1958 *Present:* **H. N. G. Fernando, J., and Sinnetamby, J.**

A. S. CHATOOR, Appellant, *and* THE GENERAL ASSURANCE SOCIETY, LTD., Respondent

S. C. 796—D. C. Colombo, 27216/M

Principal and agent—Fiduciary relationship—Duty of agent to act with perfect good faith—Profits made by agent in the matter of his agency—Duty to account and pay over—Burden of proof—Trusts Ordinance, s. 90—Marine Insurance Act, s. 84.

Where an agent enters into any contract or transaction with his principal, he must act with perfect good faith, and must make full disclosure of all the material circumstances and of everything known to him respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal.

Where any question arises as to the validity of any such contract or transaction or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position and that the transaction was entered into in perfectly good faith and after full disclosure, lies upon the agent.

It is an inflexible rule that no agent can be allowed in the matter of his agency to make any profit for himself without the consent of his principal, and the fact that the principal did not suffer any injury by reason of the dealing of the agent cannot be taken into consideration in the application of the rule.

An agent, who had been authorised by his principal, an insurance company, to issue within a reasonable time marine insurance policies on behalf of the principal in respect of rubber shipped to China, took advantage of his position as agent to issue unauthorised policies after the reasonable time had elapsed. He further availed himself of his position as agent to withdraw from the principal's bank account the amount of the premia without authority from the principal and without even affording the principal any means of ascertaining whether, in accordance with instructions, cancellation of the policies had been effected.

Held, that the agent was liable to account to the principal and pay over the value or measure of the benefit he received by issuing the policies. In such a case, the burden of establishing good faith lies on the agent.

Held further, (i) that the case fell within the scope of section 9 of the Trusts Ordinance.

(ii) that upon the findings of fact in the present case there was "illegality" within the meaning of the English Marine Insurance Act (which applies in Ceylon via the Civil Law Ordinance).

APPEAL from a judgment of the District Court, Colombo.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardene, John de Saram* and *M. Hussein*, for the defendant-appellant.

H. W. Jayewardene, Q.C., with *P. Navaratnarajah, Neville Samarakoon, S. Sharvananda* and *P. Ranasinghe*, for the plaintiff-respondent.

Cur. adv. vult.

2——J. N. B 11013—1,593 (1/59)

March 17, 1958. H. N. G. FERNANDO, J.—

The dispute in this case arises out of what Counsel has described as certain " exciting " events which took place in the second half of the year 1951 when a few businessmen in Ceylon entered into contracts for the export of rubber to the Republic of China and after a period of anxious delay caused by the difficulties of obtaining shipping space and by the risk of seizure or blockade by " hostile " parties, were able to reap handsome profits from their shipments. The defendant was one of these individuals and he apparently had in June 1951 either obtained or expected to obtain a contract with the Chinese National Import and Export Corporation of Canton to ship 1,500 tons of rubber C.I.F. to Tientsin, and he expected to be able to ship the rubber in July 1951 under arrangements to be made for the purpose by the purchaser.

The defendant besides being a businessman carrying on his own business under the name of A. S. Chatoor and Company, had under the same name been appointed the Chief Agent in Ceylon of the plaintiff Society, an Insurance Company registered in India. The terms of the Agency agreement (document D10) authorised the defendant to collect premia and to issue receipts for premia at rates set out in the agreement. Although no express provision was made in the agreement for commission on business other than Life business, it is common ground that the defendant had actual authority to accept Marine Insurance and to issue policies in respect of such Insurance in the name of the Company, the agreed rate of commission for such business being 37½ per centum of the amount of the premium, but that the defendant had no authority to accept Insurance for an amount exceeding Rs. 350,000 in respect of cargo on any one ship. The defendant also had authority to issue policies to himself in respect of produce shipped by him, and indeed one of the terms of the understanding was that his shipments would ordinarily be insured with the plaintiff Society.

The shipment contemplated in June 1951 being a very much larger one than would be covered by the defendant's ordinary authority, the defendant sent telegram P3 of 25th July 1951 to the Society in the following terms :—

> " CHATOOR INTERESTED INSURANCE MARINE WFA WAR FOR EIGHT MILLION RUPEES SHIPMENT RUBBER TO TIENTSIN CHINA CHARTERED VESSEL CHINESE OR PAN AMERICAN FLAG TELEGRAPH MAY INSURE SHIPMENT PROBABLY MIDDLE JULY."

(Counsel at the argument in appeal are agreed that the words " may insure " meant " may I insure ? "). To this telegram the Society replied immediately by P4 agreeing to accept Insurance up to 35 lakhs per bottom. This telegram was confirmed by the Society's letter D4 of 29th June 1951 in which it was further stated that the Chief Agency commission for this particular business must not exceed 15% of the

premium. The defendant then expressed his disappointment at the rate of commission and inquired by P6 of 3rd July what maximum amount the Society would be prepared to take keeping the existing rate of commission. On 13th July the Society explained in P7 their reasons for restricting the total to 35 lakhs and the commission to 15%, the reason apparently being that they would only retain Insurance for 4 lakhs per bottom and could re-insure for the excess up to 31 lakhs in London, themselves receiving only a commission of 15 per centum of the premium for this excess amount. This explanation was apparently acceptable to the defendant who replied by P8 of 20th July merely stating that the contents of P7 had been noted and that he would write to the Society " when the occasion arises re the shipment of rubber to China ". The oral evidence both for the plaintiff and the defendant makes it clear that the contemplated ship did not materialise for various reasons and that the defendant as well as other interested shippers were themselves frenziedly attempting to secure alternative shipping space. Ultimately an alternative ship, a Polish vessel " Mickiewicz ", was secured for the carriage of the defendant's shipment as well as of certain other shipments of rubber from Ceylon to China. In this connection there was produced at the trial a telegram D15, received by Mackies Ltd., who also had a contract for the shipment of rubber to China, in which the Chinese purchasers informed Mackies that space on the " Mickiewicz " was fully arranged. In fact it would appear that a relative of the defendant, Shivajee, had assisted considerably in securing space on this particular ship.

The Chinese buyers of the rubber must late in August have become aware that shipping space was secured, for the necessary arrangements for payment in Ceylon for the rubber were made between the Bank of China at Calcutta and the Bank of Ceylon in Colombo, which latter on 29th August 1951 advised the defendant of their receipt from the Bank of China of what has been described as an advice of payment or a letter of credit. In lay language the Bank of Ceylon was authorised to pay the defendant for three different consignments of rubber, each of 500 tons of Grades 1, 2 and 3 respectively, the total credit being for an amount of ten million odd rupees. In order to receive payment, the defendant had *inter alia* to produce to the Bank of Ceylon an Insurance policy covering Marine Risks, War Risks, WPI and NPA—Blockade, Seizure and Capture. The fact that the contract was CIF is reflected in the reference in the letter of credit to insurance being effected by the shipper and the freight being pre-paid by the shipper. It would appear also from the terms of the advice of credit that it would expire on 5th October 1951.

The defendant had not himself shipped rubber before and had arranged with Mr. de Soysa of Mackies Ltd. to purchase and ship 1,500 tons of rubber on his behalf. In pursuance of this arrangement, the defendant issued an irrevocable authority to the Bank of Ceylon (P53 of 11th September 1951) to pay to Mackies Ltd., on the negotiation of documents, the sums otherwise payable to the defendant on the advice of payment.

I have to turn now to the defendant's arrangements to effect insurance in fulfilment of his CIF contract with the Chinese buyers. On 4th September 1951 he sent to the plaintiff Society the following telegram (P9) :—

> " MAY ACCEPT TEN MILLION RUPEES MARINE SHIPMENT ONE THOUSAND FIVE HUNDRED TONS RUBBER IN BALES TO TAKUBAR CHINA PER POLISH VESSEL MICKIEWICZ LOADING NEXT WEEK OTHERS QUOTING FOUR PERCENT WAR RISKS INCLUDING SEIZURE BLOCKADE STOP PROVIDED CHIEF AGENCY COMMISSION AGREE TWENTY PER CENT REPLY IMMEDIATELY. "

Here too it is agreed by Counsel that the words " may accept " meant (" may I accept ? "). The Society did not reply by telegram but did so by their letter P10 dated 5th September. By this they briefly informed the defendant " of our inability to accept same (i.e ten million rupees Insurance) and even what we suggested in our letter of 13th July 1951 in view of the conditions now prevailing in China ". The defendant's evidence is that P10 did not reach him until 10th September. His next step was to send the telegram P11 of 13th September to the Society :—

> " YOUR LETTER FIFTH SEPTEMBER COVER ALREADY ISSUED FOR THIRTY FIVE LAKHS ON STRENGTH OF YOUR LETTER 29TH JUNE AND 13TH JULY ISSUING POLICIES TODAY PREMIUM TEN PERCENT. "

On 15th September the defendant again wired to the Society " can we accept further 30 lakhs rubber to China ? " and added " United India, Sterling and Legal and General covering ". The Society's reply to both these telegrams was P13 of 17th September " cancel rubber cover immediately : yours 15th declined ", and they followed up with a letter P14 of the same date pointing out that the authority given by the letters of 29th June and 13th July had lapsed and advising the defendant to cancel the cover already issued and the policies. In another telegram P16 of 19th September the Society reiterated the position that the defendant had no authority whatever to issue the cover and the policies and altogether repudiated them. They further directed the defendant to cancel and to inform them of the name of the negotiating Bank " whether the documents were negotiated or not ". This telegram too was followed up by a confirming letter declaring that the cover and the policies are void and stating that it would be the defendant's duty to see that the policy is cancelled and is not used for payment by any Bank. By P18 of the 20th the defendant replied that the policies had already been issued and negotiated and that cancellation was now impossible, but stated in addition that he had cabled Hong Kong for reinsurance and will intimate reply. There followed further correspondence in which the Society continued to take up the position that

the policies had been issued without authority and were void and repeated their request for cancellation, while the defendant maintained that the June-July authority covered the issue. Ultimately by P29 of 13th October 1951, the defendant cabled the Society as follows :—

"REFERENCE YOUR LETTER 29TH SEPTEMBER BUYERS AGREED HAVE INSURANCE THEIR END RETURNING OUR POLICIES AIR MAIL STOP WITHDRAWING FULL PREMIUM DEPOSITED YOUR ACCOUNT MONDAY PLEASE CONFIRM OUR ACTION URGENTLY"

and he again cabled thus by P31 of 16th October :—

"REFERENCE OUR TELEGRAM THIRTEENTH PREMIUM WITHDRAWN POLICIES TREATED CANCELLED OUR RESPONSIBILITY."

The Society's reply to P29 was apparently received after P31 was despatched, because P31 dated 16th October was clearly a follow-up to P29 and contained no reference to P30 of the same date. The text of P30 from the Society was as follows :—

"YOUR TELEGRAM STOP CANCELLATION ACCEPTED WITHOUT PREJUDICE TO OUR RIGHTS TO CLAIM FROM YOU PROPORTIONATE PREMIUM STOP PLEASE FORWARD CONFIRMATION OF THE BANK IN WHOSE FAVOUR THE POLICIES WERE NEGOTIATED."

The evidence establishes that a total premium amounting to Rs. 311,344·50 was paid into the Society's account with the Indian Overseas Bank, Colombo on the 25th September, by cheque drawn by Mackies Ltd., that this amount was the premium payable on the policies covering a part of the defendant's shipment of rubber to the value of 35 lakhs, that on October 4th 1951, by cheque drawn in his favour "(M/s Chatoor and Co. or bearer)" the defendant withdrew fifty odd thousand rupees, and that thereafter the defendant on 16.10.51 issued a cheque drawn on the Society's account for Rs. 256,340·43 payable to bearer, the amount of which sum was paid out to the defendant across the counter. The defendant admits in his evidence that he withdrew the money on the second cheque himself and it would seem that the earlier cheque included a sum of Rs. 55,000 odd which, according to his computation, was the commission due to him on the premium paid for the insured shipment of rubber.

On the material which I have summarized above the Society on 17th September 1952 instituted their action based on the preliminary averment *inter alia* that the Society had appointed the defendant its Chief Agent in Ceylon for all classes of Life, Fire, Marine Accident and Miscellaneous Insurance business and that the defendant functioned and served as Chief Agent and was appointed and became its Attorney in Ceylon for the said purposes. The first cause of action pleaded in the plaint was on the basis that the defendant had on behalf of the

Society issued the cover note of 7th September 1951 and the policies on 13th September 1951, that the Society was accordingly the insurer and that the risk of loss and damage was upon them and that accordingly the Society is entitled to receive from the defendant the total premium of 311 odd thousand rupees. The learned Judge has held that the policies were void and of no effect : hence this cause of action failed, and so also did the *fifth cause of action* which also rested on the validity of the policies. The *third cause of action* was on the basis that the proper premium was 40¼ per centum and constituted a claim for premium at that rate. With respect to this cause the learned Judge has held that the proper premium was not 40¼ per centum. The correctness of the findings with regard to these three causes of action was not challenged in appeal and we are not called upon to re-consider them.

The fourth cause of action (cf. paragraphs 13 and 15 of the plaint) alleged that the defendant received a benefit by issuing policies in his own favour ; that the value of the benefit is rupees one million odd (based on the amount of premia at the rate of 40¼ per centum) and that the defendant must in law account to the Society and pay over the value or measure of this benefit. On this cause of action the learned Judge held in favour of the Society, subject to the modification that the value of the benefit was the amount of the premium calculated at the rate of 10 per centum, on the footing that the defendant issued the policies without the requisite authority from the Society (a point which underlies the Judge's conclusions with respect to all the causes of action and to which I shall refer later) and that he did receive a benefit referable only to the circumstance that he was the Society's agent. The benefit—it might be better termed an advantage—was that he was able to produce to the Bank of Ceylon a policy covering the insured part of his shipment of rubber, without which payment would not have been made on the Advice of Credit. The value to the defendant of this benefit or advantage was at the lowest the amount of the premium ordinarily payable on such a policy. (The value might conceivably have been computed as the equivalent of the nett profit which accrued to the defendant from the "deal" in rubber, but the plaint contained no claim on this basis). But by the payment of the premium into the Society's account on 25th September 1951, the defendant would appear to have fulfilled his obligation to hold for or pay over to the Society the value of the benefit or advantage. The subsequent withdrawal of the premium was in this view a separate and distinct act, the propriety and consequences of which were made the subject of the plaintiff's second cause of action. In any event, even if the withdrawal can be said to have "neutralized" the effect of the earlier payment and thus given rise to the fourth cause of action, the points which would have to be considered are substantially the same as those arising on the second cause of action.

Before dealing with the plaintiff's second cause of action it is convenient to refer to certain findings of fact of the trial Judge which, although not directly relevant to the matters involved in the second cause of action, must very properly have influenced the mind of the trial

Judge in considering the credibility of the defendant's evidence with respect to those matters. These findings were (*a*) that the correspondence ending with the defendant's letter P8 of 20th July 1951 only authorised the insurance up to an amount of 3½ lakhs per bottom of a shipment to be made within a reasonable time and did not authorise any insurance of any shipment due to be made about the end of September 1951; (*b*) that the defendant was aware of this lack of authority when he sent the cable P9 of 4th September 1951 which on its face was a new application for authorisation; (*c*) that the defendant was guilty of a breach of duty if, as he maintained, he issued a cover note on the 7th of September because he was aware at this stage that the earlier authority had lapsed, and that he took advantage of his position as agent to issue unauthorised cover notes; (*d*) that the defendant was guilty of a breach of duty when he issued the three policies on September 13th, because it was perfectly clear from the plaintiff's letter P10 of 5th September, received by the defendant on 10th September the latest, that the Society had declined the Insurance. Indeed the defendant had ultimately to admit in the course of cross-examination that he may have taken the view that P10 had revoked any such authority as he might previously have thought himself to have had.

Counsel for the defendant at the argument in appeal very properly conceded that in law the earlier authority had lapsed and the policies were accordingly issued without authority. But he argued that the defendant might in good faith have thought that he still had authority to issue the cover note on the 7th of September. Even if this be so, the Judge was surely right in holding that the policies were issued on September 13th with the full knowledge of the absence of authority. Whatever the rights or claims which might have arisen against the Society by reason of the issue of the cover note, the defendant as the Society's agent was bound to withhold the issue of the policies. The general authority to insure his own shipments gave the defendant no right to treat himself differently to a third party: if the cover note had been issued to a third party would the defendant have issued the policies despite the Society's letter P10? He would surely have withheld the policies even at the risk of exposing the Society to some action, if any, maintainable upon the note.

In my view the only reasonable inference in the circumstances is that, having regard both to the chances of large profits and to the difficulty of obtaining freight if shipment was not made on the "Mickiewicz", the defendant was anxious at all costs to perform his contract with the Chinese buyers and considered it essential to possess himself of a policy of marine Insurance in order to fulfil his obligations under the contract.

The answer of the learned Judge to the issues 4 (*n*) and 5 (*d*) that there was fraud in the issue of the policies was reached after consideration of the matters I have just enumerated as well as of certain other points, to two of which I must refer. It was held that the statement in the telegram P9 of 4th September, 1951, that other Companies were quoting 4 per centum was a false statement. On this point the Society was

unable to tender evidence of falsity but there was ample evidence of falsity at the end of the case to justify the Judge's finding. If at the trial the defendant made no adequate attempt to prove the truth of his statement which related to matters within his own knowledge, it is not legitimate to say in appeal that the onus was wrongly placed on the defence.

It has been strongly pressed upon us that the finding of the trial Judge upon issue 4 (*f*) to the effect that the cover note was actually issued after 7th September but antedated to 7th September was erroneous and vitiated the main conclusion as to fraud in issuing the policies. Despite appearances, however, there was no such finding and the answer to the issue did not constitute such a finding. In that part of the judgment which deals expressly with the matter, the conclusion which the Judge reached was that he was unable to believe the defendant's evidence that he issued the cover note on 7th September, and that there was a strong suspicion that the cover note was antedated. The conclusion was, in brief, only that 7th September was not proved to have been the true date. The answer given to the issue at the end of the judgment has to be read in the light of the comments made at the stage when the learned Judge examined the relevant evidence which led to that conclusion. Having regard to all the material upon which a finding of fraud in regard to the issue of the policies could have been reached, I cannot agree that the Judge's opinion as to the antedating of the cover note, even if erroneous, must be held to have vitiated the finding of fraud.

The issues framed upon *the second cause of action* (alleged in paragraph 9 of the plaint) were the following :—

5 (*e*) Did the defendant as plaintiff's agent having effected insurances on its behalf pay into the account of the plaintiff Company premia due to it in respect of such insurances ?

5 (*f*) Did the defendant thereafter withdraw the amount without authority from the plaintiff Company ?

5 (*g*) If issues 5 (*e*) and 5 (*f*) are answered in the affirmative was the withdrawal of the said sum of Rs. 311,344·50 unlawful or fraudulent ?

6 Is the premia returnable by the plaintiff Company whether the said policies of Insurance were void or not ?

7 Is the plaintiff Company entitled to the sum of Rs. 311,344·50 and to recover the same from the defendant ?

The principal question involved in these issues, and indeed as it turns out the principal question for decision in the whole case, is whether the learned Judge correctly answered issue 5 (*f*) in favour of the plaintiff. If this issue had correctly to be answered in the affirmative, it was in my opinion unnecessary for the plaintiff to rely on fraud or illegality, in the act of withdrawal and accordingly the question whether issue 5 (*g*) was correctly answered is not material. With regard to the withdrawal, the arguments of Counsel for the defendant have been (*a*) that

the Society did authorise the withdrawal of the premia, and (*b*) that in any event the burden lay on the Society to establish that the premia were withdrawn without authority.

In order to consider these arguments it is necessary to determine by reference to the relevant correspondence what was the authorisation if any given to the defendant and what were the terms of such authorisation.

The plaintiff Society had on several occasions requested or directed the defendant to cancel the policies on the ground that they were issued without authority and were void. But these requests and directions were all at a stage prior to the departure of the ship from Ceylon: the last of them was in the letter P24 of 29th September, which refers to the fact that the ship (Mickiewicz) "is still at the wharf" and to a Reuter's message stating that the ship had been comprehensively insured by the Chinese Government—a circumstance which would enable the defendant to withdraw the cover "even now and all matters set at rest". The "mandate" to cancel (as it was termed by Counsel for the defendant) was given at a stage when the risk of the voyage had not commenced, though risk of loading may have commenced earlier. If, therefore, cancellation had been effected before the departure of the ship from Ceylon, the defendant might have been able to maintain (although I do not so decide) that the mandate to cancel implied also a mandate to refund the premia, whether to himself or to the appropriate party, and that there was implied authority to withdraw the premia. To put the matter simply the Society, although it regarded the policies as void and might reasonably have expected that opinion to be confirmed in a Court of Law, would quite naturally have preferred to avoid not merely the possibility of risk but also the possibility of dispute, by means of a cancellation. If, therefore, the defendant had represented that cancellation could be secured if the premia were refunded, the Society might well have agreed to the refund upon the faith of that representation; and had the refund been made in such circumstances the argument that the falsity of the representation had to be established by the Society might well have been entitled to succeed.

In fact however the defendant's statement in his telegram P29 that the policies had been cancelled and were being returned to him by air was made after the departure of the Mickiewicz from Ceylon and accordingly after the stage had been reached when there existed the possibility of a claim and a dispute. But even at this stage it is quite conceivable that an offer of cancellation in consideration of the refund of the premia would have been acceptable to the Society. *But P29 was not an offer of cancellation, but rather a statement that cancellation had in fact been effected,* so that there was no question then of consent to a refund on the faith of a promise to cancel. What then must be the meaning which can reasonably attach to the Society's reply P30? For the defendant it is argued that the Society impliedly authorized the refund in the belief that the policies had been cancelled, or in other words, that they allowed the money to get out of their control on the faith of a representation that the risk of liability had terminated. Much store has been placed on the circumstance that P30 made no reference to the defendant's statement of intention to withdraw the premia, and that the only matter reserved

was a possible claim for a proportion of the premium. This argument has to be considered in the context of the situation existing at the time. The Society was in P29 informed by the original assured that an assignee to whom the rights under the policy had passed had in fact waived those rights. If that information was reliable, there would be no ground to fear any future claim or dispute and therefore no need for undue haste in returning the premia, which the Society literally had in its pocket at the time. Suppose that the Society's principal in Calcutta had been informed across the table of the facts alleged in P29: would he have forthwith returned the premia, or would he rather have said "everything seems settled now; bring the cancelled policies and I will refund the premia"? Suppose that the defendant himself had without authority issued a policy to some third party who subsequently informed him of a cancellation by an assignee: would he not have awaited the return of the cancelled policies before making any refund? While an insurer might reasonably refund a premium *as an inducement* to the holder of a policy to effect a cancellation, it would be quite un-businesslike to make a refund *after an alleged cancellation* except upon surrender of the cancelled policy. In my opinion, therefore, the most favourable construction which the defendant can seek to place on the document P30, was that the Society thereby impliedly authorized the withdrawal of the premia upon the condition that the policies had in fact been cancelled. The defendant as the Society's agent had no authority to repay the premia unless the policies had actually been cancelled. What he did in fact was to withdraw the amount himself without even affording the Society any means of ascertaining whether cancellation had in fact been effected. All that the Society knew for certain at the time of the institution of the action was that the amount of the premia had come into the hands of the defendant in his private capacity, a situation which brings into operation principles of the Law of Agency and of Equity which have been expressed as follows:—

> "Where an agent enters into any contract or transaction with his principal, or with his principal's representative in interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative.
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> "Where any question arises as to the validity of any such contract or transaction or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position, or of the confidence reposed in him, and that the transaction was entered into in perfectly good faith and after full disclosure, lies upon the agent." (Bowstead—Agency, 9th Edn. Art. 52).
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> "It is an inflexible rule of the Court of Equity that no agent can be allowed in the matter of his agency to make any profit for himself without the consent of his principal, and the fact that the principal did not suffer any injury by reason of the dealing of the agent cannot be taken into consideration in the application of the rule.

"James, L.J., in *Parker v. McKenna* said: 'The rule is an inflexible one and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence or suggestion or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such inquiry as that.'

"The relation is of a fiduciary nature whenever the principal reposes trust and confidence in the person whom he selects as agent. This is so in all cases of general agency, but where the agency is not a general one its fiduciary nature depends upon the circumstances of the particular case.

"An agent will not be allowed to put his duty in conflict with his interest, and therefore he must not enter into any transaction likely to produce that result unless he has made to his principal the fullest disclosure of the exact nature of his interest, and the principal has assented." (Vinter—A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts—3rd Edn. pp.154 and 155).

The "transaction" here in question was the act of withdrawal by means of a cheque drawn on the Society's account by the defendant acting as the Society's agent. Unless the policies had in fact been cancelled, the withdrawal constituted an undue advantage to the defendant which he could not have gained except for the power he had, as agent, to operate on the Society's account. Hence the burden of proving cancellation and of establishing good faith lay on the defendant. This burden, according to the findings of the District Judge, the defendant has failed to discharge.

In his answer to issue No. 25 the Judge holds that there is no acceptable evidence that the policies were cancelled. Counsel for the defendant had to concede at the argument in appeal that if the burden of proving cancellation lay on the defence, the best evidence of cancellation had not been adduced: the production of the alleged policies was by itself quite inadequate in the absence of proper proof (*a*) that they were the identical policies issued to cover the rubber shipment, and (*b*) that they had in fact been cancelled by the holder for the time being. Despite this, the learned Judge might have held in favour of cancellation if he had felt able to accept the oral evidence that the amount of the premia had been repaid by the defendant, either directly to the buyers or indirectly by effecting cover in substitution for that issued in the name of the Society. But this evidence too was rejected by the trial Judge upon grounds which appear to be sound and which have not been seriously criticised in appeal. In failing to prove that the policies were in fact cancelled, the defendant failed to establish that the act of withdrawal was authorised by his principal.

Considered from another aspect, the circumstances in my opinion bring the case within the scope of section 90 of the Trusts Ordinance. Undoubtedly the defendant did have the authority to refund the premia

in appropriate cases upon cancellation of policies. But let us suppose that in a given month a dozen policies had been issued and the premia paid into the Society's account, and that the respective amounts had been subsequently paid out of that account upon cheques drawn by the defendant and cashed by him at the Bank. If the withdrawals were queried by the Society, would it suffice for the defendant merely to answer, without adducing proof of cancellation or refund, that he had after withdrawal of the cash, refunded the respective amounts in consideration of cancellations ? I think without hesitation that in such a case the receipt of cash by means of cheques drawn by the defendant in his capacity as agent constitutes an *apparent* advantage to himself, which the defendant would be bound to hold for the benefit of his principal in terms of section 90, unless of course he can show affirmatively that the cash was actually applied for the purpose of making authorised refunds. Where, if any other view be permissible, would there be the fulfilment of an agent's duty to make the fullest possible disclosure of the facts and circumstances of transactions with his own principal ?

> "The doctrine of fiduciary relationship is a doctrine of equity, the rule being that a person must not take advantage of that relation to obtain a gift or other benefit to himself. Equity treats a breach of this rule as a 'constructive fraud', and although there may be no fraud in fact the transaction is deemed fraudulent, because it is an abuse of some fiduciary relation, or, in other words, undue influence is presumed from confidential relationship." (Vinter op.cit. p.2)

The author (later on the same page) makes it clear that the doctrine applies not only where the possibility of undue influence exists, but generally in the case of persons standing in a fiduciary relation to others.

It is necessary to deal only with one further argument raised on behalf of the defendant. One of the grounds on which the plaintiff Society succeeded at the trial was that the premia paid in respect of the policies were not returnable to the assured for the reason that although the policies were void, there was fraud or illegality on the part of the assured. Section 84 of the Marine Insurance Act (which applies in Ceylon via Cap. 66 C.L.E.) provides that where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured, the premium is thereupon returnable to the assured. The argument for the defendant has been twofold—firstly that this is not a case of a failure of consideration but one where there was no *consensus-ad-idem* and therefore no contract, and secondly that even if section 84 is applicable there was no fraud or illegality within the meaning of that section.

The first argument is in essence that this is not a case of void or voidable contract, but one where there was no contract at all : and that therefore the question whether the plaintiff is entitled to recover the premium has to be determined without reference to the Statute. While conceding that where a contract is void as being prohibited by Statute or contrary to public policy a person who has paid any consideration is precluded from recovering it for the reason that he cannot plead his own illegal

act, Counsel has argued that the position is different where the ground on which recovery is claimed is merely that the opposite party did not in fact enter into a contract at all. But even if one assumes this argument to be sound, it does not in my opinion avail the defendant. In issuing the policies in the name of the plaintiff Society, the defendant made to himself a representation that he had authority to issue the policies, and what he is now seeking to do is to plead that he did not have the authority. To admit this plea would be tantamount to allowing the defendant to rely on his own breach of duty to his principal and on conduct which the learned trial Judge has rightly found to have been fraudulent.

As to the second argument, it has been urged that section 84 deals only with a case of fraud or illegality on the part of the assured in his *capacity as such*, that is to say, with cases where the assured has obtained the policy either in contravention of some Statute or of some rule of public policy, or by means of some fraud *committed in relation to* the Insurer. The present case, it is argued, does not fall within section 84 because the fraud, if any, was committed by the defendant not in his capacity as the assured but in his capacity as the agent of the insurer. I have just pointed out with respect to Counsel's first argument that even if section 84 does not apply, he must fail for the reason that the defendant cannot plead his fraud in his capacity as agent in order to seek recovery in his capacity as the assured. But quite apart from that consideration it seems to me that the section does apply because there was "illegality" within the meaning of the section. Upon the *findings of fact* of the learned District Judge, the defendant acted at least dishonestly when he issued the policies knowing that he had no authority so to do. He intended to cause wrongful gain to himself by possessing himself of a document to be utilised for the purpose of deceiving the Bank of Ceylon *into the belief* that the policy was one duly issued on the Society's behalf, and in fact he succeeded in carrying out this deception. I am inclined to the opinion that the circumstances bring the case within the principle to which illustration (*d*) to section 453 of the Penal Code furnishes an example. In that illustration the case is one where the agent has actual authority to insert a sum not exceeding Rs. 10,000 on a blank cheque already signed by his principal: but the mere fact that the agent fraudulently enters a larger sum renders him guilty of forgery. That case illustrates the point that a fraudulent misuse of authority is equivalent to an act done without any authority.

I must lastly mention the fact that Counsel for the defendant did not press any claim for the retention of agency commission on the amount of the premia paid on the policies. If the act of issuing the policies constituted a fraudulent breach of duty, the defendant would have no right to a commission on the transaction.

I see no ground for interfering with the judgment and decree entered in the District Court. The appeal is dismissed with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.