendant Amalgamated Collieries of W.A. Ltd. of the sum of £2,000 with interest (being the sum found to have been misapplied on or about 25th October 1928). (c) Discharge that part of the judgment which orders an inquiry and account in respect of rent, electric light and power, water and municipal rates, stationery, cleaning and clerical work cast upon the defendant, Amalgamated Collieries of W.A. Ltd., and orders payment of the amount found due. Order that a qualified auditor and accountant be appointed under sec. 50 of the Supreme Court Act 1935 (W.A.) as a referee to inquire into and report upon the matters hereinafter referred to him. Let such referee be chosen by the agreement of the parties, or, in default of their agreement, by the Supreme Court and let the parties be at liberty to propose the names of qualified persons ready and willing to act as such referee. Let the rate and method of remuneration of such referee be agreed between him and the parties, or, in default of agreement with him by both parties, let the same be prescribed in the order appointing him and let the total amount thereof be fixed on the completion of the reference by or under an order of the Supreme Court. Let the plaintiff appellant in the first instance be responsible to the referee for payment of

such remuneration and let the plaintiff during the course of such reference make such periodical or other payments to the referee on account of remuneration as the Supreme Court may direct by the order of appointing him or by orders made from time to time. Let the remuneration of the referee so paid form part of the costs of the reference and be subject to the reservation herein contained of costs for the Supreme Court. Refer to such referee the taking of the accounts and the making of the inquiries which by the judgment of Northmore C.J. as hereinbefore varied are ordered to be taken before the Master and let the said judgment be varied accordingly by substituting such referee for the Master. Refer to such referee for inquiry and report the question whether in the course of in connection with in consequence of or incidentally to the execution of the powers, duties and functions which under the "management agreement" belonged to the defendant Walter Johnson from 12th September 1928 until 16th September 1929 and belonged thereafter to the defendant Johnson & Lynn Ltd., and of those which under the "selling-agency agreement" belonged to Johnson & Lynn Ltd., those defendants or either of them have since 12th September 1928 obtained, received retained or procured any moneys, credits or other benefits to which such defendants were not or such defendant was not entitled as against Amalgamated Collieries of W.A. Ltd. without duly accounting therefor to such company; excepting, however, the matters specifically dealt with by the declarations and orders contained in the judgment of the Chief Justice as hereinbefore varied. Let the referee be at liberty for the purpose of such reference to take such account or accounts as he may think necessary and to give any directions to the parties or either of them as to bringing in accounts or otherwise that may appear desirable or requisite for the proper taking of such accounts. Let the accounts ordered to be taken by the judgment of Northmore C.J. as hereinbefore varied and any account directed by the referee be taken without verification or vouching except in so far as for any reason the referee shall otherwise direct and both in

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the taking of accounts and in carrying out the reference let the referee proceed by inspection and examination of the books of account and documents of the defendants Walter Johnson and Johnson & Lynn Ltd., and Amalgamated Collieries of W.A. Ltd., and let such books and documents be treated as prima-facie evidence of the matters therein contained. Let the referee for the purpose of the matters and accounts referred to him be empowered to take evidence on oath and to require the attendance of witnesses and have and exercise the powers which are or may be conferred by law on a refereee appointed under sec. 50 *of the Supreme Court Act* 1935. *Let the referee's report be made to the Supreme Court. Remit the cause to the Supreme Court for further consideration and for the execution of this order and to deal with all questions which may arise in the cause including any question which may be raised in relation to the existence of any liability which may be disclosed by the referee's report or in the course of the proceedings before him other than the existence of a liability in relation to the matters specifically dealt with in the judgment of the Supreme Court as varied by this judgment. Let the parties respectively be at liberty to apply to the Supreme Court as they may be advised. Confirm the order of Northmore C.J. as to the costs of the action up to and including the date of his Honour's judgment. Reserve for the Supreme Court all further questions of costs including the costs of the reference and any question of costs arising in or out of the reference or of further proceedings in the Supreme Court. Let the parties abide their own costs of and incidental to the appeal and cross-appeal to this court except the costs of and incidental to the application to transfer the appeal reserved by the order of Dixon J. which said costs shall be paid by the appellant to the respondents Walter Johnson and Johnson & Lynn Ltd.*

Solicitors for the appellant, *Jackson, Leake, Stawell & Co.*

Solicitors for the respondents, *Downing & Downing; Parker & Parker.*