the exceptions should be reversed, I am loth to give any opinion on the facts of the case, because it must go to a new trial. That is unfortunately the result of the course which has been taken below. After the learned Judge had expressed his strong opinion against the pursuers, it could only have been with the consent of the other party, that the jury could have been called upon to assess the damages, if any, which ought to be given to the pursuers. It is greatly to be lamented that that course was not taken, for the purpose of avoiding a further trial upon the event which is now so likely to take place.

My Lords, no person can read the evidence of Bernard O'Neill, together with the rest of the evidence, and not have a very strong opinion as to the delay which was interposed by the company, or by Snedden, the manager of the company, for whom the company undoubtedly are responsible in this respect, though we, as my noble and learned friend has justly said, know too little of what a roadsman is, to accurately ascertain how far the company are responsible for what the roadsman did or omitted to do. Snedden was the manager of the company, and, beyond all doubt, for his negligence the company are answerable. It is clear to me, upon reading this evidence, that he did not take proper precautions with respect to the stone—that Bernard O'Neill, who had got directions, had not got such directions as to make him speedily remove it. He says—"I did not go to take it down—I got an empty hutch for him, (that is, for Paterson,) and both went in together. He yoked to fill hutch and take away coal. I told him to do so first —then when filled, I intended to take down the stone, but it fell first." It is quite clear that they had not seen the danger, as appears by what Snedden said to Paterson, in a right point of view; though what Snedden observed with respect to Paterson making his bed, did not apply to that stone in particular, it applied to the general state of the roof. They felt a great deal too much confidence in the roof to make them give the directions which they ought to have given. (His Lordship then said, he hoped what he had said would induce the defenders to avoid a new trial, by making a timely offer to the appellants.)

Hogdson asked for the costs which the appellants had incurred in the Court below, by reason of the exceptions being wrongly disallowed, and said that costs had been allowed in *Fraser* v. *Hill*, *ante*, p. 232.

Bovill, *contra*.—In case of bills of exceptions there are never any costs given, whether the party excepting succeeds or not. In *Fraser* v. *Hill* the Court below had allowed the exceptions, but this House disallowed them, the consequence of which was that then the verdict stood.

LORD CHANCELLOR.—Yes, that was so; upon the disallowance there may be costs, but there are no costs upon the allowance of the exceptions, because they question something which the Judge has done, and it is the fault of the Judge. The cause will be remitted back to the Court of Session, with a declaration that the exceptions ought to have been allowed.

Interlocutors reversed, and cause remitted with a declaration.

Alexander Simson, *Appellants' Solicitor*.—Robertson and Simson, *Respondents' Solicitors*.

JULY 20, 1854.

THE ABERDEEN RAILWAY COMPANY, *Appellants*, *v.* Messrs. BLAIKIE BROTHERS, *Respondents*.

Railway—Contract—Director selling to Company—Copartnery—Stat. 8 Vict., c. 17, §§ 88, 89.

Held (reversing judgment), *That a contract entered into by a manufacturer for the supply of iron furnishings to a railway company, of which he was a director or the chairman at the date of the contract, was invalid, and not enforcible against the railway company.*

A director of a railway company cannot legally enter into a contract either personally or as one of a firm to supply goods to such company, and nothing in the Companies Clauses Consolidation Act makes valid such contract.[1]

The summons in this case set forth—"That Alexander Gibb, civil engineer, Aberdeen, acting as resident engineer for or on behalf of the Aberdeen Railway Company, and as authorized by them, having prepared a specification of chairs required for the permanent road of the line of railway undertaken to be constructed by the said railway company, and having, on or about 19th January 1846, being the date of said specification, communicated the same to John Blaikie the youngest, residing in Aberdeen, as acting for and on account of the pursuers, with a view to the pursuers contracting for the manufacture and supply of the said chairs, the said John Blaikie the youngest, acting as aforesaid, on the 6th day of February 1846, addressed an offer to the

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[1] See previous report 14 D. 66. S. C. 1 Macq. Ap. 461; 26 Sc. Jur. 628.

said Alexander Gibb to furnish the permanent chairs for the Aberdeen Railway agreeably to the plan and specifications, but delivered in Aberdeen, for the sum of £8 10*s.* per ton: That, on the same day, the said Alexander Gibb, acting for and on account of the defenders, addressed to the said John Blaikie the youngest, on behalf of the pursuers, the following acceptance of the said offer:—'As authorized by the directors of the Aberdeen Railway Company, I hereby accept of your offer for the supplying of the chairs for the permanent road of the Aberdeen Railway, at the rate of £8 10*s.* per ton, delivered at Aberdeen—the chairs to be supplied in every respect of the quality and dimensions stated in the specifications, of date the 19th January last, signed by me; and the quantity to be performed, and to which this acceptance is meant to refer, is also stated in that specification, and the period of delivery:' That the quantity of chairs stated in the said specification is 78,131 joint chairs, and 312,531 intermediate chairs;" and the specification further bore, that the whole chairs should be delivered within eighteen months of the date thereof, the first delivery to commence at the end of three months therefrom: That, from the state of the works on the railways, the chairs were not required to be furnished so rapidly as was originally contemplated: "That, on 9th June 1846, before any of the said chairs had been required by the defenders, or furnished by the pursuers," Mr. Gibb wrote Mr. David Blaikie, one of the pursuers, and the managing partner of the firm, stating that Mr. Cubitt, the defenders' principal engineer, was anxious that, in executing the contract, the pursuers should adopt Ransome and May's patent mode of casting the chairs: "That, on 12th June 1846, the said David Blaikie, as managing partner foresaid, wrote to the said Alexander Gibb agreeing to adopt the said patent mode of casting the chairs: That the whole quantity of chairs contracted for by the pursuers, as aforesaid, when reduced to weight, amounted to about 4150 tons of chairs: That the pursuers have already implemented their part of said contract, to the extent of furnishing and delivering to the defenders 2710 tons of chairs manufactured in terms of the foresaid specification, and subsequent agreement as to the patent mode of casting:" That the pursuers were ready to implement their part of the contract by delivering the remaining chairs, but the defenders refused to accept the same. And the summons concluded for decree against the defenders, ordaining them to implement their part of the contract by receiving the remaining chairs at the contract price.

The defenders admitted that they had received a certain amount of chairs, but denied the contract alleged by the pursuers. They stated—that during the early part of 1846, Mr. Thomas Blaikie, a partner of the pursuers' firm, was a director of the Aberdeen Railway Company, and remained so till 25th February 1846, when he resigned. And farther, that the alleged agreement libelled was not entered into with the knowledge, sanction, or authority of the defenders, or of the board of directors then existing; nor was any such agreement ever authorized or sanctioned by the company or board. And they *pleaded*, *inter alia*—2. The contract or agreement libelled not having been entered into between the parties, the action was groundless. 3. Under the Companies Clauses Act, any such contract or agreement, to which the pursuer Mr. Thomas Blaikie was a party while he remained a director of the company, was illegal, and could not be enforced.

The pursuers proposed the following issue:—"Whether, in the course of the year 1846, the defenders contracted with the pursuers for the supplying of 78,131 joint chairs, and 312,531 intermediate chairs, for the permanent road of the Aberdeen Railway, at the rate of £8 10*s.* per ton, delivered at Aberdeen; and whether the defenders failed to implement the said contract, to the extent of refusing or failing to take from the pursuers, for the said railway, joint and intermediate chairs to the amount of 1440 tons or thereby, remaining to be furnished under the said contract, or to any extent, to the loss, injury, and damage of the pursuers?—Damages laid at £7000."

The defenders proposed the following counter issue:—"Whether, in the month of January and thereafter, till on or about the 25th February 1846, at the date or dates of the contract or contracts sued on, or any of them, alleged to have been entered into, by or on behalf of the pursuers Blaikie Brothers, with the Aberdeen Railway Company, the pursuer Thomas Blaikie, a partner of the said Blaikie Brothers, and as such, interested in their contracts and dealings, was a director of the said Aberdeen Railway Company?"

The Court of Session approved of the first issue and refused the counter issue, holding that the circumstance of Mr. Thomas Blaikie being a director was not fatal to the validity of the contract.

The railway company appealed on the following grounds—"1. That the interlocutor was erroneous, in finding that the fact of Blaikie being a director at the date of the alleged contract of the 6th February 1846, is not fatal to the validity of the contract. 2. That the contract was invalid, in respect of Blaikie having been a director and chairman at the date the contract is alleged to have been entered into, and accordingly, that it could not be enforced at his instance, or by the company of which he is a partner. 3. That the interlocutor approved of an issue which is not the proper issue, and because it did not specify the particular date of the contract, which it allowed the respondents to prove." Authorities cited:—*York Buildings Company*,

Mor. 13,367; *Jeffrey* v. *Aitken*, 4 S. 722; *Hamilton* v. *Wright*, 1 Bell's App. 574; *Whichcote* v. *Laurence*, 3 Ves. 740, with the note upon it in 1 Hovenden's Notes to Vesey, Jr., p. 422; *Greenlaw* v. *King*, 3 Beav. 49; *Ex parte Lacy*, 6 Ves. 625; and *ex parte James*, 8 Ves. 337; *Att.-Gen.* v. *E. Clarendon*, 17 Ves. 500; *Morse* v. *Royal*, 12 Ves. 372; *Glen* v. *Pearson*, March 6, 1817, F. C.; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Leys, Masson and Co.*, 5 W. & S. 384.

Sol.-Gen. Bethell, and *E. Gordon*, for appellants.—The third plea in law of the defenders, the railway company, was a good defence to this action, inasmuch as it alleged that the contract was invalid. By the general law of Scotland a contract between a director of a railway company and the company is invalid on the broad principle, which must prevail in all laws, that no man can serve two masters—a trustee cannot put his interest in conflict with his duty. The rule was long ago well recognized in the law of Scotland by the leading case of *Mackenzie* v. *the York Building Company*, Mor. 13,367, and 8 Bro. P. C. 42. Such was also the doctrine of the civil law.

[LORD BROUGHAM.—The civil law, however, goes much further than we do in England, for it actually prohibits such contracts altogether.]

Yes, unfortunately some qualifications of the rule have been admitted in England. In *ex parte Lacy*, 6 Ves. 625, Lord Eldon seemed to lay down the rule very broadly, and regretted that any relaxation of the rule had been allowed. In that case, however, he said a solicitor of a bankrupt estate was absolutely prohibited from purchasing the estate. Now, a director of a railway company stands exactly in the same position of trust and confidence to the shareholders as a solicitor did to his client in the bankruptcy; and the case of a solicitor was fully settled in *Mackenzie* v. *York Building Company*. The Court below, it was true, seemed to treat a director as being on the same footing as a partner; but that was quite a mistake. In a partnership each partner had the immediate control of the partnership affairs; but it was not so in a railway company, where the directors must necessarily have the sole and exclusive control. Again, in a partnership there is a *delectus personæ*, but there is none in a company whose shares are transferable by sale. In fact, a director is not on the footing of a partner at all, but of a statutory trustee, and his duties very much resemble those of a solicitor. The law generally on such subjects is entirely the same in Scotland and England.—*Home* v. *Pringle*, 2 Rob. Ap. Ca. 384; Kames' Eq. B. 2, C. 3; *Crawford* v. *Hepburn*, Mor. 16,208; Ersk. i. 7, 19; *Jeffrey* v. *Aitken*, 4 S. 722; *Hamilton* v. *Wright*, 1 Bell's Ap. 574. These authorities clearly shew that the general rule has been strictly enforced, or at least recognized in Scotland, and no such qualifications have been permitted there as have found their way into England. The rule clearly applies to the present case, and it must be declared that such contracts between directors and their companies are entirely void.

[LORD CHANCELLOR.—Surely the contract ought not to be void, if beneficial to the beneficiary?]

Yes it should, whether so or not. The evils of allowing any exception have been often seen and regretted in England. In *Fox* v. *MacGreth*, 2 Brown's Ch. C., 400, (also noticed in *ex parte Lacy*, 6 Ves. 625,) which is the leading case on the subject, Lord Thurlow, who decided that case, has been corrected by Lord Eldon. It seems a habit has grown up of the Court in such cases first directing an inquiry as to whether the relation of trustee and beneficiary has ceased? and, secondly, if there has been acquiescence on the part of the beneficiary? But the moment such inquiries are permitted the rule is frittered away. Lord Eldon in *ex parte James*, 8 Ves. 337, did not seem to countenance these exceptions; but Lord Chancellor Sugden, in *Murphy* v. *O'Shea*, 2 Jones & L. 453, said the contract would be good if the trustee dealt at arm's length—which is evidently a loose and dangerous expression, and shews how low the doctrine has fallen. How can any Court ever correctly ascertain whether or not the relation of trust has entirely ceased, or how far the trustee may not have taken undue advantage of his position? The secret influence of the connection is too subtle and inscrutable for the machinery of any Court to detect. In *Benson* v. *Heathorn*, 1 Y. & C. 326, V.-C. Knight Bruce rightly repudiated these qualifications.

[LORD BROUGHAM.—In *Hunter* v. *Atkyns*, 3 Myl. & K. 113, Sir J. Leach held that a third person must be interposed between the parties.]

That is only another mode of saying that the relation of trust must have ceased. Fortunately, however, the law of Scotland is not embarrassed by these refinements or perversions of the general rule, and the opportunity should now be taken of putting that law on its right footing. As to the Companies Clauses Act, 8 and 9 Vict., cap. 17, §§ 88 and 89 were intended to do two things—one to render the director who so contracted incapable of continuing director, and the other to render the contract void. It would entirely defeat the object of the statute if a director, after securing his contract with the company, should be able immediately to retire from the directorship, carrying with him all the benefits which he had acquired by his position. If the only effect of the statute is, that the director ceases to be a director, and the contract remains good, the 88th section seems in effect struck out. The true construction of such statutes, however, which impose a penalty on doing a particular act, is to hold that they absolutely prohibit and render void the act, against which the penalty is directed.—Bell's Pr., § 36; Ersk. i. l. 50. (There were also objections to the form of the issues not material to be stated.)

Rolt Q.C., and *Macfarlane*, for respondents.—The Statute 6 Geo. IV., cap. 120, § 11, requires the grounds of action and of defence to be stated in the form of pleas in law, and we cannot travel beyond these in this appeal, and raise points which were not raised in the Court below. Now, the third plea in law of the defenders does not raise the general question of law—whether a contract made by a director of a railway company and that company is invalid? The sole point raised is—whether the Companies Clauses Act so renders it invalid? The general question was never raised in the Court below, and cannot be raised now. The Statute 6 Geo. IV. is conclusive. [LORD CHANCELLOR.—But how far do you carry that? Suppose, for instance, the contract bears *ex facie* to be *e turpi causa*, would the statute prevent you taking advantage of that here?]

The intention of that statute was to prevent surprise, and that points not raised in the Court below should not be raised here. Every liberty is given to amend the pleadings. Here there might have been an amendment, but, as it stands, the plea clearly restricts the question to the specific operation of the Companies Clauses Act. If, then, the question turns on the construction of the Companies Clauses Act, it so happens that a recent case decided in the Common Pleas on the two corresponding sections of the English Act conclusively proves, that the contract is not made void by that statute, but that the only consequence is, that the director ceases to be a director.—*Foster* v. *Oxford Rail. Co.*, 13 C.B. 200. So that no argument is necessary on that head. But, even admitting the general question of law to be sufficiently raised, this was not the ordinary case of a trustee, but of a partner. By the law of Scotland a partner may sell to a firm of which he is a partner. It was said by the other side, that, though the contract might be good at common law, it was bad in equity. But the leading case of *Fox* v. *MacGreth*, 1 White & Tudor's L. C. 72, shews that, even in equity, it is only so long as the relation of trust continues that the contract is bad. In such cases as *ex parte Lacy*, *York Building Company* v. *Mackenzie*, *Benson* v. *Heathorn*, and *Hamilton* v. *Wright*, the relation still existed at the time the contract was made. As to the passage in Kames' Eq., B. 2, C. 3, it is very vague, and Ersk. i. 7, 19, refers to the case of minors who stand on a different footing, though even as to them lesion must be proved. But there are many cases directly in the teeth of what is contended for by the appellants — as *Coles* v. *Trecothick*, 9 Ves. 234; *Campbell* v. *Walker*, 5 Ves. 677; *Murphy* v. *O'Shea*, 2 Jon. & L. 425; *Selsey* v. *Rhoades*, 2 Sim. & St. 41; *Gibson* v. *Jeyes*, 6 Ves. 266. These cases shew that, if you put an end to the relation of trust, and allow a reasonable time to elapse, and can shew that the transaction is quite fair, the contract is good, and even acquiescence or homologation will bar all relief. And at the most, it is only a voidable, and not a void contract; and being voidable, it may be homologated, as we say it has been here. *Fraser* v. *Hankey*, 9 D. 415; Ersk. iii. 3, 47; 1 Bell's Com. 144.

Sol.-Gen. Bethell replied.—As to the third plea, the rules of universal law do not, any more than those of morality, require to be specially pleaded, and the point of general law is sufficiently raised here, directly or impliedly, in the defences and the pleas in law. On the general question the other side rely on the analogy of partnership, and say—a director is a partner, but this is a false analogy. Directors are the agents of a body incapable themselves of managing their affairs, and by statute such agents must be appointed. The shareholders are utterly helpless, but they have a right to the services of all their directors. The validity of the acts of a director does not depend on the consent or homologation of the shareholders, for Alderson B. said, in *Macgregor* v. *Dover and Deal Rail. Co.*, 18 Q. B. 618, that the consent of the whole of the shareholders could not make valid a contract in itself illegal and against public policy. As to the case of *Foster* v. *Oxford, &c., Rail. Co.*, that was merely a case arising in a Court of Common Law, which Court, by its very constitution, must remain ignorant of the law of trusts, and therefore could not give effect to the doctrine we contend for. That case was argued exclusively on the construction of the Companies Clauses Act, and can be no authority in a Court like the Court of Session, which is able to entertain questions of equity as well as of law, and can grant entire relief to litigants. But even, notwithstanding that case, the construction there given to the act was erroneous, for § 88 recognizes in terms only what would be the common law without any statute. At all events, with the aid of the summons of reduction brought by the appellants, and which is repeated in the present action, the general ground of law is sufficiently brought out, and the House must now determine whether a director of a railway company can so abuse his trust as one of the respondents has done here.

LORD CHANCELLOR CRANWORTH.—This was an appeal heard in the last session of parliament, against the interlocutor of the Court of Session, dated 15th Nov. 1851, and the issue allowed by the Court. The interlocutor is this—(reads interlocutor). Then the form of the issue is given, which is—"Whether, in the course of the year 1846, the defenders contracted with the pursuers for the supplying a certain quantity of iron chairs for the railway at a certain price; and whether the defenders failed to implement the said contract to the extent of refusing or failing to take from the pursuers a certain quantity of such iron chairs, to the loss, injury and damage of the pursuers?"

The material facts are as follows:—Thomas Blaikie and his two brothers are iron founders at Aberdeen. From the time of the formation of the railway company,—the appellants' company,

—in July 1845, up to the 24th Feb. 1846, Thomas Blaikie was a director, and, from the 16th Sept. 1845, chairman of the board of directors of the company. On 24th Feb. 1846 he resigned his situation as director. On the 12th March 1849 Messrs. Blaikie Brothers, the now respondents, raised an action in the Court of Session against the appellants, alleging that on the 6th Feb. 1846 an agreement was come to, by which the respondents bound themselves to supply to the appellants a large quantity of iron chairs for the use of the railway.

The contract as set out in the summons is this:—It states that John Blaikie, the youngest, (as he is called,) residing in Aberdeen, as acting for and on account of the pursuers, with a view to the pursuers contracting for the manufacture and supply of the said chairs, on the 6th February 1846, addressed an offer to the said Alexander Gibb, (who is represented as having been the agent of the Aberdeen Railway Company,) to furnish the permanent chairs for the Aberdeen Railway, agreeably to the plans and specifications, but delivered in Aberdeen, for the sum of £8 10*s*. per ton. That on the same day the said Alexander Gibb, acting for and on account of the defenders, and as authorized by them, addressed to the said John Blaikie, the youngest, on behalf of the pursuers, the following acceptance of the said offer:—"As authorized by the directors of the Aberdeen Railway Company, I hereby accept of your offer for the supplying of the chairs for the permanent road of the Aberdeen Railway at the rate of £8 10*s*. per ton, delivered at Aberdeen—the chairs to be supplied in every respect of the quality and dimensions stated in the specifications of date 19th January last, signed by me; and the quantity to be performed, and to which the acceptance is meant to refer, is also stated in that specification, and the period of delivery."

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

To this summons the appellants put in defences, and the pleas were as follows:—"1. The summons is not relevantly or sufficiently framed, in so far as it does not set forth any power or authority on the part of Mr. Gibb to enter into the contract alleged." That arose from the summons, as it was originally framed, not alleging that Mr. Gibb was authorized to enter into the contract. But that was afterwards amended, and that plea falls to the ground. "2. The contract or agreement libelled having not been entered into between the parties, the action is groundless. 3. Under the Companies Clauses Act, any such contract or agreement to which the pursuer Mr. Thomas Blaikie was a party while he remained a director of the company, was illegal, and cannot be enforced. 4. Any contract or agreement contemplated having at the utmost been limited to the amount of 3000 tons weight of chairs, while the defenders have already taken and paid for a larger quantity, no further claim is competent to the pursuers. 5. The pursuers are in every view bound to give allowance for the quantity of 908 tons understated in the summons as the quantity already taken by the defenders."

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

In this state of the record the Lord Ordinary appointed the parties to prepare and lodge issues. This they did, and the Lord Ordinary then referred the case to the Court. The Court thinking, as was most reasonable, that before the proposed issue was tried the third plea ought to be disposed of, permitted the appellants to print the letters and other documents which raised the question on that plea. This was done, and the Court, not thinking that these documents shewed a case which sustained the defence raised by the third plea, proceeded to settle the terms of the issue by their interlocutor of 15th Nov. 1851.

Against this interlocutor the railway company has appealed, contending that the third plea in defence was a complete bar to the claim of the respondents, and so that they, the appellants, ought to have been assoilzied in the action brought against them.

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

Messrs. Blaikie, on the other hand, contended, *first*, that no such defence is set up by the pleas in defence, for that the third plea is not founded on any general doctrine as to the duties of trustees, but on the special provisions of the Companies Clauses Act, and that those clauses do not support the proposition contended for; and, *secondly*, they say, even supposing any general

question to be properly raised by the plea, still that no such general rule exists in Scotland which would prevent a director from entering, on behoof of the company whose affairs he was managing, into a contract with a firm of which he is a member.

Disregarding for the present the statute, I will proceed to consider the more general question, which divides itself into two branches,—*First*, Is any such general question raised by the pleas? and, *secondly*, If it is, then what is the law of Scotland on this subject?

The language of the third plea is as follows:—"Under the Companies Clauses Act any such contract or agreement, to which the pursuer Mr. Thomas Blaikie was a party while he remained a director of the company, was illegal, and cannot be enforced." The respondents contend that this plea raises no question as to the invalidity of the contract arising from Mr. Blaikie's situation as director, except so far as that invalidity is created by the statute, and so that the general law on this head is not properly in controversy. But is this so? In order to test the accuracy of this argument, we must assume the law to be such as the appellants contend for, namely, that, as a general rule, no director can enter into a contract on behalf of the company with a firm in which he is a partner. What the plea insists on is, that the contract entered into by Mr. Blaikie, when he was director, is incapable of being enforced, because it is avoided by an act of parliament. The proposition itself—that is, the invalidity of the contract, by reason of the character which Mr. Blaikie sustained—is distinctly brought forward. The objection *ex hypothesi* is valid; but a wrong reason is alleged in its support. I confess this seems to me to be immaterial. The object of pleading is to compel the litigant parties to state distinctly the facts on which their title to relief rests. If this is done, the Court is bound to apply the law. The only error (assuming the law to be such as the appellants contend it to be) is, that the words—"under the Companies Clauses Act," with which the third plea commences, ought to be struck out. But surely this cannot invalidate the plea, so as to prevent the Court from applying the law to the facts which correctly appear.

I am aware that Lord Fullerton appears to have been of opinion, that the question as to the validity or invalidity of the contract, irrespective of the statute, was not raised by the pleas in law. With all deference to the opinion of that very learned Judge, I cannot concur in the opinion (perhaps I ought rather to say the doubt) which he there expressed—an opinion which, in the view which he took of the general question, was in truth uncalled for. I must advise your Lordships to hold, that, if, on general principles of law, the contract was one incapable of being enforced, there is sufficient on the pleadings to enable your Lordships to decide in conformity with those principles.

This, therefore, brings us to the general question—whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner?

The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust*, which it was impossible to obtain. It may sometimes happen that the terms on which a truster has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted.

The English authorities on this subject are numerous and uniform. The principle was acted on by Lord King in *Keech* v. *Sandford*, Sel. Cas. Ch. temp. King, 61; and by Lord Hardwicke in *Whelpdale* v. *Cookson*, 1 Ves., Senr. 9; and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very able and learned Judge in *ex parte James*, 8 Ves. 337.

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

Was, then, Mr. Blaikie so acting in the case now before us? If he was, did he, while so acting, contract, on behalf of those for whom he was acting, with himself? Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a director, but, if that was necessary, the chairman of the directors. In that character, it was his bounden duty to make

the best bargains he could for the benefit of the company. While he filled that character, viz., on the 6th Feb. 1846, he entered into a contract on behalf of the company with his own firm, for the purchase of a large quantity of chairs at a stipulated price. His duty to the company imposed on him the obligation of obtaining these iron chairs at the lowest possible price. His personal interest would lead him in an entirely opposite direction—would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed; and I see nothing whatever to prevent its application here. I observe that Lord Fullerton seemed to doubt, whether the rule would apply where the party, whose act or contract is called in question, is only one of a body of directors, not a sole trustee or manager. But with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty. And whether he was the sole director, or only one of many, can make no difference in principle. The same observation applies to the fact, that he was not the sole person contracting with the company. He was one of the firm of Blaikie Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the company as he could induce them to make.

It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to the case of the *York Buildings Company* v. *Mackenzie*, 8 Brown's Parl. C. 42, decided by your Lordships in 1795. There the respondent Mackenzie, while he filled the office of common agent in the sale of the estates of the appellants, who had become insolvent, purchased a portion of them at a judicial auction, and though he had remained in possession for about eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet this House held that, filling, as he did, an office which made it his duty both to the insolvents and their creditors to obtain the highest price, he could not put himself in the position of purchaser, and so make it his interest that the price paid should be as low as possible. This was a very strong case, because there had been acquiescence for above eleven years. The charges of fraud were not supported, and the purchase was made at a sale by auction. Lord Eldon and Sir W. Grant were counsel for the respondent, and no doubt everything was urged which their learning and experience could suggest in favour of the respondent. But this House considered the general principle one of such importance and of such universal application, that they reversed the decree of the Court of Session and set aside the sale.

The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage:—"*Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt.*" In truth the doctrine rests on such obvious principles of good sense, that it is difficult to suppose that there can be any system of law in which it would not be found.

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

Messrs. Blaikie did not say to the directors in June—We have no binding contract with you, but we are now willing to contract. What they said amounted in fact to this—We have a contract which was entered into in February, but we are ready, if you desire, to modify it. To hold that this, in any manner, cured the invalidity of the original contract, would be to open a wide door for enabling all persons to make the rule in question of no force.

It was further contended, that whatever may be the general principle applicable to questions of this nature, the legislature has, in cases of corporate bodies like this company, modified the rule. The statute—that is, the Companies Clauses Act,—it was argued, has impliedly if not expressly recognized the validity of the contract by enacting, that its effect shall be to remove the director from his office,—indicating thereby that a binding obligation would have been created, which would render the longer tenure of the office of director inexpedient. And your Lordships were referred to a case, *Foster* v. *The Oxford, Worcester, and Wolverhampton Railway Company*, 13 C. B. 200. That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your Lordships) to pur-

chase from them a quantity of iron. The defendants pleaded that at the time of the contract one of the plaintiffs was a director of their company. And to this plea there was a general demurrer. That such a contract would in this country be good at common law is certain. The rule which we have been discussing is a mere equitable rule, and therefore all that the Court of Common Pleas had to consider was, how far the contract was affected by the statute. The decision was, that the statute left the contract untouched, and that its operation was only to remove the director from his office. The 85th and 86th sections of the English Statute 8 and 9 Vict., c. 16, on which the Court proceeded, were in the same words as the 88th and 89th sections of the Scotch Statute, and the counsel at your Lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All which the Court of Common Pleas decided was, that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. That decision will not help the respondents, unless they can go further and shew, that the statute had the effect of making valid a contract, which is bad on general principles, enforceable here only in equity, and not recognized in our Courts of common law. I can discover no ground whatever for attributing to the statute any such effect. Its provisions will still be applicable to the case of directors who become interested in contracts as representatives or otherwise, and not by virtue of contracts made by themselves.

I have therefore satisfied myself that the Court of Session came to a wrong conclusion, and that the defender's third plea was a sufficient answer to the pursuer's case, and so that the appellants ought to have been assoilzied. I therefore move your Lordships that this interlocutor should be reversed.

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

The cases which have been referred to of *Whelpdale* v. *Cookson*, 1 Ves. Senr. 9, and chiefly the case of *ex parte James*, in Bankruptcy, clearly lay down what the law of England upon this point is. And Lord Eldon, either in that case or in one of the others, in *Campbell* v. *Walker*, or in *ex parte Lacey*, goes even further than Lord Hardwicke did in *Whelpdale* v. *Cookson*, and considers (though he expresses it, no doubt, with the respect due to that eminent Judge, rather as a grave doubt than as a well-matured opinion) that Lord Hardwicke did not go far enough in giving effect to this principle, when he said that it was possible, that the assent of the creditor might validate the sale.

Now, how far the two systems of law are the same upon this very important question appears not only from that which my noble and learned friend has adverted to, namely, the case of *The York Buildings Company* v. *Mackenzie*, which is the ruling case upon this subject, and which was decided upon an appeal from Scotland, and according to the principles of Scotch law in this House, but it also appears from the fact that in that case a distinct reference was made, at least in the argument at the bar, to the English law authorities, and to the very case of *Whelpdale* v. *Cookson*. The case of *ex parte James* could not have been referred to, because it was decided some years afterwards, but the case of *Whelpdale* v. *Cookson* is referred to in the argument at the Scotch bar, as well as the passage in the Digest from the Roman law which my noble and learned friend has read.

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

My Lords, the case of *Mackenzie* was, as my noble and learned friend has observed, after eleven years of possession, and it is remarkable, too, that there was no fraud whatever found imputable to the party—Mr. Mackenzie the purchaser—in that case. I think that in the account of the subsequent proceedings in the case, though not in the Court below, it appears, that so entirely *bonâ fide* was Mr. Mackenzie's possession found to be, that the rule of the civil law, happily the rule in Scotland, though most unfortunately never introduced into our jurisprudence, namely, that "*fruges bonâ fide perceptæ et consumptæ*" are to be held to be the property of the party who is ultimately held not to have the title, was applied in the case of *Mackenzie*. So entirely free from all imputation of fraud was he found to be, that he was allowed not merely to remain in undisputed and undisturbed possession of the rents and profits of the estate during these eleven years, but up to the period of the appeal; because the rule of *bonâ fide* consumption applies not only up to the time of a decision against him in the Court below, but up to the final decision of the Court of Appeal. And accordingly Mr. Mackenzie's *bona fides* was found to be so unimpeachable in the case, and his conduct in the whole transaction was found to

be so entirely without fraud, that not only did the Court below find the other party liable to costs because they had charged him with fraud, which the Court at first decided in his favour, but afterwards he was adjudged to have the whole of the expenses allowed to him to which he had been put in ornamental improvements upon the estate. That is certainly one very strong instance of the application of the rule; perhaps it is stronger than any other within our recollection, because in that case it clearly shews that so entirely was the opinion of the Court in favour of the rule, that even while they held that the transaction could not be sustained, but that his purchase was invalid, they nevertheless decreed him possession of the rents and profits, and also to be allowed for the expenses of improvements.

In that case, my Lords, I must also observe, that it was not merely the decision of this House which set the Court below right upon a point of Scotch law, as it has once and again done; but the Scotch law appears to have been by no means distinctly maintained by the Court below to be, as it was ultimately found not to be by your Lordships' decision, for, in the first instance, they decided against the party, and repelled the reasons for reduction. It was an action of reduction for setting aside the sale, and they repelled the reasons for reduction. On the reclaiming petition the Court, by a narrow majority, sustained the reasons for reduction, and set aside the sale. Then again came both parties to appeal against this second decision; and then, by a narrow majority, again the Court assoilzied the defender, and found, as I have already stated, that in respect of the charge of fraud, the defender Mr. Mackenzie was entitled to his expenses. Therefore it cannot be said to have been at all the understanding of the Court of Session that the law was in favour of such purchases at the time, when you find these two conflicting decisions in the Court below, and each by such a very narrow majority. At that time, unfortunately, the course of reporting in Scotland was, that the Judges' opinions were not given; and it is only accidentally and rarely that you find any reference made to what passed upon the occasion; but in this case it is stated in the report, that several of the Judges entertained a strong opinion against the validity of the purchase; and the reasons are given, and the very ground which had been urged for sustaining the purchase and the validity of the transaction, namely, that in judicial sales it had been a very common practice for the common agents to become the purchasers; and that though, in 18 out of 135 instances, they became the purchasers, yet no instance had been found of an attempt made, or certainly of an attempt succeeding to set aside such a purchase (but the report would rather go the length of stating that no instance had been found of an attempt made to set aside any such purchase)—the learned Judges, I say, who held that such transactions were illegal, were of opinion that it was a ground which afforded all the stronger reason for the Court laying down what the law of honesty and what the law of common sense was, in disapproving of any such transaction.

My Lords, I also agree with my noble and learned friend, that the decision in the case of *Foster* v. *The Wolverhampton Company*, in the Common Pleas, upon which great reliance was placed at your Lordships' bar, does not apply to this case, because there the transaction was, past all doubt, valid at common law, though not in equity; but had the Court of Common Pleas had an equitable jurisdiction, as well as a common law jurisdiction, the anomaly never could have happened of a transaction being found legal and valid in that Court which could not stand an examination on the other side of Westminster Hall. It has not often occurred to me to see a stronger instance of the great inconvenience, to say the very least of it, of that division between the two sides of Westminster Hall—I will not say that impassable barrier between them; for, on the contrary, it is constantly, and must be, for the sake of justice, constantly passed;—but I have seldom seen a more striking instance of the inconvenience of the existence of that division, and of not allowing the Court to exercise both jurisdictions; at all events, whenever a case arises in which entire justice cannot be done without the exercise of both jurisdictions.

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

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

Solicitor-General.—Then your Lordships declare that the defenders ought to be assoilzied from the action, but with expenses?

LORD CHANCELLOR.—No, without expenses; because, although I think the plea properly raised the question of law, yet the defenders misled the pursuers by putting it upon a wrong issue.

Interlocutor reversed, with a declaration, and cause remitted.

Appellants' Solicitors, James Davidson and Durnford & Co.—*Respondents' Solicitors*, Dodds and Greig.