of my late father, they have authorised me to accept of the same on the conditions, namely, One thousand nine hundred pounds, say £1900 cash, the purchaser paying all expenses connected with the transfer." Now, if there had been a transfer executed carrying out these missives, it would naturally have fallen to Mr Watt to prepare that transfer, and Dr Watt's agent, or Mr Watt himself, under the employment which he had accepted from Mr M'Pherson to find a purchaser, would have been entitled to charge for the fees connected with that transfer.

I think, therefore, that Mr John Watt junior was not merely the agent generally for the trustees (that went only to a limited extent, I admit, and perhaps not to the extent of making him subject to all the liabilities of a law agent, and all the penalties of it), but that he was also their agent specially for the sale of the houses in question. That being so, I think there can be no doubt of the law to be applied to the case. It has been so fully stated by the noble and learned Lord on the woolsack that it is unnecessary for me to do more than to say that I quite concur in the views which have been expressed.

Interlocutor of Court of Session appealed against reversed; order made to reduce, decern, and declare in terms of the conclusions of the summons for reduction; and in the original action to assoilzie the appellants M'Pherson's Trustees from the whole conclusions of the summons; and to decern and find Thomas Watt and John Watt junior liable in expenses in both actions and of this appeal, and that any costs paid under the interlocutor of the Court of Session be repaid; and cause remitted to the Court of Session.

Counsel for Watt (Pursuer and Respondent)—Davey, Q.C.—Rhind. Agent—R. M. Gloag, Solicitor.

Counsel for M'Pherson's Trustees (Defenders and Appellants)—Kay, Q.C.—Herschell, Q.C. Agents—Simson, Wakeford, & Simson, Solicitors.

Thursday, November 29.

HUNTINGTON COPPER AND SULPHUR COMPANY (LIMITED) *v.* HENDERSON.

(Before the Lord Chancellor, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante*, January 12, 1877, vol. xiv. 219, 4 Ret. 294.)

Public Company—Director—Trustee—Promotion-Money.

A mining company sued one of their directors for £10,000, which they averred he had received from the persons from whom the company had purchased their mines, out of the price paid therefor, as an inducement to him to become a director, and to promote the formation of the company and the consequent purchase of the mines. The defender admitted that he had received £10,000 from the vendors, but averred that this sum was paid to him in terms of an agreement between him and the vendors, whereby he undertook to render various services to the company, when formed, outwith his duties as a director. These services he claimed to have actually rendered. There was no mention of any such agreement in the prospectus; none of the other directors were made aware of any such agreement; nor did they understand that the defender rendered any services to the company except in his capacity of director.—*Held* (affirming judgment of Court of Session) that the defender was bound to repay the £10,000 to the company.

In 1871 a project was set on foot to create a company for the purchase of certain copper mines in Canada. Before the company was formed William Henderson, chemical manufacturer in Glasgow and Irvine, agreed to become a director on condition that he received £10,000 out of the purchase money to be paid by the proposed company to the vendors. This sum was paid, but no mention was made of it in the prospectus or in the memorandum of association, &c., of the Company. This was an action by the Company against Henderson for repetition of the money. He resisted the demand, on the ground that the money had been paid for a variety of services which he had rendered to the Company or was afterwards to render to them outwith his ordinary duties as director. The other circumstances of the case are detailed in the report of the proceedings in the Court of Session, *ante*, January 12, 1877, vol. xiv. 219, 4 Rettie 294.

The First Division of the Court of Session, adhering to the interlocutor of the Lord Ordinary (Young), held that Henderson was bound to repay the £10,000, with interest.

Henderson appealed to the House of Lords.

Their Lordships did not hear counsel for the respondents.

On delivering judgment—

Lord Chancellor—My Lords, I am somewhat at a loss to understand why it has been thought desirable to bring this case under the review of your Lordships, for I must say that looking to the well-known principles upon which the Courts have now become accustomed to deal with transactions such as that which your Lordships have before you, I should have been of opinion that the case was entirely free from any kind of doubt.

My Lords, I will state very shortly the way in which the case presents itself to my mind, and for that purpose it will be desirable to look at it, first, from the point of view from which the outside public would look at the circumstances under which this Company originated. They of course would be aware of the prospectus which was issued with regard to the Company, and those who were taking shares would be aware of the memorandum of association. Now, the prospectus of the Company announced the names of the directors, and the leading, and apparently the most important, name held out to the public was that of the appellant, who was described as "William Henderson, of Buchanan Street, Glasgow, patentee of Henderson's metal extracting process." The memorandum of association of the Company, of which he is one of the directors, states that the objects for which the Company was established were in the first place—"To adopt and carry out a contract dated the 25th and 26th March 1872,

entered into by and between John George Long, of Lombard House, London, on behalf of himself and other vendors, of the one part, and James Henderson, of Glasgow, in the county of Lanark, Scotland, merchant, of the other part, and to purchase from the said John George Long and other vendors the stock, shares, and assets of the Huntington Mining Company (Limited) of Canada, and the mines, lands, hereditaments, plant, buildings, premises, and others, situated in the township of Bolton, specified in the first, second, and third schedules thereto, and the fee-simple thereof, and all the rights and interests of the vendors therein, upon the terms of the said contract, or to purchase and acquire the same upon such other terms as may be hereafter agreed upon between the said John George Long and other vendors and the said Company."

That, my Lords, is the object for which the Company is established, and there is no other contract which the Company are to be put in a position to carry into effect. Taking in connection with that, the prospectus to which I have already referred, your Lordships have this statement in the prospectus with regard to the nature of the contract:—"The purchase money to be paid for the mines is £125,000. This includes the whole working plant, steam-engines, water-wheels, crushing-mills and dressing machinery, offices, dwelling-houses, and about 5000 acres of freehold land in the same township, a great part of which is heavily timbered, all of which will be valuable for the purposes of the mine and for fuel. These lands, though little explored, are known to contain minerals, and may therefore become a valuable asset of the Company."

Therefore, my Lords, the result of those two documents is this—that it is represented to the public, and represented by the appellant, that a company is to be formed of which he is to be a director, and that the object of the Company is to carry into effect a particular contract, and he is the adviser of those who take shares that that is a contract which it will be beneficial for them to carry into effect; and with regard to the contract there is this representation, that the sum of £125,000 is to be the purchase money, and that that purchase money, standing upon one side of the account, is to be represented on the other side of the account by the mines in question, the plant, the steam-engines, the water-wheels, the crushing-mills, the dressing machinery, the offices, and the dwelling-houses.

My Lords, I stop, in the first place, therefore, for the purpose of asking whether that is a correct representation of the facts of the case. Undoubtedly I am obliged to answer that it is not. This purchase money of £125,000 was not represented by those items upon the other side alone, but opposite this £125,000 there ought to have been this further explanation, that £10,000 of it was represented, not by those items of mines and of machinery, but by a consideration, the nature of which I will afterwards proceed to examine, proceeding in some way from the appellant, who professed to be a director of the Company, and to be paid to him for something which he was to afford and supply. The purchase money for the mines was not £125,000 but £115,000, and when the question was put by the Court to Mr M'Ewen (I think it was), whether that £10,000 was to come out of the price, he was obliged to say, "Yes, in effect it would have to come out of the price."

Now, what was the consideration proceeding from the appellant for the £10,000 which is here mentioned? My Lords, I find that in the evidence of Mr M'Ewen, a witness to whose evidence the appellant is content to appeal on his behalf, as well as the respondents, it is stated that two sums of £1000 each, and two sums of £500 each, were paid to certain other gentlemen in consideration of their becoming directors. He continues—"That was a very material consideration in my paying £10,000 to Mr Henderson. I could not have secured his services otherwise than as director or manager. I have said that I would not have brought out the Company without securing Mr Henderson as director. I did not think of Mr Henderson as anything else but as a director. I considered his being a director essential to the success of the Company, and as likely to induce the public to take shares in it."

My Lords, let me suppose here for an instant that there was no other consideration (I will afterwards examine how far any other consideration did enter into the question), and that this had been not merely a material consideration for the payment of the £10,000, but the whole consideration. There is nothing better settled upon the authority of the cases, which the learned counsel at the bar did not profess to challenge or call in question, and which therefore I need not refer to by name, than that in a case of this kind and under circumstances of this kind no payment by him who is selling to a public company, made to those who are to be the directors and managers of the Company, can stand if the consideration for the payment be their affording their services as the fiduciaries, the trustees, the directors of the Company. The law will not tolerate or allow a man who is a trustee for a public body to sell his services, without the knowledge at all events of that body, to him who is at the same time selling his property to the company or body.

If that, my Lords, had been the whole of the case, there really would have been—and indeed it was admitted by the learned counsel for the appellant that there would have been,—nothing in the case to argue. But that which Mr Benjamin, with great ingenuity and skill, endeavoured to introduce as a new and distinguishing element into the case was this—that this payment of £10,000 was not altogether due to the services which the appellant was to render by becoming a director of the Company, but that it was made for something else—something more—and that therefore, although so far as it went in payment for his consent to become a director of the Company the payment might be challenged, still so far as it represented something beyond that—some services of some other kind—there might be some right on the part of the appellant to claim—to retain—if not the whole, at all events some part of the money upon that other account.

Now, my Lords, let me examine what is the consideration over and above the becoming a director which is said to have existed in the present case, and, my Lords, I preface that examination with this observation:—In the case of any person standing in the position of the appellant, if it be possible for him to claim—to retain—a pay-

ment made to him, for services of the kind suggested here, not being for his assuming the position of a director, I hold it to be absolutely his duty to distinguish and clearly to discriminate what part of the payment is made upon any other account, and what is the other account upon which that part of the payment is made. If he is unable so to discriminate it, the whole thing in my judgment is tainted with that which I find in the part of the evidence that I have read, viz., that the payment was made upon the material consideration of his consenting to become a director of the Company.

My Lords, is there any attempt here to make out that there was any other consideration *ultra* the becoming a director of the Company?

Before I turn to the evidence, I will remind your Lordships that I took the liberty of asking the learned counsel for the appellant whether in his view of the case the payment was made for services rendered before the Company was formed, or for services rendered or to be rendered after the Company was formed. Mr Benjamin said that some part of the payment at all events was for services rendered before the Company was formed. I do not so read the evidence. But supposing it to be so, what was the service for which the payment was made? Mr Benjamin said that it was for experimenting upon the ores produced by the Company, in order to ascertain whether these ores, upon analysis, afforded a hopeful prospect for the formation of the Company. My Lords, to speak of the analysis by a metallurgist of certain samples handed over to him by the person who was proposing to become a purchaser of those mines, as affording any substantial consideration for the payment of a sum of anything like £10,000 is perfectly absurd. Your Lordships have in the appendix in this case the charges which this gentleman has made upon different occasions for the analysis of ores, and they appear to be charges like 7s. 6d. or 10s. 6d., or some very minute payment of that kind. But, my Lords, it was absolutely necessary for the appellant, occupying the position of a well-known metallurgist in the country, for his own protection, to go at least the length of analysing the samples of ore produced by this mine before he consented to lend his name as a director of this Company, and before he could venture to make the statements which are made in the prospectus with regard to it.

Mr Benjamin, however, said that beyond that there was something more, namely, that before the Company was formed there was a considerable quantity—40 or 50 tons—of ore brought to the works of the appellant, and made by him the subject not merely of analysis, but of experiments for the purpose of determining the process most suitable for dealing with ore of the kind, and that considerable sums were expended under that head. My Lords, I cannot read the evidence as amounting to any proof of that kind. [His Lordship here examined the evidence, quoted in reports above referred to.] My Lords, I think that this puts an end entirely to the first part of the question, Was any part of the consideration for the £10,000 services rendered before the Company was formed?

My Lords, I now turn to the question of services performed or to be performed after the Company was formed. The learned counsel who last addressed your Lordships dwelt very much upon that; he said that there was at all events a contract by which the Company when formed would have the benefit of certain services to be rendered by the appellant. The first observation that I make upon that (and there are unfortunately several answers to be made to it) is this—I do not find in the evidence here any agreement whatever which in point of fact was entered into for the giving by the appellant of specific services. There are certain vague and general statements that the Company was to have the benefit of processes which he had a right to use, and there are general statements that if he had any new invention during the existence of the Company they were to have the benefit of it; but there was no writing—there was no agreement—it was conversation of the loosest and vaguest description—and I do not find from the beginning to the end of the evidence any proof whatever upon which the Company, if they had been so minded, could have founded a claim against the appellant to compel him to give them any specific advantage.

But, my Lords, the matter does not stop there. With regard to anything which was to be in the nature of an agreement between the Company and the appellant, I have to ask the question, Who was the person who could make such an agreement? and who is there who could have made an agreement on behalf of the Company? Why, the person—and the only person—who could make an agreement on behalf of the Company would be the director of that Company—either the director after the Company was formed, or the person who was to be the director, his agreement being made known to and satisfied by the Company when formed. But is it to be supposed for a moment that any Court of Justice would tolerate the idea of a man, who was himself a director of a Company, making an agreement with himself as to the services which he was to render to the Company, and the remuneration that he was to receive for those services. My Lords, the matter requires merely to be stated in order to show that no agreement or arrangement of that kind could stand for a moment.

But, my Lords, the matter does not rest even there, because when I turn to the document in which, if there had been any such agreement, it ought to have been made known to those who were invited to become shareholders in the Company, I not only find that there is no mention of any such agreement, but I find that which to my mind is the negation of the existence of any such agreement, because in the prospectus the public are told, and intending shareholders are told, that "it is proposed to utilise the whole of the sulphur contained in the poorer ores treated at the mine, and for this purpose to make arrangements with Mr Henderson and his partners to adopt the most improved processes, when fully developed at Irvine, which will very much increase the profits of the Company." The arrangements with Mr Henderson and his partners are not made; they are to be made; and they are to be made, not through the medium of Mr Henderson's stipulating with himself, but by the Company when formed making those agreements openly and above board with Mr Henderson and his partners.

My Lords, that is the whole of this case. It appears to me that the payment of £10,000 is one

as to which it is not merely true to say (as Mr M'Ewan says) that the material consideration for it was the circumstance of the appellant becoming a director of the Company and holding himself out to the world as a director, but it is the only tangible consideration upon which it is possible to place a finger for the payment of the £10,000.

My Lords, I therefore entirely concur with that which appears to have been the unaminous opinion of the learned Judges in Scotland, both of the Lord Ordinary and of the First Division; and I submit to your Lordships that nothing could be done with this appeal except to dismiss it, with costs.

Lord O'Hagan—My Lords, I entirely concur with the noble and learned Lord on the woolsack, and with the learned Judges in the Court below. The case appears to me almost too clear to require exposition; the facts are undisputed, and the principles of law have been admitted with very honourable candour by Mr Benjamin. Those principles are rudimentary; they have become unfortunately rather notorious through certain events in the courts of law in this country in latter times, and nobody dreams at this hour of disputing them at all. The principle is very clear that a man cannot traffic on his trust—he cannot make a commodity of that which he holds for the good of others; and it is a clear principle of law that a trustee or director of a company cannot for himself and for his own benefit do work for that Company which he can employ anybody else to do. The reason of the principle is clear, viz., that the law will not permit a man to enter into an arrangement which will cause a conflict between his duty and his interest.

These principles, applied to the facts of this case, appear to me to conclude the case at once. Mr Benjamin very forcibly and ingeniously contended that the arrangement upon which he relied ought to be carried out by your Lordships' House, because it was made antecedently to the establishment of any fiduciary relation between the parties, and that things had been done long before the establishment of that fiduciary relation, for which at all events his client should be remunerated. It appears to me, in the first place, that there has been a total failure to show the doing of any work before the establishment of the fiduciary relation, whenever that establishment took place; and, with regard to the arrangement, that the arrangement itself established the fiduciary relation. The arrangement was made in contemplation of the formation of a company, of which company the appellant was to be a director; and to say that the moment that arrangement was carried into full effect he was not a director, clothed with all the responsibilities and rights of the fiduciary relation, appears to me to be entirely impossible.

The appellant relying upon that arrangement cannot refuse to take the consequences of it, and one of those consequences undoubtedly was to place him in the fiduciary position *eo instanti* that the arrangement was made. What was the effect of that? I am not going to follow the Lord Chancellor through the very lucid and elaborate exposition which he has given of this case; but, to put it in a few words, it appears to me that the effect of t was, in the first place, with reference to the directorship, to make this payment of £10,000, if it were to be made at all, a mere bribe to the appellant to induce him to take the position of director, and in that way to induce other people to take the same position. It is impossible to say in the face of the evidence given by Mr M'Ewan, with whom he dealt, that at all events it was not as between the parties a part of the consideration—the corrupt consideration which eventuated in this arrangement—that the directors should be induced by the gift of money to take the place of directors. It is impossible, I think, to say that it was not a part—and a most material part—of the arrangement, that the appellant, who had a very considerable position, who had been a successful speculator, and whose name was very likely to attract other names of importance, should be induced by a large pecuniary consideration to lend his name for the purpose of establishing this Company. And what do we find? We find the very first act done by Mr Henderson entirely in accordance with that view of the case, because immediately after the arrangement is entered into, and before anything else is done, or at all events proved to have been done, between the parties, we find a prospectus issued for the purpose of circulation in Glasgow, in which he (Mr Henderson) is the single individual whose name appears as director—a prospectus which points to his office as the office of the Company, and names his nephew as the secretary of the Company. So that on his part, at all events, he carried out faithfully his part of the bargain to give his name as director and his influence for the purpose of getting other names. It seems to me that that alone would entirely dispose of this case.

But when you come to consider the other view in which it was presented—that it was part of the bargain that the appellant should become a director for the purpose of giving his services to this Company — in that view his case is equally desperate, because, as I have already said, according to the ordinary rudimentary principle that a director cannot employ himself for the purpose of making money for himself, this was a bargain, not as corrupt perhaps, but just as invalid as the bargain to take money for giving his name as a director.

That being so, the case seems to me to be entirely at an end, and we have to remember, in addition to that, that this gentleman, acting as a director, and being so bound to give full information to those for whom and with whom he acted, concealed the whole of this transaction from beginning to end, gave no information for, I think, a period of from two to three years to the other directors—that is to say, until the Company got into a state of difficulty, and concealment was no longer possible. The arrangement is concealed, and not only is it concealed, but it is deliberately concealed. I shall not at this time turn to the evidence, but in the prospectus, with the name of the appellant upon it, we find a declaration that there had been an arrangement with him for the purposes of this Company, and we find that in the subsequent prospectus that is omitted; and not only do we find that omission, but we find the false statement, that in future an arrangement should be made such as the appellant now relies upon as having been made before the prospectus was issued at all.

Upon the whole of the case, it appears to me impossible to doubt that the learned Judges in the Court below were right. The Company were at all times incapable of enforcing any contract, even if this contract had been a valid contract, and useful to them; they had no writing, they had no evidence, they had no muniment of title of any sort; they were wholly remediless against this appellant.

It appears to me that, applying the plain principles of law to the undisputed facts, this appeal must be dismissed, with costs.

Lord Blackburn—My Lords, I am of the same opinion.

I agree with the learned Judges in the Court of Session that this case is an important one, and to my mind it is a very clear one also. Having regard to its importance, I should say more upon it if it were not for the fact that the Judges in the Court of Session have all delivered very able opinions upon it—I refer more especially to the opinion of the Lord President, which I have studied, I may say, because it comes last, and is not long; and having studied it, I might confine myself to saying that I agree with every word as to the law, as to the facts, and as to the conclusions arrived at from the evidence expressed in that short judgment of the Lord President. There I might stop, and so I should if it were not for the fact that Mr Benjamin, in his able argument, being unable to dispute, and knowing that he could not with any chance of success dispute, the law which is laid down in that judgment, endeavoured, if I may say so, to confuse and avoid it. What he endeavoured to say was perhaps the only thing that could be said for his client, but it was a desperate attempt from the beginning, and it totally failed.

[His Lordship then examined the evidence.]

Under those circumstances, is it possible for anybody to think as at matter of fact that this £10,000 was otherwise than by previous agreement given to Mr Henderson for acting as a director of the Company in clinching this bargain? And can anyone doubt that though the bargain was made before he became a director and acquired a fiduciary relation to the Company, it is just the same as if the fiduciary relation had subsisted at the time when he arrangement was made that he should receive the £10,000?

Lord Gordon—My Lords, I consider it unnecessary to make any detailed observations upon this case, which is really clear beyond all doubt. The Court below were unanimous in disposing of the case, and your Lordships have come to the same conclusion. It is undoubted that since the case of *Blaikie Brothers* v. *The Aberdeen Railway Company*, 14 D. 66, H. of Lords 1 Macq. 461, in which your Lordships reversed the judgment of the Court of Session, and in which I happen to have been counsel for the appellant, the principle that a person occupying a fiduciary relation towards a company must not enter into any contract which may involve the interests of the company has been clearly established. I think, after the full statement of the case which has been made by your Lordships, it is quite unnecessary for me further to occupy your Lordships' time.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Counsel for the Appellant—Benjamin, Q.C.—Digby. Agents—Freeman & Bothamley.

Counsel for the Respondents—Horace Davey, Q.C.—Kekewich, Q.C.—Low. Agents—Freshfields & Williams, Solicitors.

COURT OF SESSION.

Friday, December 14.

FIRST DIVISION.

[Lord Adam, Ordinary.

FOGO, PETITIONER.

Entail—Improvements—Entail Amendment Act 1875 (38 *and* 39 *Vict. cap.* 61)—*Charge for Improvements on Mansion-house, by which Free Rental of Estate disproportionately diminished.*

The Court will allow as charges against an entailed estate under the provisions of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), such improvements upon the mansion-house as are likely to secure an increase of rent for it let as a residence and may be classed as "of a substantial nature and beneficial" to the estate, without regard to the fact that by the charges the free agricultural rental suffers corresponding diminution.

This was a petition under the 7th and 8th sections of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), presented by Mrs Jane Mathie Lawrie Fogo, heiress of entail in possession of the entailed estate of Row, and her husband, the Rev. John Lawrie Fogo, for leave to charge the entailed estate with certain sums for improvements on the mansion-house, partly already executed, and partly in course of execution, or only contemplated. The Lord Ordinary remitted to Mr George Dalziel, W.S., as a man of business, and to Mr David Ballingall, as a man of skill, to report on the petition. As regarded the sum for improvements executed prior to this application, the Lord Ordinary granted the desired authority, after deduction of a trifling sum for certain items of improvement which had been altered or removed by subsequent operations.

But the petitioner further asked to be allowed to charge the estate with a sum of upwards of £3000 for contemplated expenditure. The improvements were reported by Mr Ballingall to be of a substantial nature, but excessive when compared with the rental of the estate. And it appeared that the free rental, which, exclusive of the mansion-house, amounted to £670, would be reduced by the proposed charges to £220 per annum. Mr Dalziel, the reporter, suggested that in these circumstances it might be necessary to make some provision for the protection of the younger children of the petitioner, in favour of whom and of her husband the petitioner Mrs Fogo had executed a bond of provision, dated 9th September 1843. That deed provided for payment of an annuity of £225 to her husband during his life in the event of his surviving her, and of £1500 to the younger