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A FIDUCIARY'S DUTY OF LOYALTY

By ROGER A. CLAPP*

Some years ago a trustee was confronted with this situation: Among the assets of his trust estate was a valuable lease. At the expiration of the term the trustee attempted to renew the lease for the benefit of the estate. The lessor, however, had doubts as to the responsibility of a trust estate as a lessee and refused to renew. Believing that he had fulfilled his entire duty to the estate, the trustee renewed the lease in his own name and for his own benefit. Probably much to his surprise, a court of equity later held that he had acted wrongly in the matter and required him to hold the lease for the benefit of the estate. In the course of his opinion the Chancellor said:

“This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*.”

The facts stated are those of *Keech v. Sanford*¹ decided in 1726. Although the trustee was not accused of fraud or bad faith, he was held to have violated his duty as a fiduciary and as such was required in this case to abide by a decree exemplary in effect.

Trustees, executors and administrators, guardians, agents, partners, joint adventurers, corporate directors, pledgees, and attorneys are all fiduciaries.² The standard required of them varies as the confidential nature of their position varies, but the primary duty of all is loyalty to the person for whom they are acting. This duty of loyalty

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¹ Sel. Cas. Ch. 61 (1726).

² See Scott, *The Trustee's Duty of Loyalty* (1936) 49 Harv. L. Rev. 521, for an exhaustive treatment of the subject with reference to trustees. The authorities in Maryland dealing with agents are collected in the Maryland Annotations to the Restatement of the Law: Agency, Secs. 387-398.

extends to every incident of their position and requires of them an unbending adherence. The courts are not content to require that the fiduciary act honestly and in good faith, but do not even permit him to occupy a position in which his personal interests and his duty as a fiduciary might conflict. In a leading Maryland case³ the Court of Appeals said: "Remembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin, a strict observance of the divine precept: 'Lead us not into temptation' ". Since this is the basis of the doctrine, the motives of the fiduciary are immaterial.⁴ The law sets up an objective standard and will not undertake to determine whether the fiduciary in any particular case acted solely for personal gain or profit, or whether his motives were proper.

Although a fiduciary is held to a standard higher than that required of others, he is not entirely forbidden to deal with those for whom he is acting. If the beneficiaries are *sui juris* and fully advised of the facts the fiduciary may deal with them. Even in such cases the fiduciary may not act at arm's length but must treat the beneficiary fairly, and if the transaction is questioned, the fiduciary has the burden of proving that it was fair.

I. PURCHASE BY THE FIDUCIARY INDIVIDUALLY

A fiduciary who has property in his hands for sale may not purchase the property at his own sale, unless the beneficiary⁵ consents or subsequently ratifies the transaction. This rule has been applied to trustees,⁶ executors and ad-

³ Hoffman Steam Coal Co. v. Cumberland C. & I. Co., 16 Md. 456, 77 A. D. 311 (1860).

⁴ Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 A. D. 779 (1866); Mangels v. Tippet, 167 Md. 290, 173 A. 191 (1934); Carey v. Safe Deposit & Trust Co., 168 Md. 501, 178 A. 242 (1935).

⁵ For want of a better term the word "beneficiary" is used throughout to designate the person for whom a fiduciary acts.

⁶ Dorsey v. Dorsey, 3 H. & J. 410, 6 A. D. 506 (1810); Ringgold v. Ringgold, 1 H. & G. 11, 18 A. D. 250 (1826); Richardson v. Jones, 3 G. & J. 163, 22 A. D. 293 (1831); Mason v. Martin, 4 Md. 124 (1853); North Balto. Bldg. Assn. v. Caldwell, 25 Md. 420, 90 A. D. 67 (1866); Kornis v. Shaffer, 27 Md. 83 (1867); Smith v. Townshend, 27 Md. 368, 92 A. D. 637 (1867); Pairo v. Vickery, 37 Md. 467 (1873).

ministrators,⁷ agents,⁸ attorneys,⁹ pledgees,¹⁰ corporate directors,¹¹ partners,¹² and joint adventurers.¹³ The rule is enforced even though the sale is at public auction.¹⁴ At such a sale the fiduciary may be required to exercise his discretion and withdraw the property if the bids are too low and, as the active vendor, he is in a position to discourage prospective bidders if he desires to bid in the property himself.

This rule was firmly established by the courts at an early date. In a case decided in 1820,¹⁵ the Court of Appeals said: "That a trustee cannot purchase at his own sale in person, or by another, and when it is done, that the act is deemed fraudulent, is law too well understood at this day to be controverted." In these cases the good intentions of the fiduciary are not considered since the doctrine is enforced as a matter of public policy "to remove all temptation from the trustee to promote his own interest by violating the trust."¹⁶

Not all purchases by fiduciaries are improper. By statute a mortgagee is permitted to bid in the mortgaged property at a foreclosure sale.¹⁷ A fiduciary who has terminated the relationship may purchase the property as well as any other. In *Peters v. Speights*,¹⁸ the defendant was the master and part-owner of a vessel with a power of sale from the other owner. This power of sale was revoked

⁷ *Conway v. Green*, 1 H. & J. 151 (1801); *Turner v. Bouchell*, 3 H. & J. 99 (1810); *Singstack v. Harding*, 4 H. & J. 186, 7 A. D. 669 (1815); *Davis v. Simpson*, 5 H. & J. 147, 9 A. D. 500 (1820); *Scott v. Burch*, 6 H. & J. 67 (1823); *Williams v. Marshall*, 4 G. & J. 376 (1832); *Elchelberger v. Hawthorne*, 33 Md. 588, 3 A. R. 211 (1871); *McLean v. Maloy*, 136 Md. 467, 111 A. 91 (1920); *Sessions v. Casey*, 141 Md. 312, 118 A. 759 (1922).

⁸ *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 A. D. 600 (1858); *Woodcock v. Dennis*, 199 A. 845 (Md. 1938).

⁹ *Roman v. Mali*, 42 Md. 513 (1875); *Merryman v. Euler*, 59 Md. 588, 43 A. R. 564 (1883); *McLean v. Maloy*, 136 Md. 467, 111 A. 91 (1920).

¹⁰ *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 A. D. 779 (1866).

¹¹ *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456, 77 A. D. 311 (1860); *Cumberland C. & I. Co. v. Sherman*, 20 Md. 117 (1863).

¹² *Welbourn v. Kleinle*, 92 Md. 114, 48 A. 81 (1900).

¹³ *Ricketts v. Montgomery*, 15 Md. 46 (1860).

¹⁴ See cases *supra* notes 6 and 7.

¹⁵ *Davis v. Simpson*, 5 H. & J. 147, 9 A. D. 500 (1820).

¹⁶ *Mason v. Martin*, 4 Md. 124 (1853).

¹⁷ Md. Code, Art. 66, Sec. 14.

¹⁸ 4 Md. Ch. 375 (1853).

and given to another who sold the vessel to the defendant. The defendant was not required to account for the profit which he made upon a resale at a better price. In such cases the burden of proof is on the fiduciary to show that the relationship has been terminated.¹⁹ It frequently happens that a fiduciary may purchase property in which he has an interest, not only as a fiduciary but also as an individual. In two cases²⁰ involving sales made in lieu of partition, it appeared that the purchaser at the respective sales had an individual interest in the property and also an interest as trustee. The sales were allowed to stand in both cases. One obvious distinction, however, is that in neither case did the fiduciary conduct the sale. Although there was a very real conflict of interest, evidently the court felt that the danger to the beneficiaries was too remote.

In a recent case²¹ an executor sold property at public sale and purchased it in his capacity as trustee under the will. When an assignee of some of the beneficiaries under the will objected, the Court held that since the purchase was made for the benefit of the beneficiaries, it could stand provided the executor showed that it was fairly made and that the price was adequate. It is true that not all of the beneficiaries were benefited, but those who were had to rely upon the fiduciary for protection. From a practical standpoint they would not be in as good a position to protect their interests in the estate by bidding at the sale as those who received their bequests outright. As trustee under the will, the fiduciary might well have been under a duty to act as he did.

Sales made by fiduciaries to themselves are not void, but are merely voidable.²² Here a distinction is drawn between those cases in which the beneficiary does not know that the fiduciary was the purchaser at the sale and those in which the beneficiary had this knowledge. In the first

¹⁹ *Woodcock v. Dennis*, 199 A. 845 (Md. 1938).

²⁰ *Hopper v. Hopper*, 79 Md. 400, 29 A. 611 (1894); *Whitely v. Whitely*, 117 Md. 538, 84 A. 68 (1912).

²¹ *Harlan v. Lee*, 199 A. 862 (Md. 1938).

²² But see *Singstack v. Harding*, 4 H. & J. 186, 7 A. D. 669 (1815).

situation the beneficiary has an election to avoid the sale or affirm it. If the fiduciary has resold the property at a profit, he may be required to account to the beneficiary for this profit.²³ In *Woodcock v. Dennis*²⁴ the plaintiff employed the defendant to act as a real estate agent in the sale of a farm. The defendant reported a sale to a third person which was accepted, and title passed. On the same day the property was resold at a profit by the third person. The third person took no beneficial interest in the property but merely held title for the defendant. The Court held that the plaintiff was entitled to recover the profit made by the defendant on the resale of the property. If the property has been sold by the fiduciary to one who is not a bona fide purchaser for value, he may be required to return the property to the beneficiary.²⁵

In all these cases the election must be made by the beneficiary; neither the fiduciary²⁶ nor the third person may avoid the sale.²⁷ The beneficiary may ratify the sale, but if his ratification is to be effective, he must be *sui juris* and must know all the facts connected with the sale and the legal effect of such facts.²⁸ This last requirement is a good illustration of the strictness of the courts in dealing with these situations. In the case cited, the court held that the ratification by stockholders of the purchase of corporate property by a director was not effective unless the stockholders had complete knowledge of the transaction, including the knowledge that they had the legal right to rescind.

Although a fiduciary is not permitted to make a profit from his position, he is not penalized gratuitously. If the beneficiary elects to avoid the sale, he must return to the fiduciary the purchase price and compensate him for permanent improvements and additions to the property made

²³ *Ricketts v. Montgomery*, 15 Md. 46 (1860); *Woodcock v. Dennis*, 199 A. 845 (Md. 1938).

²⁴ 199 Atl. 845 (Md. 1938).

²⁵ *Eichelberger v. Hawthorne*, 33 Md. 588, 3 A. R. 211 (1871).

²⁶ *Richardson v. Jones*, 3 G. & J. 163, 22 A. D. 293 (1831).

²⁷ *Williams v. Marshall*, 4 G. & J. 376 (1832).

²⁸ *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456, 77 A. D. 311 (1860).

in good faith.²⁹ The usual equitable defenses such as laches and estoppel are also available to the fiduciary.³⁰

In those cases in which the beneficiary has knowledge of the fact that the fiduciary is selling to himself and does not object, his rights are different. A sale thus made is not voidable at the option of the beneficiary, but can be upset only if the fiduciary took advantage of his position. If the transaction was completely disclosed, and the beneficiary treated fairly, it will stand. However, when such a transaction is questioned, the fiduciary has the burden of proving that it was proper under all the circumstances.³¹ In such cases the beneficiary makes out a *prima facie* case by showing that the fiduciary purchased the property individually. On the other hand the fiduciary is permitted to defend by showing that the price paid was fair and that he took no advantage of the beneficiary by reason of his position. Whether the sale is allowed to stand in such cases depends upon the facts in the particular case. Here also a beneficiary who knowingly permits a fiduciary to change his position by improving the property may be estopped from raising subsequent objections.

Thus, in *McLean v. Maloy*³² the fiduciary was an executor who purchased stock in a corporation formed for the purpose of purchasing property of the estate. The beneficiaries were aware of this at the time the transaction was consummated. They rested on their rights until the newly formed company made substantial payments under the purchase contract and then brought a bill to require the executor to account for any profits he might have made. During this entire period the beneficiaries were represented by independent counsel. The Court held that under the

²⁹ *Smith v. Townshend*, 27 Md. 368, 92 A. D. 637 (1867); *Eichelberger v. Hawthorne*, 33 Md. 588, 3 A. R. 211 (1871).

³⁰ *Williams v. Marshall*, 4 G. & J. 376 (1832). Cf. *McLean v. Maloy*, 136 Md. 467, 111 A. 91 (1920).

³¹ *Smith v. Townshend*, 27 Md. 368, 92 A. D. 637 (1867); (trustee); *Pairo v. Vickery*, 37 Md. 467 (1873) (trustee); *Roman v. Mall*, 42 Md. 513 (1875) (attorney); *Merryman v. Euler*, 59 Md. 588, 43 A. R. 564 (1883) (attorney); *Welbourn v. Kleinle*, 92 Md. 114, 48 A. 81 (1900) (partner); *McLean v. Maloy*, 136 Md. 467, 111 A. 91 (1920) (attorney and administrator); *Buechner v. Goodman & Glick*, 197 A. 586 (Md. 1938).

³² 136 Md. 467, 111 A. 91 (1920).

circumstances the beneficiaries had ratified the agreement and were estopped from questioning its validity.

II. SALE OF FIDUCIARY'S INDIVIDUAL PROPERTY TO HIMSELF AS FIDUCIARY

Just as it is improper for a fiduciary to sell the beneficiary's property to himself, so it is equally improper for him to use the funds of the beneficiary to purchase property belonging to himself. The opportunity for self interest to color the fiduciary's judgment is fully apparent.

Only two cases of this sort have been found in Maryland. In the first a guardian invested funds of his ward in a promissory note executed by the guardian. The Court held that this was not a proper investment and that the order of the Orphans' Court approving it was erroneous.³³ In the second case the promoters and directors of a corporation sold certain real estate to it for a consideration of about \$500,000 which had cost them not over \$70,000. The Court held that the corporation had the right to rescind this sale if it desired.³⁴

The rule governing these cases seems to be similar to that governing cases where the fiduciary purchases at his own sale. The beneficiary has an election to avoid the transaction if he desires. The Court of Appeals has not as yet dealt with a case in which the beneficiary had notice that the fiduciary was purchasing from himself or ratified the purchase after such notice. On principle it would seem that the rules governing sales made by the fiduciary to himself would apply.

III. USE OF PROPERTY FOR THE FIDUCIARY'S OWN PURPOSE

Since a fiduciary is not permitted to make a profit by reason of his position, it is obvious that he cannot use the property of the beneficiary for his own purposes. An example of such neglect of duty would be the case of a

³³ *Fidelity & Deposit Co. v. Freud*, 115 Md. 29, 80 A. 603 (1911).

³⁴ *Urner v. Sollenberger*, 89 Md. 316, 43 A. 810 (1899).

trustee of shore property which included a ducking blind, who used the blind himself instead of leasing it. Similar cases have arisen in England, but none has been found in Maryland.³⁵ In one case a trustee was permitted to lease trust property for use as his home over the objections of his co-trustee.³⁶ However, it appeared that the settlor had permitted the trustee to occupy this property during her lifetime so that the decision was based on the intention of the settlor. The court intimated that without such authority from the settlor this would have been improper.

IV. PURCHASE OF ADVERSE INTEREST FROM THIRD PERSON

"He who accepts a trust takes it for the benefit of the persons for whom he is trusted and not to benefit himself."³⁷ For this reason a fiduciary who purchases from a third person an adverse interest in the beneficiary's property is not permitted to retain it; instead he is required to hold it for the benefit of the beneficiary. Thus a fiduciary who purchases a mortgage on the estate at a discount holds it for the beneficiary at the price which he paid, rather than its face amount.³⁸ The same rule is enforced in case of purchase at execution sales,³⁹ tax sales,⁴⁰ and other instances where a fiduciary procures a claim against his trust estate at a discount.⁴¹ The beneficiary must reimburse the fiduciary for the amount he has expended in making the purchase, but the fiduciary may not make a profit. In these cases also the beneficiary may be barred by laches or estoppel.⁴²

The fact that the beneficiary has an interest in the property is not sufficient to preclude the fiduciary's dealing with it. In order that this principle may apply the property must be held by the fiduciary for the benefit of the benefi-

³⁵ See cases collected in Scott, *The Trustee's Duty of Loyalty* (1936) 49 Harv. L. Rev. 521, 546.

³⁶ *Whitelock v. Dorsey*, 121 Md. 497, 88 A. 241 (1913).

³⁷ *Turner v. Bouchell*, 3 H. & J. 99 (1810).

³⁸ *Ibid.*

³⁹ *Callis v. Ridout*, 7 G. & J. 1 (1834); *Bell v. Webb*, 2 Gill 163 (1844); *Spindler v. Atkinson*, 3 Md. 409, 56 A. D. 755 (1852).

⁴⁰ Cf. *Love v. Rogers*, 118 Md. 525, 85 A. 771 (1912).

⁴¹ *Garey v. Hignutt*, 32 Md. 552 (1870).

⁴² *Love v. Rogers*, 118 Md. 525, 85 A. 771 (1912).

ciary. Thus a trustee for the benefit of creditors was permitted to purchase and foreclose a mortgage made by the debtor prior to the date of the deed of trust and thus not held by the trustee as a part of the trust estate.⁴³

In *Parks v. Skipper*⁴⁴ an attorney purchased certain mortgages previously made by his sister whom he had represented without compensation. His administrator was permitted to recover from the sister in a suit on the mortgages. The court recognized the principle that an attorney may not acquire an interest in the property of his client for his own advantage and to the prejudice of his client, but held that it was not applicable under these circumstances.

V. RECEIPT OF BONUSES, COMMISSIONS, COMPENSATION

Although a fiduciary is generally entitled to compensation from the trust estate for his work, he is not permitted to accept additional compensation or commissions from persons with whom he deals in performing his fiduciary duties. Thus a fiduciary, who is employed to buy or sell real estate, may not receive a share of the commissions usually paid by the adverse party for such sales.⁴⁵ For the same reason a fiduciary may not receive a commission for investing the funds of the estate from the person to whom he lends the funds or purchases the investment.⁴⁶ The trustee in *Carey v. Safe Deposit and Trust Co.*⁴⁷ was required to account for "commissions" paid by mortgagors to whom he loaned trust funds.

In not allowing the fiduciary to receive such compensation, the law seeks to remove any possibility that his action may be determined by his own interests. For this reason the rule is enforced even though it may be shown that the fiduciary acted in good faith.⁴⁸ Where the fidu-

⁴³ *Read v. Reynolds*, 100 Md. 284, 59 A. 669 (1905).

⁴⁴ 164 Md. 388, 165 A. 543 (1933).

⁴⁵ *Croft Lumber Co. v. Bond*, 119 Md. 687, 87 A. 264 (1913); *De Crette v. Mohler*, 147 Md. 108, 127 A. 639 (1925).

⁴⁶ *Carey v. Safe Deposit & Trust Co.*, 168 Md. 501, 178 A. 242 (1935). Cf. *Tippett v. Myers*, 127 Md. 527, 96 A. 678 (1916).

⁴⁷ *Ibid.*

⁴⁸ *Mangels v. Tippett*, 167 Md. 290, 173 A. 191 (1934).

ciary is not acting in good faith, the rule is obviously applied.⁴⁹

The extent of the duty of a fiduciary who by reason of his position is elected an officer of a corporation and is paid a salary has been considered in several cases. *Mangels v. Tippett*⁵⁰ dealt with a trustee of a large block of stock who was elected director and secretary of the corporation, and paid a salary for his services. The Court held that he should be required to return the amount of the salary to the trust estate, although there was no evidence that the salary was excessive or that the services of the trustee were inadequate.

On the other hand, in *Dailey v. Wight*⁵¹ relief was denied to a beneficiary who petitioned the court to remove a trustee on the ground that he had improperly voted to pay himself a large salary as an officer of a corporation whose stock he held as trustee. It appeared that the estate held two-ninths of the stock but that the trustee individually held a majority and that the trustee had been selected by the settlor so that the stock would continue to be closely held. The distinction in this case seems to be that the fiduciary did not receive the salary by reason of his position but by reason of his individual holdings. A conflict of interest was present, but the result must have been contemplated by the settlor.

The same distinction was followed in *Adams v. Hearn*.⁵² In this case an executrix held 2,457 shares of stock out of a total issue of 2,500. She was beneficially entitled to one-half of the shares held by the estate and the remaining 43 shares were held by third persons. The executrix by voting the stock of the estate was unanimously elected president of the company and was paid a large salary. She neglected to close the estate and distribute the stock but continued to act as president and receive a salary until her death four years later. The complainant, who also was

⁴⁹ *Refining Co. v. Campbell & Zell Co.*, 83 Md. 36, 34 A. 243, 369 (1896); *Hambleton v. Rhind*, 84 Md. 456, 36 A. 597, 40 L. R. A. 216 (1897).

⁵⁰ 167 Md. 290, 173 A. 191 (1934).

⁵¹ 94 Md. 269, 51 A. 38 (1902).

⁵² 168 Md. 544, 178 A. 606 (1935).

beneficially entitled to half the shares held by the estate, brought a bill to require an accounting of the salary received by the executrix while acting as president of the company. In holding that her election as president was proper the Court said:⁵³

“It will be noted, from the above quoted extracts, that a distinction is drawn between cases wherein the fiduciary is elected to a position of profit in a corporation by voting stock pertaining to his trust estate, without the votes of which he could not be elected, and cases wherein stock pertaining to the trust estate is not necessary for his election.”

Corporate directors who vote themselves salaries as officers are also treated as fiduciaries.⁵⁴ From the nature of their position they are not required to serve as officers without compensation, but they do have the burden of proving that the salaries are fair.

VI. COMPETITION WITH THE BENEFICIARY

Since a fiduciary is required to act at all times for the best interests of the beneficiary, it is a breach of his duty to compete as an individual with himself as a fiduciary. In *Keech v. Sanford*⁵⁵ the trustee who renewed the lease in his own name was required to hold it for the beneficiary. In Maryland the same rule was applied in *Acker, Merrall & Condit Co. v. McGaw*.⁵⁶ McGaw who was an employee and director of the plaintiff corporation secured in his own name a renewal of the lease of property occupied by the plaintiff's store with the expressed intention of going into business at this location for himself. The Court held that he was liable for any loss caused by his breach of duty. It seems clear that the plaintiff corporation could have secured an assignment of the lease if it had desired such relief.⁵⁷

⁵³ *Ibid.*, 168 Md. 544, 556.

⁵⁴ *Francis v. Brigham Hopkins Co.*, 108 Md. 233, 70 A. 95 (1908).

⁵⁵ *Keech v. Sanford*, 1 Sel. Cas. Ch. 61 (1726).

⁵⁶ 106 Md. 536, 68 A. 17 (1907).

⁵⁷ See case cited *supra* n. 25.

The *Acker* case was not followed where an agent who was employed to prepare plans for a building later purchased for himself the lot on which it was proposed to erect the building.⁵⁸ The agent, of course, was not employed to purchase the land. However, it is submitted that an agent even for a limited purpose should not be permitted to profit by an action directly contrary to the interests of his employer.

A partner is also treated as a fiduciary and as such he is not permitted to carry on a business competing with that of the partnership.⁵⁹ Other fiduciaries, such as trustees or agents, undoubtedly would be under similar restrictions. Even part-time agents are permitted to engage in other enterprises only if it is not detrimental to the employers' interests.⁶⁰ In one rather unusual case both plaintiff and defendant claimed that each was sole proprietor of a business and that the other was merely an employee.⁶¹ The court held that the real owner was entitled to an injunction and enjoined the agent from interfering with the business.

VII. REPRESENTATION OF ADVERSE INTERESTS

A fiduciary's duty of loyalty to the beneficiary will not permit him to act for a person who has an interest adverse to that of the beneficiary. While he is employed in his fiduciary capacity, his entire energies must be devoted to the advancement of the beneficiary's legitimate interests.

The results flowing from this breach of a fiduciary's duty are not uniform. In those cases in which the beneficiary must, of necessity, rely upon the fiduciary's judgment the transactions have been rescinded without the necessity of showing that they were unfair to the benefi-

⁵⁸ *Debnam v. Simonson*, 124 Md. 354, 92 A. 782 (1914). This case may be an example of the choice of the wrong remedy. The suit was brought for conspiracy to interfere with contractual rights. As the Court pointed out, the plaintiff had no contract at the time.

⁵⁹ *Crownfield v. Phillips*, 125 Md. 1, 92 A. 1033, A. C. 1916 E. 991 (1915).

⁶⁰ *Jaffray v. King*, 34 Md. 217 (1871); *Hippodrome Co. v. Lewis*, 130 Md. 154, 100 A. 78 (1917).

⁶¹ *Lord v. Smith*, 109 Md. 42, 71 A. 430 (1908).

ciary. Thus a judgment by default, which was obtained because an attorney representing both a surety and a principal withdrew general issue pleas and entered the judgment to the use of the surety, was set aside on the ground that it was impossible for the attorney to represent adverse interests.⁶² The same result was reached in a case in which an attorney represented a widow to negotiate a settlement of her husband's estate with her step-children, when the attorney's wife was one of the step-children.⁶³

However, in cases where an attorney deals with the client directly, the Court of Appeals has been content merely to place upon him the burden of proving that the transaction was fair to the client.⁶⁴ The distinction between these cases seems to be that in the second situation the client necessarily knows that the attorney is acting on his own behalf and therefore does not rely exclusively upon the attorney's judgment.

The same rules are applied in cases dealing with agents. If an agent acts for an adverse party, including himself, without the principal's knowledge, the transaction will undoubtedly be voidable at the option of the principal.⁶⁵ On the other hand if the principal has knowledge that the agent's interests are adverse, the transaction will be avoided only if the agent fails to prove that it was fair.⁶⁶ Of course, if the principal consents to the agent's representation of an adverse party, he cannot thereafter complain.⁶⁷

In a number of cases these principles have been applied to suits brought by real estate agents to recover commissions. Such an agent who attempts to represent adverse principals is not permitted to recover commissions from

⁶² *Martindale v. Brock*, 41 Md. 571 (1875).

⁶³ *Derlin v. Derlin*, 142 Md. 352, 121 A. 27 (1923).

⁶⁴ *Merryman v. Euler*, 59 Md. 588, 43 A. R. 564 (1883); *Buechner v. Goodman & Glick*, 197 A. 586 (Md. 1938). Cf. *Etzell v. Duncan*, 112 Md. 346, 76 A. 493 (1910).

⁶⁵ Cf. *De Crette v. Mohler*, 147 Md. 108, 127 A. 639 (1925).

⁶⁶ *Highberger v. Stiffer*, 21 Md. 338, 83 A. D. 593 (1864); *Todd v. Grove*, 33 Md. 188 (1870); *Kerby v. Kerby*, 57 Md. 345 (1882); *Zimmerman v. Bitner*, 79 Md. 115, 28 A. 820 (1894); *Reed v. Reed*, 101 Md. 138, 60 A. 621 (1905); *Horner v. Bell*, 102 Md. 435, 62 A. 736 (1906); *Zimmerman v. Frushour*, 108 Md. 115, 69 A. 796, 16 L. R. A. N. S. 1087 (1908).

⁶⁷ *Liggett Co. v. Rose*, 152 Md. 146, 136 A. 641 (1927); *Balto. Am. Ins. Co. v. Ulman*, 165 Md. 630, 170 A. 202 (1934).

both.⁶⁸ Obviously the same result is reached where the agent either buys or sells the property himself.⁶⁹

Although the fiduciary may be guilty of a breach of duty, the beneficiary alone may take advantage of it. A third person to whom the fiduciary owes no duty may not defend his own wrongdoing on the ground that the fiduciary has represented adverse interests.⁷⁰ The fiduciary's duty extends only to the particular transaction for which he is employed. He may deal with the beneficiary freely and at arm's length after the fiduciary relationship has terminated.⁷¹

One apparent exception to these principles is found in the case of corporate directors who deal with themselves as directors of another corporation. The Court of Appeals has repeatedly held that there is no presumption of unfairness or illegality simply because corporations who are parties to a transaction have common directors or stockholders.⁷² In such cases the directors' duty to each of the corporations may conflict, but the temptation to disregard their duty because of self interest is not so evident. The rule is otherwise when the directors deal with themselves.⁷³

VIII. OTHER BREACHES OF THE DUTY OF LOYALTY

Finally, there are certain cases which do not seem to fit into the classifications here employed, in which the Court has recognized the fiduciary's duty of loyalty. In most of them the facts presented an *a fortiori* case for the application of these principles. Directors of a corporation

⁶⁸ *Raisin v. Clark*, 41 Md. 158, 20 A. R. 66 (1874); *Blake v. Stump*, 73 Md. 160, 20 A. 788, 10 L. R. A. 103 (1890).

⁶⁹ *Slagle v. Russell*, 114 Md. 418, 80 A. 164 (1911); *Wieghardt v. Wagner*, 140 Md. 188, 117 A. 330 (1922).

⁷⁰ *Jaeger v. Shea*, 130 Md. 1, 99 A. 954 (1917).

⁷¹ *Schwartz v. Yearly*, 31 Md. 270 (1869); *Brown v. Mercantile Trust Co.*, 87 Md. 377, 40 A. 256 (1898); *Lucas v. Crenshaw*, 116 Md. 455, 82 A. 446 (1911); *Owners Realty Co. v. Cook*, 123 Md. 1, 90 A. 602 (1914). But the fiduciary has the burden of proving that the relationship has terminated, *Woodcock v. Dennis*, 199 A. 845 (Md. 1938).

⁷² *Booth v. Robinson*, 55 Md. 419 (1881); *Davis v. U. S. E. P. & L. Co.*, 77 Md. 35, 25 A. 982 (1893); *Shaw v. Davis*, 78 Md. 308, 28 A. 619, 23 L. R. A. 294 (1894); *Hagerstown Mfg. Co. v. Keedy*, 91 Md. 430, 46 A. 965 (1900); *Penna. R. R. Co. v. Minis*, 120 Md. 461, 87 A. 1062 (1913); *Homer v. Crown Cork & Seal Co.*, 155 Md. 66, 141 A. 425 (1928).

⁷³ See cases *supra* n. 11.

and the owners of a majority of its stock, who induced minority stockholders to exchange their common stock for preferred stock without disclosing that the corporation had earned large profits and would pay correspondingly large dividends on the common stock, were held to have violated their fiduciary duty.⁷⁴ Officers of a bank which was hopelessly insolvent who permitted the payment of a large check drawn on the bank by a corporation owned by one of them, and the payment of a note owed by the bank and endorsed by three of them, were likewise held to have neglected their trust.⁷⁵

IX. CONCLUSION

In an early case Chancellor Hanson, in setting aside a sale made by an administrator to himself, said:

“The Chancellor earnestly wishes it understood, that in his opinion no rule of this Court, adopted for the prevention of fraud, ought to be relaxed; but that, on the contrary, rules against fraud ought to be as strict as possible. He has known more than one instance where a trustee has openly purchased, and there was no reason to doubt the fairness of his conduct, and yet this Court would not ratify the sale.”⁷⁶

The Court of Appeals, in a recent case, said:⁷⁷

“This question is governed by a broad and most salutary equitable principle, which may be thus stated: that a trustee, or one acting in a fiduciary capacity, is not permitted to place himself in such position that the interest of the beneficiary and his own personal interest do or may conflict; and the question of whether or not such a position has resulted in a benefit or loss to the beneficiary is not permitted to be inquired into.”

The Court of Appeals has been consistent in applying these principles. Fiduciaries are treated as a class apart.

⁷⁴ *MacGill v. MacGill*, 135 Md. 384, 109 A. 72 (1919).

⁷⁵ *James Clark Co. v. Colton*, 91 Md. 195, 46 A. 386, 49 L. R. A. 698 (1900).

⁷⁶ *Conway v. Green*, 1 H. & J. 151, 152 (1801).

⁷⁷ *Mangels v. Tippet*, 167 Md. 290, 300, 173 A. 191 (1934).

Their actions have been condemned not only when they are unfair to the beneficiary, but also when they are likely to result in unfairness. In this respect the law's appraisal of human nature is skeptical in the extreme. A fiduciary is not permitted to place himself in a position in which there is any likelihood that his actions will be affected by self interest. We generally think of trustees as fiduciaries, yet there are many others who occupy this relationship. The same principles which are applied to trustees are applied to these other fiduciaries, even if the rigor of their application is lessened somewhat by the varying dependence of the beneficiary on the fiduciary's judgment. In all cases the standard required of the fiduciary is definitely higher than that required of others whose dealings are considered by the Courts.