[HIGH COURT OF AUSTRALIA.]

NICHOLSON . . . . . APPELLANT;
PLAINTIFF,

AND

GANDER & OTHERS
DEFENDANTS,
AND
McLACHLAN AND OTHERS
INTERVENANTS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *May* 18, 20, 21, 24, 28.

Griffith C.J., O'Connor and Higgins JJ.

Mining on Private Lands Acts (*N.S.W.*) 1894, 1896—*Authority to enter—Agreement to form mining syndicate—Land taken up by one member on behalf of syndicate—Partnership—Abandonment of undertaking—New authority to enter obtained by member of syndicate—Trustee—Constructive trust—Declaration of trust—Agreement to hold for the benefit of others—Consideration.*

Practice—Assignment of interest of party before appeal—Assignees allowed to intervene.

Under the *Mining on Private Lands Acts* 1894, 1896 a mining Warden may grant an authority to enter upon a definite area of private lands and prospect for minerals, subject to certain conditions as to compensation. The authority continues for one year, is renewable in certain circumstances, and the holder has the exclusive right during its currency to apply to the Crown for a mining lease of the area.

N. agreed with G. and Z. that one of the three should obtain an authority under the Act to enter certain private lands on behalf of the three, and that they should then form a syndicate to work the land with a view to obtaining a lease in the event of their inducing some one with the necessary capital to join them. N. undertook certain work in connection with having the land declared open for application. The land was declared open owing to his efforts and he received certain private information from the Department of

Mines which enabled G. to obtain an authority to enter the land. In pursuance of the agreement G. and Z. entered on the land and began prospecting operations. At the expiration of the year of the authority to enter G. abandoned the authority under circumstances which, taken in conjunction with the conduct of the parties during the period of its currency, indicated that the original enterprise had been abandoned. Z., N., and M. the assignee of G.'s interest in the original authority then made independent applications for a new authority, and Z.'s application was granted by virtue of priority. There had been no prior communication or concert between the applicants, but Z. subsequently admitted G. to a share in the authority, and both repudiated any claim by N. to a share. In a suit by N. to have Z. declared a trustee for himself, G. and M. of the authority and the benefits attaching to it:

Held, on the evidence, that the original enterprise which had been abandoned had never been renewed; that Z.'s application was not in any way founded upon or connected with the title under the original authority, so that he had not made use of any right or advantage belonging equally to the parties to the original agreement; that he was not in any fiduciary position and owed no duty to them in respect of the authority; that he had not been guilty of any fraud or concealment, and, therefore, following *In re Biss*; *Biss* v. *Biss*, (1903) 2 Ch., 40, that he could not be held to be a trustee of the authority for the benefit of the others.

Held, also, that mere statements made subsequently by Z. of his intention or willingness to admit N. to a share in the benefits of the new authority did not amount to a declaration of trust as to a definite share in it which equity could enforce in favour of N., and that, even if they amounted to a promise to hold the authority for the benefit of N., there was no consideration for the promise and it could not be enforced.

Decision of *A. H. Simpson* C.J. in Equity, 18th March 1908, affirmed.

Where the respondents in an appeal had assigned their interest in the subject matter of the litigation between the hearing in the Supreme Court and the appeal, the High Court refused to allow the assignees to be substituted as respondents for the original respondents without the appellant's consent, but allowed them to intervene as respondents on giving an indemnity to the original respondents for all costs.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity in the Supreme Court of New South Wales.

This was a suit by the appellant to have it declared that Martin Zobel, one of the respondents, was a trustee for the parties to the suit, that is, for himself, Gander, the appellant, and one Murray, according to their respective interests, of an authority to enter under the Mining on Private Lands Acts, and of an application

H. C. OF A. 1909.

NICHOLSON v. GANDER.

made by Zobel for a lease in virtue thereof, and of all rights and powers attaching to them, and for an injunction and other consequential relief. The suit came on for hearing before *A. H. Simpson* C.J. in Equity. It is not necessary, for the purposes of this report, to refer to the evidence in detail, the material portions being sufficiently stated in the judgments hereunder. The appellant relied upon an agreement made between himself, Zobel, and Gander during 1903 in reference to acquiring certain private lands then under lease to the Mount Bulga Copper Mine Co., as to which the learned Chief Judge in Equity said in delivering judgment:—"The result of the evidence I find to be that it was arranged that the plaintiff should obtain the forfeiture of the leases and do all the necessary work in the Mines Department; that some fourth person should be found to provide the necessary money; that Gander and Zobel should peg out or otherwise take up the land after the cancellation of the leases, and the mine when so obtained should be divided into four shares, one fourth for the plaintiff, one fourth for the finder of the money, one fourth for Gander and one fourth for Zobel." His Honor, after further reference to the evidence, said in conclusion:—"The evidence as to what the original agreement between the parties was is very intricate and conflicting. There were numerous interviews, and it is practically impossible to say what took place at one interview and what at another. I am satisfied that it was agreed between the plaintiff, Gander, and Zobel that a fourth man should be found to bring in the money required; that the plaintiff should undertake the work in the Mines Department of getting the lease to the company cancelled and a beforehand notice issued to him; that Gander and Zobel should take up the land; and that the four should then be partners in equal shares. There was no definite agreement as to what was to be done if the man who was to supply the capital could not be found, as turned out to be the case, but I am inclined to think, and if necessary to hold, that there was an implied agreement that in that event the plaintiff, Gander and Zobel should be partners in equal shares. Assuming that to be so, the plaintiff contends that his share was to be taken as fully paid up in consideration of the work he did at the Mines Department. This is denied by the others and seems very

improbable. The plaintiff certainly has not satisfied me that this was the agreement, and if so, when once the authority to enter was obtained the plaintiff was liable to contribute a third share of the expenses of working the mines. This he did not do, though he knew creditors were pressing, and in my opinion, whatever rights he had were lost by his laches. As has often been pointed out the doctrine of laches is peculiarly applicable to cases of mining adventures, and it would be unjust if a plaintiff could lie by till the mine had been discovered to be valuable and then claim a share, while if it turned out unsuccessful he could repudiate any liability." His Honor held, therefore, that the appellant's case had failed, and dismissed the suit with costs, 18th March 1908. From that decision the present appeal was brought.

On the appeal coming on for hearing,

Ackermann, for the respondents Gander and Zobel, stated that those respondents, having assigned their interest in the mine since the hearing to Messrs. McLachlan and Murray and others, for whom *Langer Owen* K.C., with *Maughan* and *C. E. Manning* now appeared, desired to be protected in regard to costs, an indemnity having been promised by their assignees, but not yet given.

[GRIFFITH C.J.—I think that the assignees should ask for leave to intervene.

HIGGINS J.—The English practice is to apply before the appeal comes on to have the assignee substituted for the party on the record.

GRIFFITH C.J.—I do not see how in this Court we can alter the parties without the consent of the appellant.]

Langer Owen K.C., for the assignee offered to indemnify the respondents for all costs of the appeal and of the hearing.

The assignees were allowed to intervene on giving the indemnity offered.

Wise K.C. (*Loxton* with him), for the appellant. The evidence establishes a partnership by virtue of the agreement made in 1903. The Judge so found, in effect, and his finding should not

H. C. OF A. 1909.

NICHOLSON v. GANDER.

be disturbed as the question was wholly one of fact. In pursuance of that Gander took up the land under the first authority to enter, and Zobel acquired the authority in 1905 in continuation of the original authority. There was a continuity of title during the whole time. Each of them held for the benefit of other members, the object of the partnership agreement being to obtain an authority to enter as a step towards ultimately acquiring a lease. The arrangement was never abandoned, and Zobel has admitted that he held the authority on behalf of the partners. The partnership can be proved by admissions. Statements by one party in a joint adventure are evidence against the others as to the nature of the arrangement.

[HIGGINS J. referred to *Rochefoucauld* v. *Boustead* (1).]

An agreement to take up and hold land for mining purposes should be presumed to be a partnership, as it necessarily involves working the land, which is a business entailing profit or loss. It is highly improbable that mere co-ownership was intended, as it is practically impossible to work a mine jointly except in partnership. It is not necessary to prove an actual division of profits: *Lindley on Partnership*, 5th ed., p. 54; *Zobel* v. *Croudace* (2); *Fereday* v. *Wightwick* (3); *Crawshay* v. *Maule* (4); *Robinson* v. *Anderson* (5); *Dale* v. *Hamilton* (6).

[GRIFFITH C.J.—The last-mentioned case has been much discussed.]

Only on the question of the *Statute of Frauds*. It was clearly held that there was a partnership. The Statute does not apply here, because under the *Mining Act* 1906, sec. 129 (1), mining interests are chattel interests: *Williams* v. *Robinson* (7).

[HIGGINS J.—I cannot understand why the fact that they are chattel interests prevents the Statute from operating. It has been held that it applies to interests in chattels real.]

The *Statute of Frauds* must be specially pleaded: *Kennedy* v *Currie* (8).

[GRIFFITH C.J.—But there is nothing in the statement of claim

(1) 65 L.J. Ch., 794; 74 L.T., 783.
(2) 18 N.S.W. L.R., 306.
(3) 1 Russ. & M., 45.
(4) 1 Swans., 495, at p. 518.
(5) 20 Beav., 98; 7 D., M. & G., 239.
(6) 5 Ha., 369; S.C. on appeal, 2 Ph., 266.
(7) 12 N.S.W. L.R. (Eq.), 34.
(8) 17 N.S.W. L.R. (Eq.), 28.

to suggest that the Statute should be pleaded. It is really only an allegation of agency.]

Even if there was not a partnership, Zobel is a trustee for the appellant. He is in the same fiduciary position as Gander was in 1904. Nothing has happened to relieve him from that position. Each was a trustee for the others of whatever interest he acquired in the property. That is the only explanation of the appellant not resisting Zobel's application in 1905. Zobel's admissions are strong evidence that he was acting on behalf of the appellant, and he has not denied it.

If the agreement conferred rights upon the appellant he has done nothing to bar his right to relief. Under the authority nothing but prospecting could lawfully be done, and the appellant was willing to contribute towards all legitimate expenses. Gander and Zobel carried on actual mining operations as opposed to prospecting, and were acting illegally in so doing. The appellant's refusal to contribute was, therefore, justifiable. [He referred to *Mining on Private Lands Acts*, 57 Vict. No. 32, sec. 8; 60 Vict. No. 40, sec. 2.] The respondents did not alter their position in any way owing to the appellant's conduct. [He referred to *Lindsay Petroleum Co.* v. *Hurd* (1).] If there was a partnership the appellant had a legal interest which cannot be barred by laches. He had an executed interest; he had given valuable consideration by doing work in connection with the cancellation of the lease and obtaining the beforehand notice without which the original authority would never have been obtained. The presumption against abandonment of such an interest is very strong: *Clarke* v. *Hart* (2); *Clements* v. *Hall* (3).

Langer Owen K.C. and *Maughan*, (*C. E. Manning* with them), for the intervenants. The plaintiff had to establish (1) a definite arrangement between himself, Gander and Zobel before the land was taken up in 1905, (2) the terms of that arrangement, and (3) that Zobel obtained his authority in 1905 in pursuance of that arrangement or of a new one on the same terms. Assuming that an arrangement of some kind has been proved, it was not an

(1) L.R. 5 P.C., 221, at p. 239. (2) 6 H.L.C., 633.
(3) 2 DeG. & J., 173.

H. C. OF A. 1909.

NICHOLSON v. GANDER.

agreement for a partnership, but for a holding of the land in co-ownership. The arrangement would not necessarily have fallen through owing to the failure to find a fourth with capital, but the evidence shows that that failure was the main reason for its falling through in fact. But the arrangement was quite indefinite. There was no provision for the shares which each member was to have, or for what was to be done in the event of a failure to find the capital. Certainly there was no arrangement to work the property as a mine in partnership. The correspondence is inconsistent with a definite arrangement up to April 1904, but suggests rather that the matter was in a state of negotiation. All questions of fact are open to this Court, as the Judge made no definite findings of fact except as to laches. Whatever the original arrangement was, the appellant lost any equities which he might otherwise have had by his conduct during the currency of the first authority. The actions of all parties are inconsistent with the continued existence of any arrangement under which the appellant was to have equal rights and equal liabilities with the other two. The appellant in fact was not ready and willing to carry out on his part the arrangement which he alleged. He made no move whatever in the matter after Gander and Zobel had begun operations, and, when asked to contribute towards expenses necessarily incurred, refused to do so. The appellant knew that if work was not carried on the property was liable to forfeiture: 60 Vict. No. 40, sec. 2, sub-secs. (*b*), (*c*), (*e*). Even if he did not definitely abandon his rights, he allowed the others to suppose that he had done so.

In regard to mining properties, delay in asserting a claim is stronger evidence of abandonment than in ordinary cases.

[HIGGINS J.—If the appellant had a vested interest laches could not deprive him of it: *De Bussche* v. *Alt* (1).]

There was no vested interest. He had only an equitable right. He had promised to join the others in a working mine when established, and he stood by while the others took the risk and did the work. [They referred to *Prendergast* v. *Turton* (2).] The agreement to form a partnership was wholly executory. Gander and Zobel in their dealings with the property acted on the

(1) 8 Ch. D., 286. (2) 1 Y. & C.C.C., 98.

assumption that the appellant had no interest, and there is no suggestion against their *bona fides*.

Zobel's application for an authority to enter, and his entry under it had no connection with the original title of Gander. It was not in any way founded upon the earlier authority, and nothing that the appellant or any of the parties had previously done assisted him in any way in obtaining it. The value of the beforehand notice obtained by the appellant came to an end with the taking up by Gander in 1904. There is no evidence that Zobel was acting in pursuance of the original arrangement. Apart from any question of laches the title of the co-owners expired in August 1905, and they were not in any fiduciary position towards one another after that time. The rule in *Keech* v. *Sandford* (1), therefore, does not apply: *In re Biss*; *Biss* v. *Biss* (2). There being no constructive trust arising out of the original relationship of the parties, the appellant must show that a new fiduciary relationship was created before the acquisition of the new title by Zobel. That would require a contract for valuable consideration. There is no evidence of such a contract, nor is it suggested on the pleadings. Even if Zobel's admissions amount to evidence of a promise to hold on behalf of the appellant, they do not prove a prior contract. In themselves they are a *nudum pactum*. There is no evidence of any consideration. What the appellant had contributed had been in pursuance of the original arrangement, and cannot be relied on as consideration for a renewal of that arrangement. There was no declaration of trust in favour of the appellant. That would require a clear statement of intention to hold as trustee a definite interest in a definite property in favour of named persons. It is not clear whether Zobel intended to admit only the appellant to an interest, or Gander also, and on what terms. The utmost extent to which his words can be strained is a voluntary promise to admit the appellant to an interest. A promise to create a trust must be supported by consideration. [They referred to *In re D'Angibau*; *Andrews* v. *Andrews* (3).]

[HIGGINS J. referred to *Hartly* v. *Wilkinson* (4).]

(1) Sel. Cas., 61; 2 Wh. & T., 7th ed., p. 693.
(2) (1903) 2 Ch., 40.
(3) 15 Ch. D., 228.
(4) 1 Ridg. L. & S., 357.

H. C. OF A. 1909.

NICHOLSON v. GANDER.

Even if the appellant succeeds he should be put on terms to pay his share of what has been expended by the others on the property.

Wise K.C. in reply. The original arrangement was for a specific purpose and could not be put an end to until that purpose was carried out, except by mutual consent. Every step taken by any of the parties towards that end must be deemed to have been taken on behalf of all. The fact that the parties quarrelled about details in the meantime did not put an end to the arrangement.

Cur. adv. vult.

May 28.

GRIFFITH C.J. The subject matter of this suit is an area of 33 acres of private land which contains copper ore, the right to occupy which is an authority to enter under the *Mining on Private Lands Acts* 1894 and 1896. The system of these Acts is that a person desiring to mine upon private lands may apply to the Warden for an authority to enter upon the land and prospect, and the Warden in a proper case grants the authority upon condition of the payment of a sum to be assessed by him as compensation to the owner of the land for surface damage and payment of rent. The authority does not authorize mining operations strictly so called, but prospecting, and the proceedings under the authority are preliminary to an application for a lease to be made at any time during a period of twelve months, or such extended time as the Warden thinks fit to grant for that purpose. If a lease is granted then the title of the holder is under the lease. There is, it appears, a practice in the Mines Department, that, when a mining lease of Crown or private lands has been granted, and it is alleged that the lease is liable to forfeiture by reason of failure to perform the conditions as to working which are always included in such leases, the person who gives notice of the breaches of conditions to the Department is treated as entitled to a certain priority of right to apply for the land if it becomes vacant through forfeiture. The practice is, when information is given and the Crown determines to forfeit the lease, to send what is called a "beforehand notice" to the informant who has alleged

the default, informing him of the day and hour at which the land will be declared forfeited and open for application. So that, as he is the only person who knows of it, he has the first chance of applying, and, apparently, a beforehand notice of this sort is treated as a kind of asset of which use may be made. With these preliminary observations as to the nature of the title and the practice of the Department, I will refer to the facts of this case.

The subject matter, as I have said, is an area of 33 acres of land. In 1903, possibly before, the plaintiff and the respondents, Zobel and Gander, had been associated in mining adventures, and at that time the private mining lease now in question was held in conjunction with two Crown leases by a joint stock company called the Mount Bulga Copper Mine, and it was alleged, and seems to have been discussed between these parties, that the leases were liable to forfeiture; and it was proposed that the plaintiff should give notice to the Department that the leases were liable to forfeiture in order that he might in due course obtain a beforehand notice, and that one of them should then take advantage of the opportunity so afforded to apply for the land for the benefit of the three. As the parties had not a superfluity of money, it was contemplated that they should induce some person with capital to come in with them, so that they would then have a syndicate or partnership of four to take up the land and ultimately acquire a lease of it. Notice was given, as proposed, by the plaintiff of the breach of conditions in respect of the Crown leases and they were forfeited, and nothing more seems to have been done with them. The main question that arises is as to this agreement, which was found by the learned Judge to have been made—and there is no reason to doubt his finding—what was the real nature of the agreement, and whether it was sufficiently definite. That question has to be considered from more points of view than one. I will deal with it first of all from this point of view: how many shares each party to the arrangement was to have in the authority. There can be no question that there was an agreement to form a syndicate of three, Nicholson, Zobel and Gander, with a stipulation that, if they could find a fourth with the necessary capital, then it was to become a syndicate of four. It was definite

H. C. OF A. 1909.

NICHOLSON v. GANDER.

Griffith C.J.

enough that until a fourth should be found there should be a syndicate of three. The execution of that project was deferred until 1904. On 24th February of that year the plaintiff reported to the Mines Department that the leases which I have referred to were liable to forfeiture. In April 1904 Zobel went to New Guinea, having appointed Gander his attorney under power of attorney with full powers. On 13th June the plaintiff received from the Department a beforehand notice which stated that in view of the provisions as to forfeiture the land would be open for application on 21st June at half-past two in the afternoon. Nicholson gave the notice to Gander, who on 21st June applied for an authority to enter upon 20 acres, part of the 33 acres. He obtained an authority from the Warden, upon the usual terms as to payment of assessed damage to the freeholder and payment of rent. That authority expired on 2nd August 1905. It was renewable for a further period under certain conditions, but was not renewed, and we do not know whether under the circumstances which existed the holder was entitled to a renewal or not.

I am stating as far as possible the facts which are not in dispute. But at this point we come to a matter as to which there are contradictory accounts, that is, what took place when Nicholson gave Gander the beforehand notice. Gander says that shortly afterwards he told Nicholson that he had got the assessment and rent papers, and that labour would have to be put on the property, and asked Nicholson if he was going to do anything in the matter; that Nicholson said that he was not going to do anything; that Gander then said "Well Zobel and I will go on with it by ourselves," to which Nicholson made no reply. At that time Gander had not the authority but he had the assessment papers and the rent papers. After getting the authority he says that he saw Nicholson again, and said that he had got it, and was arranging to put the labour on, to which Nicholson said "You know what I told you before, if I could I would not find anything," and that Gander said "When you put it that way, it's no contribution, no share," and then left. Nicholson states, on the other hand, that he was willing and offered to Gander to contribute towards any necessary expenses, and that

Gander said that they were only trifling, and that he did not want anything and there the matter ended. The learned Judge has not found which version he accepted, and it is very difficult for us, not having seen the witnesses, to know which version we should accept, but in the view I take of the case it is not necessary to determine that question. I will proceed now with the narrative so far as the facts are not in dispute. Gander, having obtained the authority to enter, put on labour and worked the ground. I have mentioned that the authority was only an authority to prospect. It is suggested that Gander went beyond that. Possibly he did, but I do not think that is material. At that moment I think that Gander must be taken to have held the authority as trustee at any rate for himself and Zobel, and possibly for Nicholson as well. Zobel returned from New Guinea in September 1904, and went to the mine, where he continued to work with Gander until February 1905. In October 1904, being in want of money to carry on operations, they sold one half share of their interest under the authority to one Anderson for cash, and in the following December bought it back, giving payment by promissory notes. They acted throughout the transaction upon the assumption that Nicholson had nothing to do with them, and no communication passed between Nicholson and Gander or between Nicholson and Zobel from August 1904 to August 1905 with respect to this adventure. Under these circumstances another question might arise whether, supposing that Nicholson's version of the conversation between himself and Gander, before Gander applied for the authority to enter, was correct, he would have been allowed, after the expiration of so long a time, during which the other parties were acting on the assumption that he had nothing to do with the property, whilst he remained silent, to assert a claim to a share in it, or was barred by laches. Before 2nd August 1905, on which day the authority of Gander expired, Gander, apparently acting *bonâ fide*, entered into a contract to sell the whole adventure to one Murray, who is also a party to this suit. He was paid the price agreed upon, and Gander, in order to carry out the contract of sale—it does not appear whether the authority to enter was transferable or not—shortly before the expiration of

H. C. OF A. 1909.

NICHOLSON v. GANDER.

Griffith C.J.

the authority, gave notice to the Warden of his intention to abandon it; and Murray, while the authority was still in existence, applied for an authority to enter the 33 acres now in question. Zobel, who at that time was away, when he learnt what had taken place, disputed Gander's authority to sell, and opposed Murray's application, and in another litigation between those parties it was held by this Court that Gander had no authority to sell Zobel's interest, and that therefore all that he really sold was his own interest: *Gander* v. *Murray*; *Zobel* v. *Murray* (1). On 10th August Zobel, who had been engaged in mining somewhere else, and had accidentally heard of what had been done, put in an application in his own name for an authority to enter the 33 acres. All that he knew, apparently, was that Gander had given up the land, and that Murray was trying to get it, and he desired to save it. As I have said, it is difficult to say whether it can be held that Zobel at that time was a trustee for Nicholson or whether, if he was a trustee, Nicholson had lost his right to assert his title by silence, or laches as it is called, during the period referred to. About the same time, shortly after Zobel had put in his application for 33 acres, Nicholson became aware that Gander's authority had expired and had not been renewed, and put in an application for the 20 acres which Gander had originally held. After this there followed a sort of quasi-litigation between Murray and Zobel before the Warden, the question being who was entitled to get the authority to enter, Murray who had applied while the original authority was still in existence, or Zobel who applied after it had come to an end. In that dispute Gander supported Murray to whom he had sold. This went on for some months and finally on 12th March 1906 Zobel obtained an authority to enter, and upon that authority this suit is founded. The plaintiff claims that when Zobel took up the land under the circumstances stated he took it up not for himself, but as trustee for the plaintiff as well as himself. After this dispute friendly relations between Zobel and Gander were renewed. Zobel admitted Gander to a share in the mine, and, though he personally was willing that the plaintiff should have a share, Gander always refused to allow it. Under

(1) 5 C.L.R., 575.

these circumstances the question is what was Zobel's legal position when he took up the 33 acres afresh, what equities attached to the land in his hands, or what personal equities attached to him? As against Gander I do not think there can be any question that Zobel would have been absolutely entitled. He certainly did not take the land up for Gander. All that we know on the point is that Gander had thrown it away and that Zobel wanted to save it. What equities then had Nicholson against Zobel? Any equities that he had must be founded upon the original agreement for a syndicate of three, and must be based upon the assumption that that agreement was still in existence, and binding upon Nicholson himself as well as upon the others. It was suggested that the new title was an accretion upon the old one, to use the words of *Romer* L.J. in *In re Biss*; *Biss* v. *Biss* (1), in which the whole of the law upon the subject was shortly stated. Upon that point I remark that exactly the same facts were the subject of litigation in *Gander* v. *Murray*; *Zobel* v. *Murray* (2). The plaintiff was not a party to that litigation and no finding by the Court in that case can affect him. But exactly the same facts were proved, and I came to this conclusion upon them (3): "At the expiration of Gander's authority on 1st August 1905 he had no further right to the land, or in any way connected with the land. Zobel, whose share in the partnership had been ineffectually sold, was, when that authority expired, probably free to obtain authority for himself to enter the land. There was no privity between him and Murray. Zobel only did what he was entitled to do when he got his authority to enter the land, and it cannot be disputed that he acquired that authority free from all equities as far as Murray was concerned." Of course whether he was free from equities as far as Nicholson was concerned is another question. In *In re Biss*; *Biss* v. *Biss* (4), *Romer* L.J. summed up the different grounds upon which such a claim can be supported. He said:—"To conclude, the result of my investigation of the cases is that, neither on authority nor on principle, can the appellant in the present case be held a trustee of the new lease he has obtained. He was in nowise in any

(1) (1903) 2 Ch., 40.
(2) 5 C.L.R., 575.
(3) 5 C.L.R., 575, at p. 586.
(4) (1903) 2 Ch., 40, at p. 64.

H. C. OF A. 1909.

NICHOLSON v. GANDER.

Griffith C.J.

fiduciary position in respect of the matter; he owed no duty to any one in respect of it; he has been guilty of no fraud or concealment; and he has not used any right that a Court of Equity can recognize as belonging to other persons to enable him to obtain the lease."

Now I will take these questions in inverse order. In the present case Zobel was not making use of any right that a Court of Equity could recognize, belonging to other persons in obtaining the authority; nor was he guilty of any fraud or concealment towards anyone. The other two questions are: Was he in a fiduciary position with respect to the land, and did he owe any duty to the plaintiff? If he owed any duty to the plaintiff it must have been by virtue of the original agreement, because no fresh one had been made. What then was the original agreement? How is it to be regarded? Is it to be regarded as of indefinite duration, to apply to that particular land so long as or whenever either of the parties to the agreement should take it up, or was it limited to the particular adventure, namely, that the plaintiff should give notice of the liability of the leases to the forfeiture, and then apply for the land for the benefit of the syndicate of three, who were to hold the land for twelve months and during that time apply for a lease. The original agreement certainly did not contemplate such events as actually happened, that is to say, that it should be thrown up by Gander, apparently under a misconception as to his powers—for he appears to have acted *bonâ fide*—and so brought to an end. I cannot consider the agreement upon the whole as an agreement that for an indefinite time either of these parties, if he succeeded in acquiring any interest in the land, should hold it as trustee for the others, or to put it in another way, as an agreement to extend for an indefinite time, that if any of them applied for the land in his own name he should be deemed to have acted as agent or trustee for the others. I am unable to find any solid ground for holding that there was any nexus between the original title and the new one. If Zobel was a trustee for Nicholson, in what shares were they to participate? The original agreement was for a partnership or syndicate of three, to be enlarged in certain events to four. What was the new one? Gander was out

of it: was it to be a syndicate consisting of Zobel and Nicholson only? And if so, were they to hold in equal shares, and who was to find the money? For my part, I cannot think that if Nicholson's application had been successful he could have been deemed to be a trustee for Zobel, and for the same reasons I am unable to come to the conclusion that when Zobel applied for and obtained an authority he was acting as a trustee for Nicholson. The result is then that Zobel when he applied for the land, not being in a fiduciary position, did not owe any duty to Nicholson to hold it for him as well as himself. The case in that result seems to me somewhat analogous to a case where land, to which an equity is attached of which the holder has notice, has got into the hands of a purchaser for value without notice. When it comes into the hands of such a purchaser it is quite immaterial that the original purchaser had notice that there was this equity attaching to it. The conclusion to which I am compelled to come is that in Zobel's hands the land was free from all equities which attached to it originally, which was the view taken by this Court in dealing with Murray's case in 1904. That being so, Nicholson's case, if it is to be supported, must be based upon some other grounds, either upon a declaration of trust by Zobel or upon an agreement by Zobel for valuable consideration to give Nicholson a share in the adventure. There is strong evidence of admissions from which the Court would be justified in inferring, if the facts were not known, that Zobel had taken up the land as trustee for Nicholson and himself, or if the facts had been doubtful would have been strong evidence from which the Court might have found that he was acting in pursuance of a prior agreement between himself and the plaintiff. But here the facts are known. Admissions do not cut down known facts; they are evidence to prove facts. We know them all, and upon the uncontroverted facts it appears to me that Zobel was not a trustee for the plaintiff. Any admissions that he afterwards made could only operate as a declaration of trust, or as evidence of a contract for valuable consideration. But learned counsel for appellant, who argued the case with great ability, declined to rest his case upon a declaration of trust. The principal evidence of that was to be found in a letter from Zobel to the plaintiff of 17th

H. C. OF A. 1909.

NICHOLSON v. GANDER.

Griffith C.J.

February 1906, in reply to one of the previous day from the plaintiff, in which the plaintiff had said:—"The Warden has dismissed Murray's objections to your application for authority to enter," &c. Zobel, in his answer on the following day, said:—"Bulga: This will now be back in its first position again, and I hope we will have a little better luck with it this time." That indicates clearly an intention on Zobel's part that Nicholson should have a share in the concern. But it is impossible to consider it as a declaration of trust. A declaration of trust must be intended to operate as such, but I do not think that letter can be considered as a deliberate statement by Zobel to this effect:—"I have taken up this land as trustee for you." There is nothing in any of the letters that goes as high as that. With respect to the suggested contract for valuable consideration there is no evidence to support it. So that, although from that time onward up to the date when the suit was brought, or shortly before, the plaintiff had every reason to suppose that he was to be admitted to a share in the adventure, or that Zobel intended to give him a share, I am unable to find any sure ground upon which to rest a decision in his favour. I will say, so far as that aspect of the case is concerned, that I see no evidence of laches on his part. But we know of no principle upon which we could give effect to such an understanding as existed between the parties. The parties must rest on their legal rights, and as the plaintiff has failed to establish any legal right, his suit must fail.

O'CONNOR J. I am of the same opinion. There is no question of law involved in the case. It depends entirely upon the proper inference to be drawn from the facts proved. Upon that I entirely agree with the observations of my learned brother the Chief Justice, and I think it necessary to add very little to what he has said.

I take the law as summarized in the judgment of *Romer* L.J. in *In re Biss*; *Biss* v. *Biss* (1), and I can see here nothing to justify a finding that Zobel, in regard to taking up the land in August 1905, was in any way in a fiduciary position in respect of Nicholson, or that he owed any duty to him to hold it for him or

(1) (1903) 2 Ch., 40, at p. 64.

was guilty of any fraud or concealment towards him. In order to come to that conclusion I do not think it necessary to enter upon the determination of any disputed facts. It is quite clear that there was no new agreement made between the parties with reference to the taking up the land in August 1905. Mr. *Wise* properly admitted that any case of trusteeship or contract which exists must be founded upon the first contract. There was an agreement between the three, Zobel, Gander and Nicholson, to take means for determining the title of the old company and for the taking up of the land by Gander on behalf of the three. But that agreement, in my opinion, did not extend beyond that venture. It was not a general agreement for a partnership. It was not even an agreement with respect to the working of that particular land whether the first authority failed or not. It was simply an agreement to hold the land and deal with it under the authority and if possible obtain a lease under the authority. That, I think, is the agreement which was come to in the first instance. And the evidence is very strong to show, on the undisputed facts, that during the course of that agreement the parties themselves abandoned it and treated it as at an end before the termination of the authority. I find that Zobel and Gander dealt with the mine as if it was their property in a sale to one Anderson, that they later on bought back from Anderson the share which they had sold to him, and that afterwards Gander sold the whole property to Murray. All these transactions took place without reference to Nicholson. Then take Nicholson's own conduct. Although the other two men were actually working the mine and expending money upon it from September 1904 to February 1905, and after that employed other men to carry on the work and fulfil the conditions under which the land was held, Nicholson seems to have taken no part in all that, to have contributed nothing towards it, and to have had no communication whatever with them from August 1904 to August 1905. Well under those circumstances it is very difficult to suppose that Nicholson considered that he was in any way interested in the mine then being worked and dealt with by the other two who, he says, were his partners. Then when it comes to the period when the first authority was running out, we find that even as between Gander

H. C. OF A. 1909.

NICHOLSON v. GANDER.

O'Connor J.

and Zobel there did not seem to be any obligation on the part of one towards the other. Gander sells the concern to Murray, thinking apparently that he had the consent of Zobel. Then when the land is open, the original authority having come to an end and not having been renewed, independent applications are put in for the right to enter the land, apparently without any previous concert or agreement amongst the three, Gander, Nicholson and Zobel. Zobel's application was successful, and having been successful I think that he held the property entirely for himself, and was under no obligation by virtue of the old agreement, which had come to an end, to hold it for either Nicholson or Gander or any other party. Under those circumstances I think that the learned Judge in the Court below, although he did not base his finding on quite the same reasoning, has come to a right conclusion, and that the appeal, therefore, should be dismissed.

HIGGINS J. read the following judgment. In this case the facts are very complicated, and the evidence is very conflicting; but the essential facts are, to my mind, few and uncontested.

The defendant Zobel applied on 10th August 1905 to a mining Warden for an authority under the *Mining on Private Lands Act* of 1894, as amended in 1896, to enter upon certain private lands for the purpose of prospecting. The authority lasts for a year; and the person who has such an authority may apply, during its currency, to the Crown for a mining lease. The authority was granted to him, after opposition, in March 1906. Subsequently Zobel applied for the lease. The plaintiff brings this suit against Zobel in November 1906 for a declaration that Zobel is a trustee for the plaintiff and others of the said authority, and of the application for the lease, and of the lease if it be granted. The lease has since been granted.

Primâ facie, of course the authority and the lease belong to Zobel, the person named therein. *Primâ facie*, the applications for the authority and the lease were made on his own behalf. The burden lies on the plaintiff of showing that he has any interest.

Now, I do not know of any means by which the plaintiff could

possibly have an interest except, (*a*) by agreement, (*b*) by declaration of trust, or (*c*) by some constructive trust—some fiduciary relation of Zobel to the plaintiff which would make it inequitable on the part of Zobel to hold the authority for himself. The facts preclude any idea of any conveyance of the interest, or any resulting trust. The plaintiff paid no money for the expenses of prospecting, for surface damage, for rent, or for anything else.

I can find no agreement on the part of Zobel that he would hold this authority on behalf of any one but himself. There certainly has been no written agreement. On 10th August 1905 Zobel learned something from a miner named Bergwarra, and forthwith put in his application for an authority. The plaintiff did not know that he was going to apply; Zobel never actually agreed with the plaintiff that he would apply for or hold the authority on the plaintiff's behalf as well as on his own; and the plaintiff never undertook any obligation in respect of the authority, or gave any consideration for any promise of Zobel's.

I can find no declaration of trust—no statement, verbal or written, made by Zobel to the effect that he held the authority for the plaintiff as well as for himself. It is true that the plaintiff asserted his interest. It is true that Zobel on various occasions intimated to the plaintiff and to others a readiness and willingness to let the plaintiff have an interest if he contributed the same proportionate sums as himself and others. No doubt Zobel also said, in desperation, because of the maze of litigation in which he was involved on the subject of the land, that if Nicholson went to law (Nicholson is a solicitor) he would not defend the action, or was not inclined to defend it. No doubt Zobel even assured Nicholson that he would "protect his interest"—whatever it was or should be—but at no time did he say that Nicholson had one-third or any definite interest in the concern. The expression which seems to be nearest to a declaration of trust seems to be that contained in the letter of 17th February 1906. The plaintiff had written stating that the Warden had dismissed the objections of one Murray to Zobel's application; and Zobel wrote:—"Bulga—This will now be back to

H. OF C.A. 1909.

NICHOLSON v. GANDER.

Higgins J.

its first position again, and I hope we will have better luck with it this time." Looking at the facts, it seems clear that he meant that the field is now clear again—no one obstructs my application—and we can now settle any differences, and make our arrangements, as there is no longer opposition to the grant of the authority to me. But the arrangements were never made, and a mere intimation of friendly intention is not binding. I am relieved also by Mr. *Wise's* frank admission that he cannot find anywhere any distinct statement by Zobel that he held the authority to any extent on trust for the plaintiff.

The point of constructive trust needs more detailed examination. It seems that Zobel, Gander, and the plaintiff devised a scheme in 1903 to get a mining lease cancelled which was held by the Bulga Copper Mining Company, and to get a new lease; and the company's lease was cancelled, because the plaintiff pointed out to the Department of Mines the failure of the company to fulfil the conditions of the lease. None of the three persons mentioned had much money; and the intention was to get a fourth person having money to join them, and to give him one-fourth. They did not succeed in finding the fourth person; nevertheless Gander, to whom Nicholson had handed the "beforehand notice" for the purpose, applied for authority to mine, in the hope that they would yet succeed in finding some fourth person with capital, and get the authority. So, at least, the learned Primary Judge has found. I pass over the contested facts as to Gander repeatedly asking Nicholson to find his share of the expenses of surface damage, rent, cost of working, &c., and as to Nicholson refusing; and I pass over the difficult question of the alleged implied agreement for a syndicate of three, if the fourth could not be found. It is enough to say that this authority, granted on 2nd August 1904, was surrendered on or about 1st August 1905; and thereafter all the world was free to apply for a new authority to prospect. The joint interest—if the plaintiff ever had a joint interest in the previous title, such as it was—had ended. Gander had surrendered the authority without consulting Zobel. An authority lasts only for one year. True, the authority may be extended; it can only be extended, however, if the Warden be satisfied that

the period named in the authority is insufficient to enable the holder to complete the prospecting (Act of 1896, sec. 2 (*b*)). But there was no extension of Gander's authority, or attempt to get it extended; and there is nothing to show that the conditions precedent to extension could have been fulfilled. Zobel made a fresh application on 10th August 1905 without consulting Gander, or the plaintiff, or any one else. There was no causal or other connection between Gander's title which had expired, and Zobel's title which is the subject of this suit. Zobel was in no sense a trustee, or even co-owner, on 10th August 1905. It was not his position as co-owner of the previous authority that gave him the new title; it was his position as first applicant. Zobel's title was not due in the least to Nicholson's "beforehand notice"; and as to the fact that Nicholson had caused the cancellation of the company's lease, that fact enured to the benefit of all the world except the company. A trustee cannot renew for his own benefit the lease of a property held by him for the estate: *Keech* v. *Sandford* (1); but Zobel held no longer any fiduciary position towards the plaintiff. He may, perhaps, be treated as one of several principals, or even as one of several beneficiaries, as to Gander's authority. But in neither aspect can any constructive trust be established against him. If several principals instruct an agent to buy for them a certain racehorse, and the horse die, and one of the principals buy another horse from the same stables, he is surely entitled to keep the horse for himself. There are numerous partnership cases in which a partner has been compelled to give the firm the benefit of transactions into which he has entered on his own account. But in such cases the advantage has been gained *by virtue of his position as a partner*—say, by the employment of the partnership property, or by means of the partnership transactions. Where surviving partners were compelled by the administratrix of the deceased partner to treat a new lease of the partnership premises as held on trust for the old firm, it was because the old lease was *the foundation* of the new one: *Clegg* v. *Fishwick* (2).

(1) 2 W. & Tud. Eq., 7th ed., p. 693.

(2) 1 Mac. & G., 294.

H. C. OF A. 1909.

NICHOLSON v. GANDER.

Higgins J.

The recent case of *In re Biss* (1), is conclusive on the point that the new authority cannot be treated as a graft or accretion to the old authority, so as to create a constructive trust.

The view taken by the Primary Judge is that, if no one could be found with sufficient money to be a fourth partner, there was an implied agreement that Gander, Zobel, and the plaintiff should be partners in equal shares; but as the plaintiff failed to contribute his third share of the expenses, though he knew that creditors were pressing, he had lost his interest by laches. Even assuming that Gander applied for Zobel and Nicholson as well as for himself, I do not think that "partnership" is the correct expression for the relationship of the three in respect of the authority held by Gander. They had never made up their minds to work the mine for profit. As mine speculators they rather favoured the idea of selling or of "syndicating." Even according to the plaintiff, he told Gander to apply for the lease, and "when you have done that we can arrange to work the ground, or sell or bring capital in." Gander and Zobel contributed labour and money; but the plaintiff contributed neither. The plaintiff's exertions in getting the company's lease cancelled and in getting the "beforehand notice" were before Gander applied. At no time was there any agreement of the three to work the mine for profit in partnership, even if we are to assume that the three took up the land as co-adventurers. The definition of "partnership" in the *Partnership Act* 1892 is "the relation which exists between persons *carrying on business* in common with a view of profit." I am of opinion that this definition is not satisfied. I do not think that there was even an agreement for a partnership. But even if there was an agreement to become partners in respect of Gander's application, that agreement was not carried out; and the Court does not enforce specific performance of an agreement for a partnership. Moreover, the partnership, if any, was determined when Gander's authority was determined.

I do not think that it is necessary for me, taking the view which I take, to examine in detail the arguments which have been so ably urged by learned counsel on both sides on other

(1) (1903) 2 Ch., 40.

points. Mr. *Wise* rests his case, finally, on the original agreement for a joint adventure of four persons made in August 1903, and says that an agreement must be implied for a joint adventure on the part of the three if the fourth could not be found, and that that agreement was never terminated. It is sufficient to say that that joint adventure, if any, ended with the surrender of Gander's authority; and that Zobel, in taking up the new authority, was in no way aided by the previous authority. He in no way availed himself of his position, whatever it was, under the previous authority in acquiring the new authority. He acquired it as a complete stranger might have acquired it. I also am therefore of opinion that the appeal should be dismissed.

Appeal dismissed. Appellant to pay the costs of the intervenants.

Solicitor, for the appellant, *A. Nicholson.*

Solicitors, for the respondents, *McLachlan & Murray*; *Robson & Cowlishaw.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

REX v. NEIL.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Criminal Code Act 1899 (*Qd.*) (63 *Vict. No.* 9), *sec.* 226—*Supplying drugs or instruments to procure abortion—Intention of person supplied to procure her miscarriage—Special leave to appeal.*

The applicant, J. N., was tried for having "unlawfully supplied to one E. S. certain drugs which were intended to be used by the said E. S. to procure her own miscarriage, as he the said J. N. then well knew," and was sentenced to be imprisoned, the sentence being suspended under sec. 656 of the *Criminal Code.* Counsel for the prisoner asked that the case should be taken from the jury because E. S. had given evidence that she had no