[HIGH COURT OF AUSTRALIA.]

NOEL TREVOR JONES . . . . . APPELLANT,
DEFENDANT,

AND

MARTIN BOUFFIER, AND GRACE BOUFFIER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 30, 31; *April* 3, 5, 6, 7, 10, 11, 12.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Trust and trustee—Principal and agent—Fiduciary relation—Purchase by co-owner—Failure to disclose material facts—Approval of sale by Registrar.

Contract—Champertous agreement—No evidence of fraud or undue pressure—Right of rescission.

On 6th June 1904 the defendant agreed to disclose certain information to the plaintiffs, M. and G., by which it was anticipated that the plaintiffs would recover certain land, and in consideration of his doing so the plaintiffs agreed that the defendant should receive 25 per cent. out of the net proceeds recovered. The information given by the defendant resulted in the plaintiffs recovering two pieces of land of about 160 and 41 acres respectively, situate near a railway station, but without immediate access to it. The share of the plaintiff G. in the land was held by her as administratrix of her deceased brother's estate. Various negotiations and communications took place between the plaintiffs, their solicitor, and the defendant for disposal of the land, in which the plaintiffs and defendant dealt with one another as co-owners of a property acquired for the purpose of re-sale, and it was pointed out that to make a successful sale it was essential that certain adjoining land belonging to one O'Brien should first be acquired. After several unsuccessful efforts to dispose of the land, in the course of which the plaintiffs refused to agree to the purchase of O'Brien's land, on 2nd April 1906 the plaintiffs offered to sell the defendant the 160 acres together with ¾ acre of adjoining land, which in the meantime had been purchased by the plaintiff M., and which would afford

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access to the railway station, at the price of £24 per acre for the 160 acres, and £100 for the other land. On 14th April an agreement was made between the plaintiffs and the defendant for sale of the land at the price offered, subject to the approval of the Registrar of Probate with regard to the share held by the plaintiff G., as administratrix, which was afterwards obtained on 28th May. The plaintiffs knew on 2nd April that the defendant was buying for the purpose of an immediate re-sale at a profit, and that he contemplated the purchase of O'Brien's land. On 12th April an agreement had been made by the defendant to sell to the Caledonian Coal Co. the land included in the plaintiffs' offer of 2nd April, together with 60 acres of adjoining land over which the defendant had since obtained an option of purchase from O'Brien, for the lump sum of £6,350. This agreement was not disclosed to the plaintiffs when they entered into the agreement of 14th April, nor to the Registrar of Probate. The transfer from the plaintiffs was made direct to the Caledonian Coal Co., and in apportioning the lump sum for the purpose of the transfer it was stated at £4,800. The whole of the purchase money was received by the plaintiffs' solicitors, who retained the amount agreed to be paid by the defendant less the defendant's one-fourth share, and paid the balance to the defendant.

In November 1909 this suit was brought by the plaintiffs alleging that the agreement of 6th June 1904 was champertous, and that the agreement for sale of 14th April between the plaintiffs and defendant was voidable, upon the grounds that the relation of principal and agent then existed between the parties, and the defendant had failed to disclose all the facts in his knowledge material to the value of the property, and in particular the agreement for sale to the Caledonian Coal Co., and that the plaintiffs were entitled to the same rights as if the agreement of 14th April 1906 had not been made. It was further contended that the non-disclosure to the Registrar of the agreement with the Caledonian Coal Co. vitiated the sale.

Held, that the agreement of 6th June 1904 was champertous, but that the plaintiffs were not entitled to a refund of the one-fourth share of the proceeds of the land which they had agreed to pay to the defendant, as there was no evidence of fraud or undue pressure on the part of the defendant, and the bargain was not an improvident one.

Held, also, by *Griffith* C.J., *Barton* and *O'Connor* JJ. (*Isaacs* J. dissenting), that the agreement of 14th April 1906 was not voidable either upon the ground of the existence of a fiduciary relationship between the plaintiffs and the defendant, the uncontradicted evidence showing that on 2nd April and subsequently the position of the parties was that of vendor and purchaser dealing with one another at arm's length, or upon the ground that the Registrar's approval of the sale had been obtained by the non-disclosure of material facts, the mere fact that the defendant was a purchaser not imposing upon him any duty to disclose to the Registrar the re-sale to the Caledonian Coal Co.

Decision of *A. H. Simpson*, Ch. J. in Eq., of 26th July 1910, reversed.

APPEAL by the defendant against so much of the decree of the Equity Court of 26th July 1910 as ordered that the defendant should pay the plaintiffs £703 2s. 6d., less deductions to be determined either by agreement between the parties or by reference to the Master in Equity upon the grounds: 1. That the Court was in error in holding that there was any duty upon the appellant to disclose to the Registrar of the Probate Court the particulars of the sale or proposed sale to the Caledonian Coal Co. 2. That there was no evidence to support the findings of the Court. 3. That the decree was against evidence.

The facts are stated in the judgment of *Griffith* C.J.

Knox K.C. and *Mitchell*, for the appellant. The Primary Judge came to a wrong conclusion, upon the uncontradicted evidence and the documents, in holding that a case of general agency had been established. At the crucial time no fiduciary relation existed between the parties. The position was that Jones asked Bouffier, his co-owner, to join him in speculating in the purchase of the adjoining land belonging to O'Brien, with a view to the sale of the whole block. Bouffier, after hearing all the facts, refused to join the speculation, but permitted Jones to purchase on his own account. At that time the fiduciary relation, if it ever existed, came to an end, and the parties reverted to the position of vendor and purchaser, dealing with one another at arm's length. Jones concealed nothing from Bouffier as to his position with the coal company, and found that Bouffier would have nothing to do with the purchase of O'Brien's land, and the company would not purchase without O'Brien's land. The existence of a fiduciary relationship was based purely on the finding that Jones was constituted agent for Bouffier in selling the land. That never was so, and if it ever was so, the relationship had long since terminated. The approval of the Registrar to the sale was obtained by the Bouffiers alone. There was no obligation imposed upon Jones to keep the Bouffiers posted in the latest developments as to the price of the land. The fact that the Bouffier land was part of a trust estate would not put Jones under a fiduciary duty to disclose the price: *Coaks* v. *Boswell*

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(1). Even a purchaser from the Court is not bound by the obligation sought to be imposed upon Jones. If the suit should succeed upon the point of non-disclosure to the Registrar, it would be impossible to frame appropriate relief. One trustee, Grace Bouffier, sues, alleging her own fraud, and not joining the *cestuis que trustent*, and the transaction has gone too far to be set aside. It is an absolutely novel cause of action. There would have to be an account as to damages. This is an entirely different suit from that which was brought originally. Even if Martin Bouffier might have resisted specific performance on the ground of concealment from the Registrar, he cannot now apply, four years afterwards, for damages.

Rich K.C., *Milner Stephen* and *Hall*, for the respondents. The Court will not disturb a verdict on a question of fact. The Judge found there was evidence which, if believed, would establish a fiduciary relationship. This admittedly existed at one time, and the letters show that the confidence reposed by Bouffier in Jones continued up to the date of the agreement for sale. Jones was on terms of intimacy with Bouffier, who looked to him for information and advice. If a person puts himself in a position of adviser to another, he cannot take advantage of that position, and of the confidence reposed in him, to purchase the other's land for himself without making full disclosure. There was a sale to Jones, but he is liable to account for the profits he made, because he did not satisfy the obligations of the fiduciary position in which he then stood by making full disclosure of all the material circumstances. Until this was done Bouffier was not in a position to properly determine whether he would consent to the sale of his share as co-owner of the land. When Jones accepted Bouffier's offer to purchase he had Howell's contract in his pocket. The whole of the correspondence shows there never was any break in the confidential relationship. The jurisdiction of a Court of Equity to watch and control transactions between persons standing in a fiduciary relationship will be freely exercised: *Billage* v. *Southee* (2). Bouffier was entitled to know what Jones could do with his land either by itself or in conjunc-

(1) 11 App. Cas., 232.

(2) 9 Ha., 534, at p, 540.

tion with other land. The question is not what was the fair value of the land. While endeavouring to sell the land on behalf of himself and his co-owner, Jones got certain information as to its possible value. He was then in the position of a co-owner authorized by his co-owners to negotiate for the sale or leasing of the property. That constituted him an agent for sale of the property, and established the existence of a confidential relationship. Once that relationship existed Jones could not purchase his co-owners' share without imparting to them all the information he had previously acquired. Until he had done so his co-owner was not in a position to consent to the sale of his share. Until the agent has made full disclosure he cannot divest himself of the confidential relationship. It is not sufficient to put the principal on inquiry: *Dunne* v. *English* (1); *White and Tudor*, 7th ed., vol, 2, p. 729; *Luddy's Trustee* v. *Peard* (2).

[ISAACS J. referred to *Ex parte James* (3).]

In *Tate* v. *Williamson* (4) the information was not obtained until the trustee had purchased. But the Court set aside the sale. The obligations of a co-owner are dealt with in *Kennedy* v. *De Trafford* (5). If Jones was a constructive trustee for Bouffier he is bound to account for any profits he has made: *Bowstead on Agency*, 3rd ed., 128; *Liquidators Imperial Mercantile Credit Association* v. *Coleman* (6); *In re Hallett's Estate*; *Katchbull* v. *Hallett* (7).

Secondly, the sale should be set aside as between Jones and Bouffier by reason of the concealment of material facts from the Registrar. The purchaser is not bound to say anything, but if he makes a misstatement in a material matter, the contract will be rescinded: *Davies* v. *London and Provincial Marine Insurance Co.* (8); *Coaks* v. *Boswell* (9); *W. Scott, Fell & Co. Ltd.* v. *Lloyd* (10). Here Jones made misleading statements both to the Registrar and to Shaw.

If the agreement of 6th June 1904 was champertous, the infants were not parties, and even if they were they would not be *in*

(1) L.R., 18 Eq., 524.
(2) 33 Ch. D., 500.
(3) 8 Ves., 337, at p. 352.
(4) L.R. 2 Ch., 55.
(5) (1897) A.C., 180.
(6) L.R. 6 H.L., 189.
(7) 13 Ch. D., 696.
(8) 8 Ch. D., 469, at p. 475.
(9) 11 App. Cas., 232.
(10) 4 C.L.R., 572.

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delicto. And in this case the adult plaintiffs were not *in pari delicto* with Jones, and therefore are not disentitled to recover: *Rees* v. *De Bernardy* (1), *Reynell* v. *Sprye* (2), *Atkinson* v. *Denby* (3).

Mitchell, in reply.

Cur. adv. vult.

The following judgments were read:—

April 12.

GRIFFITH C.J. The principal question for determination in this case is entirely one of fact. The relevant evidence, which, when disentangled from the enormous mass of material with which it has been overlaid, lies in a comparatively small compass, is either documentary or uncontradicted.

The plaintiffs are Martin Bouffier and Grace Bouffier, the administratrix of the lands of Martin Bouffier's deceased brother Henry. Martin Bouffier is a vigneron, and an alderman of the town of Singleton. The defendant is a solicitor by profession, but not in practice. At all material times he resided in Sydney, which is about 150 miles by rail from Singleton. In Henry Bouffier's lifetime the brothers, who were carrying on business in partnership, assigned their estate to a trustee for the benefit of creditors, and the trustee acquired the land in question in this suit, which formed part of their estate, for his own benefit under circumstances which disentitled him to retain it. This fact was unknown to the plaintiffs. In 1904, the defendant, who had discovered the fact, represented to the plaintiffs that he was in possession of information that would be highly beneficial to them. After consulting Mr. Shaw, a solicitor at Singleton, they entered into an agreement in writing with the defendant dated 6th June 1904, by which the defendant agreed to disclose "certain particulars known only to himself whereby it is anticipated that certain moneys or other property will be recovered for the Bouffiers." In consideration of his so doing and using his best efforts to bring matters to a successful issue he was to receive 25 per cent. out of the net proceeds received. The agreement was drawn up and

(1) (1896) 2 Ch., 437.

(2) 1 D.M. & G., 660.

(3) 7 H. & N., 934.

attested by Shaw. The defendant then gave information which resulted in the plaintiffs recovering two pieces of land, containing about 161 acres (called the 160 acres) and 41 acres respectively, at Cessnock, a colliery district of New South Wales, and situated close to a railway station but without immediate access to it.

Various efforts were made to dispose of the property. Finally on 2nd April 1906 the plaintiffs made a written offer to the defendant to sell him the 160 acres, together with some land of the plaintiff Martin Bouffier—about three-quarters of an acre—which would afford access to the railway station, at the price of £24 per acre for the 160 acres and £100 for the other land. The offer was to remain open for two days. It was not, however, accepted within that time, but was afterwards renewed, with the result that on 14th April an agreement was entered into between the plaintiffs and the defendant for the sale of the land offered on the 2nd, subject to the approval of the Registrar of Probates, which under the law of New South Wales is necessary in the case of a sale of land by an administrator. On 12th April the defendant had entered into an agreement with the Caledonian Coal Co. to sell them the land thus purchased from the plaintiffs, together with 60 acres of adjoining land (spoken of as O'Brien's land), for the lump sum of £6,350. The contract of sale was conditional, but was ultimately carried out. The transfer from the plaintiffs was made direct to the company, and in apportioning the lump sum for the purpose of the transfer, which had been executed with a blank for the amount, it was stated at £4,800.

The whole purchase money was received by Shaw as solicitor for the plaintiffs in July 1906. He retained the amount agreed to be paid by defendant less the defendant's one-fourth, and paid the balance to the defendant. The plaintiff Martin expressed himself as quite satisfied. The plaintiff Grace obtained counsel's opinion on the question whether she could claim any part of the defendant's profit, and was advised that she could not.

The 41 acre block was shortly afterwards sold, and the defendant received from plaintiffs a quarter of the price.

Nothing more was done until this suit was instituted on 26th November 1909.

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It is important to consider the nature of the case which the defendant was called upon to answer.

The statement of claim alleged that about the end of March 1906 the plaintiffs instructed the defendant to sell the 160 acres at £24 per acre and the three-quarter acre for £100, provided that the defendant could induce O'Brien to sell his land also, and had authorized the defendant to sell the land in his own name on the defendant's representation that he would thereby be able to deal with it more freely and expeditiously, and that for the purpose of carrying out such a sale the document of 2nd April was drawn up. It then alleged that the defendant was at that time secretly negotiating for a re-sale of the 160 acres to the Caledonian Coal Co. and that on 12th April he re-sold it to that company at a largely increased price, that on 14th April he still represented to the plaintiffs that he was in treaty with the company for the sale of the 160 acres to them at the price named (£24 per acre), and, concealing the fact that he had already sold it, again induced the plaintiffs to authorize him to sell the land in his own name, and that in pursuance of that authority the document of 14th April was drawn up.

A few days before the hearing the statement of claim was amended by adding an allegation that the approval of the Registrar of Probates to the agreement of 14th April was obtained wholly or in part by the defendant's fraudulent concealment of the fact of the re-sale by him of the 160 acres to the Caledonian Coal Co.

On the seventh day of the hearing the statement of claim was further amended by adding a charge that, apart from and in the alternative to the alleged agreement of 14th April being a mere authority from the plaintiffs to the defendant to sell the 160 acres, the defendant at the time of making that alleged agreement and throughout all the negotiations relating to it stood in a fiduciary position to the plaintiffs and did not make full disclosures of his knowledge and negotiations concerning the 160 acres.

The nature of the alleged fiduciary position was not further defined. The only relation suggested in argument was that of an agent for sale.

We are told by counsel that at the hearing the case was presented as one of conspiracy between the defendant and Shaw to defraud the plaintiffs, but that this attitude was afterwards abandoned, and that the Court was asked to deal with the case upon the footing that the defendant's contract with the Caledonian Coal Co. was in fact made by him while he was the plaintiffs' agent. And, if I rightly understand the judgment of *Simpson* J., this was the view which he took of the transaction. He accordingly ordered the defendant to account for three-fourths of the difference between £24 an acre and £30 an acre in respect of the 160 acre block, deducting any expenses properly incurred by him in the re-sale. He apparently lost sight of the £100.

In this Court Mr. *Rich* frankly admitted that (as the evidence clearly established) the transaction of 14th April was, and was intended to be, an out and out sale from the plaintiffs to the defendant. The claim now maintained is that the agreement for sale was voidable by reason of the then existing relation of principal and agent between the parties, and the failure of the defendant to disclose all the facts then in his knowledge material to the value of the property, in particular the state of the negotiations between himself and the Caledonian Coal Co. It is contended that the plaintiffs are consequently entitled to the same rights as if the agreement had not been made. This is not the case made by the amended statement of claim, as I understand it, but I will assume that it is sufficiently raised by the amendment.

There is, then, a clear and distinct issue for determination, namely, whether at the time of the sale the relation of principal and agent existed between the parties. And, as I said at the outset, the evidence on this point is fortunately clear and unambiguous.

It will be well, in dealing with the evidence, not to forget the warning contained in Lord *Herschell's* speech in the case of *Kennedy* v. *De Trafford* (1): "No word is more commonly and constantly abused than the word 'agent.' A person may be spoken of as an 'agent,' and no doubt in the popular sense of the word may properly be said to be an 'agent,' although when it is

(1) (1897) A.C., 180, at p. 188.

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attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading."

Every case must, as pointed out by *Wigram* V.C. in *Edwards* v. *Meyrick* (1), depend on its own circumstances, which may, even in the case of solicitor and client, "have left the parties substantially at arm's length and on an equal footing." The principle of all the cases in which relief has been given is that the parties did not deal on an equal footing. The principal subject for inquiry in the present case is whether the parties dealt on an equal footing at the time of making the agreement now impeached.

Before referring to the facts in detail I may premise that there is no difficulty as to the original position and rights of the parties. The plaintiffs were the legal owners of the land. The defendant had no legal estate in it, but it was from the first accepted by all parties that it was to their common interest to dispose of the land as soon as possible and at the best price obtainable. They in fact throughout acted on the footing of being co-owners of an estate acquired for the purpose of re-sale. Communications between them were almost entirely by written correspondence, conducted, with three exceptions, on plaintiff's side by Shaw or his managing clerk, Austin.

Some of the land was believed to be coal-bearing.

On 29th August 1904, when it was practically certain that the land would be recovered for the plaintiffs, defendant wrote to Shaw, opening the subject of dealing with the land. He said that he represented a syndicate which would like to work the coal on a royalty. This, he believed, was probably a different method from that in the plaintiffs' minds, but he proceeded to give some reasons for thinking that it would be more advantageous than selling straight out. He concluded by saying:— "Further of course before sale it would be necessary to prove the land for coal which would be expensive and in our negotiations we will take all risks, but of course I will give you all the information which leads me to believe the existence of coal beds there. Of course I assume you will not allow the Bouffiers to come to any conclusion before you have an expert's report, and of

(1) 2 Ha., 60, at p. 70.

course any agreement as regards the share of J. H. Bouffier deceased will be subject to the Court's approval, but my syndicate are very anxious to begin operations at as early a date as possible."

On 31st August Shaw wrote, saying that he had conferred with the plaintiffs, and that he was instructed to say that they "are willing to receive an offer from you for a mining lease of part of the land at Cessnock, which offer they will carefully consider and submit to some mining expert to guide them in the details."

On 5th September 1904 defendant wrote to Shaw, giving him full information as to the projects of the proposed syndicate and of the royalty which they were prepared to offer. He pointed out that it was essential to the success of the project to secure O'Brien's land.

On 19th September Shaw wrote suggesting that defendant should take a sum to be agreed on for his interest in the land.

On 21st September defendant replied, discussing the project, pointing out that his negotiations included others besides O'Brien, and making an alternative suggestion that the land should be offered at auction or sold to himself at a price to be agreed.

In October 1904 the plaintiffs obtained from a Mr. Nielson, a mining expert, a report on the land, in which he said :—"This property alone would not be sufficient to open a profitable concern chiefly on account of its small area, but if the two adjoining properties were added a colliery with a reasonable output would have considerable life and the surface value of the land would be considerably increased by the opening of such works."

On 20th October Shaw wrote to defendant stating in detail the conditions on which plaintiffs were prepared to grant a mining lease to defendant's proposed syndicate.

On 15th November defendant replied, agreeing to some and dissenting from others of the proposed conditions, and adding that he had not yet concluded the matter with O'Brien but hoped to come to terms with him. Further negotiations took place, in the course of which defendant in a letter of 24th November said that if the plaintiffs wanted the money, and if they set a price on their interest and were reasonable, he thought he could arrange

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to buy. The negotiations lingered, and on 4th January 1905 Shaw wrote to defendant saying that plaintiffs thought that the matter "ought now either to be closed or dropped," and adding that unless the matter was settled within a week he did not think that defendant could complain if Bouffier proceeded at once to put the land in the auctioneer's hands for sale in lots.

On 9th March 1905 Shaw wrote to defendant enclosing a plan of a proposed subdivision of the land for the purposes of an auction sale. On 5th May 1905 Shaw again wrote, saying that Bouffier was beginning to get a little impatient over the long delay in the negotiations for the coal mining lease, and asking if there was any prospect of an early settlement of matters.

On 8th May 1905 defendant wrote to the plaintiff M. Bouffier saying that he had learned from Shaw that the plaintiffs were impatient "in reference to the coal lease or sale." He then discussed the position, pointing out that "It will pay us far better to get a coal mine on our land than any other way of dealing with it," and giving reasons for that opinion. He added: "Now with regard to the company which I had got together, we have practicallv failed because though we had sufficient capital subscribed to do the development work we feared that if the coal trade continued as slack as at present we would run a serious risk of losing all we put into it, and without inviting more investors to put money into it, we were not sufficiently assured of success. However this has not interfered with my endeavours to have the land dealt with and I have to report the result so far. Our area together with Brown's and O'Brien's and a portion of the Newcastle-Cessnock area, has been submitted to the chairman of the Hetton colliery and they are now considering the areas; they are having a report made I believe, but by whom I cannot say. It has also been mentioned to two South Coast men whose areas are worked out, and after the meeting of the next coal exchange in Sydney, will give me some sort of answer. Then again I have mentioned the area to a director of the Wickham and Bullock Co., but as you probably noticed this company may be wound up. But in case of their winding up we believe that we may form a company from some of the shareholders, but even if they do not wind up, they may be induced to reject the area then at (*Qu.* for

the) present. The course which would suit us best however I think, would be to get a small colliery on our own and Brown's and O'Brien's area alone, for then our own areas would be worked constantly right on till they are worked out and I am now making every inquiry for a man who has worked out his area and if he will take on our area I can get him considerable financial backing."

It is abundantly clear that at the inception of this negotiation the relation of the defendant to the plaintiffs was that of one of three persons jointly interested in land offering to deal with the others as purchaser, and not that of an agent for sale. The concluding words of the letter just quoted may be ambiguous, but they do not show the relationship of principal and agent.

On 26th June 1905 plaintiff M. Bouffier wrote to defendant, communicating an offer that had been made to him of £100 for one acre of the land. Defendant replied on 27th June, advising against acceptance of the offer and saying, "We must not spoil the whole by chipping off a part." He also said that failing a disposition of the whole the best course would be to offer the two blocks at auction for coal companies, and "failing our selling the last course is to sell in sub-division." He asked Bouffier to "wait a little longer."

The negotiations for the formation of a syndicate to take the land fell through. The defendant appears then to have made proposals to the Howard Smith Co. to take a lease of the land, which were not accepted. There is nothing to show what these proposals were. But it appears from the letter next to be mentioned that defendant as one of three persons jointly interested was endeavouring to obtain an offer which might be submitted to his co-adventurers. On 10th August 1905 defendant wrote to Shaw stating that the final result of negotiations with the Howard Smith Co. was an offer which was quite unsuitable, and that he "did not bother to refer the matter to Bouffier." He said that in view of all the circumstances he could only regretfully say that it would be best to advertise the property in two lots "as you suggested some time since," but added that he would not "cease to endeavour to arrange leases, &c." On 16th August defendant wrote to Shaw, enclosing a letter from a firm of anctioneers, in

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which they said that the most likely way in which a sale could be effected would be as a whole, and asked the lowest price. Defendant said that if Bouffier would name a price it would be well to let the firm know, but that he thought that if they got £20 an acre cash they would be lucky. On 6th September the Registrar of Probates directed the land to be offered at auction with a reserve price of £30 per acre.

The land was in fact offered at auction on 7th October at a reserve, fixed by Bouffier, of £25 per acre. The highest bid was £18 per acre, and no sale was effected. On 17th October 1905 defendant wrote to plaintiff M. Bouffier asking him to write what he thought about the property and inquiring what he was prepared to do, either to hold on for higher offers or sub-divide for town lots, and whether he was prepared to sell at or about the price offered at the auction. He added: "Personally I would not sell at that price, but if you are hard up and must sell I think I would be prepared to take it on at that price, but please write me first what you think of it, as of course we cannot waste any more time than we can help in deciding what to do, so please write me at once."

On 18th October Bouffier replied in a letter which I will read in full:—"In reply to your letter of the 17th instant the price that I was offered at the sale is not enough. There is no doubt but I would like to sell, but not at that price, and to sub-divide for town lots I would rather not, if we can sell it in one lot, as it would mean another lot of expense to sub-divide. I think that before long we will get our price for that 160 acres, viz., £25 per acre. By a letter that I got from George Brown yesterday, I think that they will form a company and take it on at £25 per acre. I wrote to Brown this morning that they could have it at that price, but that I could not fix any time as others were in treaty with the auctioneers at the present time and my doing so might confuse matters. So as soon as I get word from Brown I will write to you in full.

"I am enclosing Brown's letter to you which you can return to me, as I want to keep all his letters. So now, Trevor, I don't think that I can say any more just now but I hope that Brown,

and whoever is with him, will take it on at £25 per acre, and as soon as I get word I will let you know."

At this time the relation between the parties was, in my opinion, that of co-owners each of whom was trying to get an offer for the property to be submitted to the others for consideration.

Before 26th October 1905 some land which would give direct access from the 160 acres to the railway station had been advertised for sale by auction, and it had been suggested by Shaw to defendant that it would be advisable to buy it. On that day defendant wrote to Shaw referring to the suggestion, and saying that it would not be necessary to buy the whole of the land offered. He added: "Since last writing I have become aware that there is a very strong probability of either the Stockton Coal Co. or Howard Smith & Co., who own the areas to the south-east of us, either buying or leasing our freehold. The former company have inspected and have had one favourable board meeting on the question. So that in view of this it is important that we should secure the lot which immediately abuts on the end of the rails, if no other is secured. But of course this is all subject to the question of finance as owing to my change in 'condition' I could not undertake to carry the matter through. But as the terms are liberal I feel sure we could arrange it if not beyond the price you mention even for the one lot at end of rails.

"It would not be well to delay our preparations for subdivision, but as a matter of fact I expect to have definite answers at once from both colliery companies, as to either buying or leasing."

On the 27th defendant agreed to buying the land offered at a price not exceeding £150. At the auction the plaintiff M. Bouffier bought it for £175, and he refused to let the defendant stand in with him in the purchase. He afterwards, and before the completion of the transaction now impeached, sold it to defendant at a large profit. The three-quarters of an acre already mentioned formed part of the land so purchased.

On the same 26th October defendant wrote to a Mr. Howell, a representative of the Howard Smith Co. Ltd., making a proposal to lease the 160 acres to them or to sell it at £30 an acre, which

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was the price fixed by the Registrar of Probates. In this letter he used the terms "we" and "us," meaning, of course, the plaintiffs and himself. In making this offer he no doubt assumed to act in one sense as agent for the plaintiffs, but only in the sense in which a co-owner who makes an offer to sell the joint estate may be said to act as agent for the others. He informed plaintiffs of his action, and they apparently acquiesced. Defendant pressed for an answer to his letter to Howell, but could not get one. On 13th November 1905 he wrote to Shaw, referring to his previous letter of 26th October, and stating that he had word that one company (named) would not take an area on the Cessnock field and that he believed the Howard Smith Co. had a six months extension of labour in respect of their Crown leases. He proceeded:—

"Now in view of this which is very unsatisfactory I propose with financial assistance from my father to buy the whole property if we can come to terms. So I want you to ask the Bouffiers what they will take for the whole 200 acres and will they give terms.

"Please don't proceed with sub-division pending these negotiations and let me know what has been done." On 24th November plaintiffs replied offering to sell the whole area at £40 per acre.

At this time the parties were manifestly dealing as independent parties at arm's length.

On 2nd December 1905 plaintiffs placed 111 acres, part of the 160 acres, under written offer to defendant for one week from that date. The price asked was £22 10s. per acre, and defendant was also to buy for £210 the land which plaintiff M. Bouffier had recently acquired for £175, and to forego all interest in the balance of the land under the original agreement between them, deducting, however, a sum of £450 as representing that interest.

On 9th December, the last day for accepting the offer, defendant wrote to Shaw, fully disclosing his negotiations with the Howard Smith Co. for a lease, and asking, in effect, for an extension of the offer to sell the 111 acres, and for a modification of the terms. He made it clear that he could not complete the purchase unless he had first concluded a bargain both with that company and with O'Brien. On 11th December 1905 Shaw replied, saying

that plaintiffs would agree to some of the modifications asked for.

The negotiations with the Howard Smith Co. fell through, and with them the negotiations for a sale to defendant.

At this period it is impossible to say that the relation of principal and agent existed between the parties in any relevant sense of the term.

On 4th January 1906 Shaw wrote to defendant, to the effect (apparently) that the plaintiffs considered his offer at an end: for on the 5th defendant wrote in reply, suggesting that whether he bought or not there was no one who could judge better than he what was best to be done, and "insisting, if only for the Bouffiers' sake, that they make no move, but I concur in it." The reference was apparently to Bouffier's intention to sell the land by auction in town lots. For in a letter from defendant to Howell of 4th December requesting an immediate answer to his offer of 26th October he had said that "my partner Bouffier insists on a sub-division," which would spoil the land for the company's purposes.

It was suggested that by defendant's letter of 5th January he constituted himself the adviser of the plaintiffs and so incurred fiduciary obligations. But his proffered advice was disregarded, and on 23rd February 1906 Shaw wrote to him, informing him that Bouffier had instructed him to offer for auction on 31st March 153 lots of land as delineated on the plans which defendant had already seen. He further said that "We have carefully considered the matter for months and from every point of view." He expressed a hope that the proposal would be satisfactory to defendant. The terms of this letter are inconsistent with the existence of a fiduciary relation at that time. The parties dealt with one another as equals and at arm's length.

Defendant replied, making various suggestions as to the proposed sale, some of which were accepted by plaintiffs, and some rejected. The sale was provisionally fixed for 14th April, and later for 28th April. Defendant's suggestions were treated with respect, but as mere suggestions, the decision resting with the plaintiffs.

In the meantime considerable expense had been incurred in

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clearing and surveying the land in preparation for the auction. Plaintiffs were bent on trying to dispose of the land in that way, while defendant still thought that it would be better to dispose of it *en bloc* to a coal company. All parties were aware that this could not be done unless they were in a position to offer O'Brien's land with it.

In March defendant renewed communications with Howell, then representing the Caledonian Coal Co., and suggested that that company should purchase the plaintiffs' 160 acres, 170 acres of O'Brien's land, of which about 60 acres were supposed to be coal-bearing, together with a right of access to the railway terminus, for the sum of £6,850, the price conventionally assigned to the 160 acres plus the right of access being £4,800, and that to O'Brien's land £2,050 (60 acres at £25 and 110 acres at £5). This appears from a letter of 24th March from Howell to his principals which communicated the proposal, and which was admitted in evidence. Defendant was not at that time in fact the plaintiffs' agent for sale in respect of the 160 acres, or O'Brien's agent in respect of his 170 acres, or the agent for the plaintiff M. Bouffier in respect of the land required for the right of access. Howell says that defendant told him that he would have had to acquire the land from the owners before he could carry out the proposal. About 1st April Howell told defendant that his company would not give more than £6,000 for the lot. Defendant, however, did not lose hope.

On 2nd April he had a conversation with plaintiff Martin Bouffier. I will read his account of it at length. It was not contradicted, and is corroborated by all the contemporary documents. He said:—

"On the 1st April I went to Singleton. On the morning of the 2nd April I went to Martin Bouffier's house. I said to him, Howard Smith or the Caledonian Coal Company are again inquiring about our land, are you inclined to sell? He said, yes I would still prefer to sell in one lot than to subdivide. I said the company have told me they will not deal for our property without O'Brien's. I said that means we must acquire O'Brien's if we wish to deal with them. Are you prepared to consider purchasing O'Brien's? He said, no, I won't have anything to do

with purchasing, neither will Mrs. Bouffier. We want to sell. I said, very well then will you sell to me? And I will buy O'Brien's and try and make a deal with the company. He said yes, I will sell to you but I want my price. I said what is the lowest price. He said £30 per acre. I said the prices I understand the company is prepared to pay will not go that, if you can't bring it down to something like £25 I had better go back by the next train. After some consideration he said, well I won't come below £25. I said I have not seen O'Brien yet and it will depend on what price he asks. I said the margin is very small for me and I must ask you to cut it down as low as possible. I said if you sell to me there will be no commission to pay and I think you ought to bring it down at least £1 an acre. I expect on the price I have at present there is not more than a profit of about £200 for me. After some further discussion Martin Bouffier said provided Shaw will agree I'll accept £24 an acre. We were dealing for the Bouffier 160 acres.

"Then we went to Shaw and saw Austin. Martin Bouffier said to him—I want to sell 160 acres to Jones and the price is £24 an acre for the lot. Austin said the reserve price for the subdivision sale had been fixed, and he didn't think the auction could be cancelled. I think after some discussion Shaw either came into the room or was referred to.

"I said I would give £100 for the two lots 18 and 19. Austin said the sale would have to be subject to the Registrar's consent. Eventually Martin Bouffier said emphatically 'I want to sell.'

"Looking at Exhibit D—I told Austin I had to purchase O'Brien's property, and I had not yet seen it, and that I was going to see O'Brien, and would require Bouffier's offer for a week. There was some discussion about it. Austin said to me, 'you won't require much time after you return to Sydney to make up your mind.' I said 'very well, leave it till Wednesday next, *i.e.*, the 4th April.' Austin left the room and brought back Exhibit D. He read it and Martin Bouffier signed it. I took it."

By Exhibit D the plaintiffs offered to sell to the defendant, subject to the approval of the Registrar of Probates, 160 acres 3 roods 30 perches, the land in question, at £24 per acre cash. M. Bouffier also agreed to sell the ¾ acre for £100. The offer

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was to be open until noon on the following Wednesday (4th April).

It is common ground that the plaintiffs knew that defendant desired to buy for the purpose of an immediate re-sale at a profit.

The gravamen of the charge now made is that the defendant did not disclose to the plaintiffs the details of the then abortive negotiations with the Caledonian Coal Co. The obligation to make such a disclosure depends upon the existence of a fiduciary relation between the parties. In my opinion the relation then existing was that of persons dealing with one another on an equal footing as co-owners, one of whom, to the knowledge of the other, wished to buy the joint estate for the purpose of an immediate re-sale at a profit, the amount of which the vendor neither knew nor wanted to know. No authority was cited to show that a person in such a position is bound before purchasing from his co-owner to disclose the details of an unsuccessful proposal which he has made for disposing of the property in the event of his acquiring it from his co-owner, nor was such a contention seriously put forward for the plaintiffs.

The plaintiffs were anxious to sell. The defendant was all through known by them to be a willing purchaser if a price could be arranged. He was no more their agent in the, so far, abortive negotiations with the Caledonian Coal Co. than he was O'Brien's agent or plaintiff M. Bouffier's agent. On 2nd April he offered to act as plaintiffs' agent in negotiating a sale to the company on the only terms on which, as all parties knew, it was feasible, namely, the acquisition from O'Brien of his land which would have to be included in the sale, but the plaintiffs absolutely refused his offer. They refused to have any dealings with O'Brien, dealings which were likely to involve, and did in fact involve, the making of onerous financial arrangements before the projected purchase from him could be carried out. It was suggested that if a man professing to act as agent for another offers property for sale that other may adopt the agency. As between the principal and a third person the law on that point is well settled, but I know of no authority for the proposition that a man by making an unauthorized offer in the name of another constitutes a fiduciary relationship between himself and the person

on whose behalf it purports to be made. But even that evidence of agency is wanting. I am further of opinion upon the evidence that the plaintiffs did not, in fact, at this time, repose any confidence in the defendant as an agent for sale or in any other fiduciary capacity.

Upon these facts, which are undisputed, I come to the conclusion that on 2nd April the plaintiffs and defendant were, to use the words of *Wigram* V.C., dealing "at arm's length and on an equal footing." The footing was that of vendors and purchaser, the vendors knowing that the purchaser was buying for the purpose of an immediate re-sale at a profit, and refusing to take any part in the risks of the re-sale.

The learned Judge says in his judgment that he thinks it is shown on the evidence that the property was placed in defendant's hands to do the best he could with it for all parties, that is, to find a purchaser or lessee, and refers to the fact that he spent a good deal of time in trying to let the property to a mining syndicate or company. I have fully stated all the relevant facts, from which it is manifest that, so far as regards the syndicate, he was acting as agent for the intended purchasers or lessees, and not for the owners, and that so far as regards the Howard Smith Co., the negotiation was an isolated transaction which came to an end long before the material time. I fail to find any evidence that the property was placed in defendant's hands for sale in any other sense than that which I have already dealt with.

The learned Judge also refers to the fact that defendant spoke of the plaintiffs to Howell as "his principals." It appears, however, that if he did so (which is doubtful) it was with reference to the negotiation of October 1905, and that Howell assumed in March 1906 that defendant still had the same principals, although defendant then told him that if the negotiations were successful he would acquire the properties from the Bouffiers and O'Brien, and would therefore be able to sell them straight out to Howell. I cannot attribute any weight to casual expressions of this sort, or to the defendant's speaking of the plaintiff M. Bouffier as his partner (a very natural expression), in opposition to the overwhelming evidence afforded by the written records of

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the several transactions. The only evidence offered in opposition to those records are statements by M. Bouffier, one, that the defendant told him, on an occasion unspecified, that it would be to his advantage if the land was in his name to give him full authority to sell, and the other, "I say that everything connected with the 160 acres was left in defendant's hands."

I am therefore of opinion that on 2nd April 1906, and throughout the negotiations which followed and which resulted in the agreement of 14th April, there was no fiduciary relation existing between the defendant and the plaintiffs. There being no agency to terminate before the defendant could buy from his principal, the question whether he made full disclosure of all material facts does not arise. If it did, other questions would arise which would deserve much consideration.

Having obtained the option of 2nd April, defendant on 4th April made a fresh offer to Howell to sell the 160 acres, the three-quarters of an acre, and 60 acres only of O'Brien's land, for a lump sum of £6,300 cash. This offer was at once rejected.

On the same day defendant wrote to the plaintiff M. Bouffier, saying that O'Brien was asking a prohibitive price, that the matter was off and they had better proceed with the sub-division. O'Brien had in fact refused an offer of £2,000.

On the 9th defendant telegraphed to M. Bouffier, asking for a renewal of the offer till the 11th, and on the same day wrote to the effect that he was in a position to make a larger offer to O'Brien, and offering to pay any additional expenses incurred in the meantime. (It appeared that since the 4th he had made fresh arrangements for financial assistance). On the 10th he pressed for an answer, saying that "if you can renew your offer I can assure you the purchase will be completed." On that day Shaw wrote to him, saying that it was impossible to stop the sale by auction. Bouffier also wrote (his letter apparently crossing the defendant's last letter), acknowledging defendant's of the 9th, and saying that he would be quite satisfied "if it can be arranged with Shaw" (*i.e.*, to stop the expenditure which was going on in preparation for the auction). Relying on this letter defendant on 11th April renewed his offer of 4th April to Howell, but asking an additional £50 purchase money (which was to cover the

additional expense so incurred), and on the 12th the Caledonian Coal Co. accepted the offer subject to certain conditions, one of which was that they were to have the choice of the 60 acres of O'Brien's land to be taken, and another that a concession should be obtained from the Government of New South Wales, which was likely, but not certain, to be granted.

On the same 12th April Bouffier telegraphed to defendant—"Satisfied if you can arrange to-day," and defendant replied, also by telegram, "I accept purchase 160 acres as arranged. Stop auction sale at any cost." He also telegraphed to Shaw, saying that he had bought the 160 acres, and asked him to stop the auction. On the same day the plaintiff Grace Bouffier wrote to Shaw saying that she had seen her brother-in-law, who had shown her defendant's letter and wire to the effect that he had bought the 160 acres as arranged in Shaw's office at £24 per acre, and that she was quite satisfied with any arrangement her brother-in-law might make with defendant. Shaw then drew up the agreement of 14th April, which was signed by both plaintiffs, and which he took to Sydney and handed to defendant on that day. The purchase money included the £24 per acre for the 160 acre block, the £100, the £50 for additional expenses, and an agreed sum for expenses incurred by the plaintiffs in connection with the land. The defendant had also incurred some liabilities, and says that he believed that he had incurred others, in respect of his previous efforts to acquire and dispose of the land.

It is impossible to suggest that there was any alteration in the relations between plaintiffs and defendant between 2nd and 14th April, or that any new obligation to make a disclosure arose in the meantime. The foundation of the attack upon the agreement of 14th April is therefore gone.

That agreement, as already said, was subject to the approval of the Registrar of Probates, which was formally given on 28th May. As to the charge that it was obtained by the defendant's fraudulent concealment of the sale to the Caledonian Coal Co., it is sufficient to say that the word "concealment" is misleading, unless either there was a duty on defendant's part to disclose, or he took an active part in preventing the disclosure of material facts to the Registrar. The mere fact that defendant was a pur-

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chaser did not create any duty to disclose the re-sale, and the evidence entirely fails to show that he procured the concealment of that fact. At most, it amounts to a suggestion to Shaw that the fact was not material to be disclosed. The real truth is that the £4,800 conventionally assigned as between defendant and the company to the 160 acres, plus (apparently) the three-quarter acre which afforded access to the railway station, does not represent the value of the 160 acres *per se*, but the value of the 160 acres as increased by the inclusion of the 60 acres of O'Brien's land in the bargain. If, however, there were any dereliction of duty on the part of the defendant in this respect, other questions would arise. The order of the Registrar stands unimpeached, and I do not know of any principle on which a suit can be founded upon a suggested fraud upon the Court while the order stands. A suit of such a character, if it would lie at all, would be a very different case from that with which we are dealing. The land has been transferred to purchasers for value without notice, and the sale itself cannot be set aside. The relief, if any, to be given would be in the nature of damages to the beneficiaries in H. Bouffier's intestacy. It will be time enough to deal with such a suit when it is brought. But I should add that I do not see any evidence of the non-disclosure of any material facts. If it were necessary to express an opinion on the subject I should, as at present advised, find as a fact that the sale by the plaintiffs to the defendant was not made at an undervalue.

During the hearing the plaintiffs were allowed to make a further amendment claiming to have the original agreement of 6th June 1904 set aside as champertous, and to have defendant's one-fourth share of the proceeds of the land, which he received from plaintiffs in 1906, refunded. This claim was dismissed.

On this point I entirely agree with the judgment of the learned Judge. There was a further defence to this claim, in the nature of an estoppel, which would deserve much consideration if the plaintiffs could now be heard to found a claim based upon an executed illegal contract to which they were parties.

I should add that, for reasons already indicated, even if the defendant were liable to account for the profits made by him upon the re-sale, the difference between the conventional sum of

£4,800 and the price which he paid for the 160 acres is not the measure of his gross profits on the whole transaction, nor even the measure of the profit made by him in respect of the 160 acres, if that part of the bargain were severable from the rest.

I entertain, as I think is well known, very liberal views as to the exercise of the power of amendment, but I think it right to say that, when a definite charge of fraud is made against a defendant to which he directs his evidence, it is not, in my opinion, consonant with justice to spell out from the evidence adduced on that issue fragmentary statements which, standing alone and unexplained, might establish a *primâ facie* case of fraud of a different kind, and to which his attention was not directed: See *Hickson* v. *Lombard* (1). A defendant charged with fraud is especially entitled to know the case he is called upon to meet.

I desire to say in conclusion that the relations dealt with by Lord *Eldon* L.C., in the case of *Coles* v. *Trecothick* (2), and by Lord *Chelmsford* in *Tate* v. *Williamson* (3), upon which the arguments of the plaintiffs were mainly founded, were, in my opinion, relations of quite a different character from those which existed between the parties in this case. No authority was cited which would make the principles laid down in those cases applicable to such a case as the one now before us.

In my judgment the plaintiffs' case as now made is entirely unsupported by the evidence, and the suit should be dismissed.

BARTON J. The case really rests upon the allegations (1) of a fiduciary relationship between the plaintiffs and the defendant, and (2) of a failure by the defendant to discharge the duty of full disclosure imposed by that relationship. First, then, was there such a relationship? If there was not, the main appeal fails. The agreement of 6th June 1904, while it bound the defendant to use his best efforts for the recovery of the "moneys or other property" to which it relates, does not contemplate or point to any fiduciary relation as a consequence of such recovery. The defendant was merely to receive 25 per cent. of the net proceeds recovered. Mr. Shaw was to be the solicitor for all parties,

(1) L.R. 1 H.L., 324. (2) 9 Ves., 234. (3) L.R., 2 Ch., 55.

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but his position in that regard related only to the accomplishment of the object of the agreement. It is not said or implied that he was to be the solicitor to Jones after the recovery of the "money or other property," and throughout the dealings which ensued upon the recovery from Campbell, Shaw appears clearly as the adviser of the plaintiffs alone, whom they consult on every question between the defendant and themselves as it arises. It may be said broadly that the plaintiffs had the advice of Mr. Shaw up to the recovery of the property, in common with the defendant, and that after that time they had Shaw's advice apart and separately from the defendant, who, though a solicitor, was not practising. He was never the professional adviser of the plaintiffs, and as will appear, he did not become the depositary of their confidence in any sense which raises such a duty of full disclosure as equity will enforce. Hence in their subsequent dealings the plaintiffs and the defendant started upon an equal footing. Was the footing afterwards altered so that the alleged confidential relationship arose?

In November of 1904 we find the defendant, who had been suggesting a lease at a royalty on the coal to a syndicate represented by himself, first putting himself forward as a possible purchaser—and two months later Shaw writes in a strain which makes it clear that his client, M. Bouffier, asserts his mastery over the property. The defendant's letter of 8th May 1905 shows him abandoning, for the time at least, the endeavour to lease at a royalty, but negotiating in fresh quarters for the disposal of the land in the interest of all concerned. This a co-owner might well do without creating any fiduciary relationship with his fellows. In no other sense does he appear to be an agent acting for principals. He goes on with his efforts, in his own interests as well as those of the plaintiffs, and tries to obtain an offer for a lease. Later, under an order of the Registrar of Probates, the land was offered at auction, but not more than £18 per acre was bid, while the Registrar's reserve was £30. After that, the defendant tells M. Bouffier he thinks he is prepared to buy at the rate bid. M. Bouffier writes in answer that the price offered at the sale is not enough, though he would like to sell, and thinks that before long they will obtain £25 an acre for it in one lot, so that we find M.

Bouffier and Jones each acting independently of the other in the attempt to obtain offers, which of course would be submitted to the co-owners before acceptance.

On 26th October the defendant writes suggesting they should secure some land giving access from the 160 acres to the railway station at Cessnock, in view of probable offers by the Stockton Co. or Howard Smith & Co. to buy or lease the land of the co-owners. He expects to have definite answers at once from both companies.

Accordingly, Bouffier, with Shaw's advice, bought some of the land between the 160 acres and the railway, but would not allow Jones to participate, and Jones had afterwards to buy it from him. This is further evidence of the clear independence of the plaintiffs' position in this affair.

On the date of his letter suggesting the purchase of some of the necessary adjoining land, defendant makes an offer to sell or lease the 160 acres to the Howard Smith Company at £30 per acre and tells the plaintiffs of it; but nothing came of this. On 13th November, after reviewing shortly the unsatisfactory position of affairs, he writes Shaw that he proposes, with financial assistance from his father, to buy "the whole property," and asks him to ascertain from the Bouffiers what price they will take for the whole 200 acres (*i.e.*, the 160 and the 40) and whether they will give terms. The answer is an offer to sell at £40 per acre—evidently a prohibitory price. The plaintiffs seem to have preferred to go on with a subdivision sale, for which arrangements were being made.

Now, to my mind, there was not then, any more than at any previous stage, any relation between the parties which imposed on one of them any more than on the other a fiduciary obligation. It would have been impossible for co-owners to stand in a position of clearer independence of each other than the Bouffiers, advised by their solicitor, and the defendant then stood. But if a fiduciary relationship did not subsist at that time, what is there to show that any such position was created afterwards? Let us look at the offer of 111 acres made by the plaintiffs on the 2nd December following, and the defendant's reply (in which, though willing to treat for 100 acres, he made it clear that he was rely-

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ing for any such purchase on his ability to buy also 50 acres adjoining from O'Brien, and to lease the 150 acres thus acquired to the Howard Smith Company for mining). The parties are here bargaining, each as alert in his own interest as if they had been complete strangers, and it is absurd to say that the plaintiffs did not accept the position. So, again, as to the correspondence in January 1906, after that treaty with the Howard Smith Company had gone off. They were now in disagreement as to the expediency of a subdivision sale, and in the next month M. Bouffier's solicitor announces that he is instructed to offer the land for auction in lots. Shaw adds "we have carefully considered this matter for months, and from every point of view." The plaintiffs, advised by their solicitor, made up their minds in entire independence of Jones, and subsequent letters show this, if possible, more emphatically. Then we come to the transactions of the following April. On the 1st of that month Martin Bouffier, though at last ready to sell the 160 acres in a block, flatly refuses, on behalf of both plaintiffs, to join in buying any of O'Brien's land, without which Howard Smith & Co. or the Caledonian Coal Company, who, as Jones tells him, are again inquiring about the 160 acres, will not bargain. He says, he and Grace Bouffier will have nothing to do with purchasing, they want to sell. "Very well then," says the defendant, "will you sell to me, and I will buy O'Brien's land and make a deal with the company." Yes, he is willing to sell to Jones. At first he will not take less than £30 per acre. When told that the prices that it is understood the company is prepared to pay "will not go to that," he considers, and then says he will not go below £25. After further discussion he will accept £24 if Shaw will agree. This, be it remembered, with knowledge that Jones is contemplating a re-sale on his own account. Then they go to Shaw's office and the matter is discussed with him and his managing clerk, and the offer at £24 an acre is drawn up in the office and signed by the plaintiffs. The lots 18 and 19, three-quarters of an acre, were to be added for £100, and the option lasted to the 4th April.

I find it difficult to conceive of a transaction less open to the suggestion of any confidential relationship than was this; and I utterly fail to see in what way the defendant was bound to make

a full, or indeed any statement to Bouffier of the negotiations with the Caledonian Coal Company, which had in fact already gone off, though they were afterwards resumed. So far was he from being the plaintiffs' agent that his offer to endeavour to arrange a sale to the company, including O'Brien's land, which to the company was a *sine quâ non*, had been declined with emphasis. Nor is the case of the plaintiffs any better as regards the events which led up to the actual sale to the defendant. There being no confidence on 2nd of April, none was created between that date and the 14th, when the actual contract to sell the 160 acres and the access—giving lots 18 and 19—was executed. I will not recount the documents that passed after the defendant's failure to exercise the option granted him on the 2nd April, through the Caledonian Coal Company's refusal of his offer of the 4th. On the 12th of April that company closed with the defendant for the 160 acres, the three-quarter acre, and 60 acres of O'Brien's for £6,350 on certain conditions which are not now material. On that date he obtained by telegraph the consent of the plaintiffs to sell to him on the terms of their offer of the 2nd, and the contract, as already stated, was signed by the plaintiffs on the 14th, two days after the defendant had contracted for the re-sale to the company. No element of confidence was introduced into the relations of the parties between the 2nd and the 14th of April. The plaintiffs continued to be safeguarded by the advice of their solicitor, and they still dealt with the defendant at arms' length. I cannot say that they were not on an equal footing with him. Moreover, there is nothing to show that the 160 acres-block standing by itself was then worth more than £24 per acre.

On the allegation that the Registrar's approval of the sale was obtained "wholly or in part" by means of a fraudulent concealment by the defendant of his re-sale to the company, I entirely agree in the view expressed by the Chief Justice. The defendant was not under any obligation to disclose his re-sale to the Registrar, nor is there any evidence of fraudulent concealment.

On the claim for a refund to the plaintiffs of the defendant's 25 per cent. of the proceeds of the sale to him, on the ground that the agreement in 1904 was champertous, and that it should be

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delivered up to be cancelled, the plaintiffs have failed to adduce any valid reason why we should disturb the conclusion of the learned Chief Judge in Equity.

I am of opinion that the defendant's appeal should be allowed.

O'CONNOR J. Two main issues are involved in this appeal. First, whether the appellant is entitled to retain the remuneration allowed him by the respondents in pursuance of the agreement whereby he gave them information and assistance which enabled them to recover certain lands which otherwise would have been lost to them. Secondly, whether, having purchased from them a portion of the said lands under the circumstances disclosed in evidence, he is bound to account to them for the profits made by him on the re-sale of the portion together with other lands to the Caledonian Coal Company. As to the first issue I agree with the learned Judge in the Court below that the agreement was champertous, and therefore illegal. But I also agree with him that, for the reasons he has given, it was not open to the respondents, in the events that happened, to take advantage of the illegality, and that therefore the respondents claim to have the 25 per cent. of the value of the land recovered repaid to them must fail. As to the second issue there is no controversy as to the general principles of law which are applicable. The rights of the parties in the suit depend upon what is the right view to take of the facts, that is to say, of the great mass of evidence, oral and documentary, which was placed before the learned Judge. If the decision had turned upon the credibility of the parties or witnesses I should have been loth to disturb the finding of the learned Judge who had the advantage of hearing the parties and their witnesses give evidence. But the decision does not turn upon questions of personal credibility. The crucial facts are established by uncontradicted evidence, and supported by documents, the only matter for determination being what is the proper inference to be drawn from those facts and documents. In arriving at that determination the Court of first instance is in no better position than the Court of Appeal. After a full consideration of all the evidence I have come to the conclusion that the learned Judge of the Court below has not drawn the right infer-

ence in deciding that the appellant is liable to account to the respondents for his profits on the re-sale by him of the portion of land in question, and I am of opinion that as to that portion of the judgment the appeal must be allowed. I have had the advantage of reading the judgment of my learned brother the Chief Justice, which states very fully and completely the reasons which have led him to the same conclusion. Deeming it unnecessary to repeat what he has said, I do not think it necessary to do more than say that for the reasons he has given I entirely concur in holding that the appeal should be allowed, and the decree that he has proposed should be pronounced.

ISAACS, J. During the course of these proceeding there have been various amendments of the pleadings. These amendments have been criticized by learned counsel for the appellant, but only from the standpoint of throwing doubt on the merits of the respondents' case, and not in any way as now challengeable in themselves. No appeal was made on the ground of their allowance; nor could they be successfully challenged seeing that the matter was within the discretion of the learned primary Judge, at a time when no prejudice but costs could accrue to the appellant, he having the fullest opportunity of meeting the case as finally made.

The whole merits have been fought, and the claim is ample to meet whatever rights the respondents have: *Beningfield* v. *Baxter* (1).

As this case presents itself to me, there is no controverted issue of fact of any materiality to the decision on any of the points raised. All the questions resolve themselves into pure law, and having reference to the law as I understand it, I arrive at a conclusion, I regret to say, different from that reached by my learned brothers.

First, as to the claim for an account of profits received upon the sale to the Caledonian Coal Company. That claim is rested upon two grounds; non-disclosure to the vendors, and non-disclosure to the Registrar. As to the first the admitted position is this:

(1) 12 App. Cas., 167, at p. 179.

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The Bouffiers were registered owners of 161 acres (all but 10 perches) of land, having therefore the complete legal title in themselves. By the conceded interpretation of the agreement of 6th June 1904 Jones had a one-fourth equitable interest in the land. The parties were co-owners, as tenants in common.

They determined to make a profit out of the land either by letting or selling it. Both Martin Bouffier and Jones at various times took steps with a view of selling the land as an entirety, and not of selling severally their respective shares. They from time to time communicated to each other and discussed the progress of negotiations that each carried on. Mrs. Bouffier left the active conduct of the matter so far as she was concerned to Martin and to Shaw. In the state of the title it is plain that the appellant had not even a legal interest of his own to deal with. It follows from all this that whatever sale or letting of the property was proposed to another by him must necessarily have been on the Bouffiers' behalf as well as his own, unless and until some express arrangement all round provided to the contrary. There was none before the conversation of 2nd April which eventuated in the agreement of 14th April 1906. Each of the several co-owners of a thing can only sell or authorize the sale of his own interest in the thing, but all the co-owners of a thing may combine and sell or authorize the sale of the whole thing: *Per Lindley* J. in *Keay* v. *Fenwick* (1). And if a joint owner purports to sell the entirety, the purchaser cannot obtain specific performance even of the vendor's share; *per* the same Judge in *Lumley* v. *Ravenscroft* (2). The appellant, therefore, in treating for the disposition of the whole property as an entirety, with the knowledge and approbation of the Bouffiers carried the matter far beyond mere co-ownership. He acted in contemplation of and preparatory to their being co-principals in the disposition; his acts being in fact according to the essence of his own postscript to the letter of 21st September 1904. This contemplation of being co-principals or joint vendors lasted down to 2nd April 1906, according to Jones' own evidence, and until the moment when Bouffier refused to purchase O'Brien's land. If Bouffier had consented to do that the whole transaction would

(1) 1 C.P.D., 745, at p. 752.

(2) (1895) 1 Q.B., 683, at p. 685.

have been on behalf of the three co-owners. See *Robinson* v. *Gleadow* (1).

Now, as Jones had no right to lease, sell, place on the market or in any way interfere with his co-owners' property without their permission or authority, it is clear he had expressly or tacitly (and must, *Moore* v. *Peachey* (2), be taken up to 2nd April at least to have acted upon) that permission and authority to so interfere.

At this point I may distinguish the present case from *Kennedy* v. *De Trafford* (3). Lord *Herschell* (4), speaking of Dodson, the supposed agent, whose responsibility was sought to be rested on agency as an alternative ground, said:—"He collected these rents in his own right—the right he had as owner. He was collecting his own rents." Apply that to the present case; was the appellant negotiating to sell or let this property as an entirety in his own right, the right he had as owner? If not, the case cited is, in principle, an authority against him. See also pp. 186, 187 of the report referred to, which I need not quote.

And so, when Lord *Herschell* adverts to the slipshod use of the word "agent," he carefully draws attention to the necessity of ascertaining the act done, that is, by what right the party called an agent was acting in respect of the property. If by virtue of an independent right he already possessed, he was not an agent in the sense of occupying a fiduciary position; if by virtue of some authority from another, then he was such an agent. It is the substance and not the name that is to be regarded.

Now, as I shall indicate presently, this case does not depend on whether Jones was the Bouffiers' "agent" in the strict sense or not. It does not even matter whether in fact he had or had not any antecedent permission or authority to act on their behalf. He did in fact interfere with their affairs and their property, as a person would who had some authority to do so; they, in confidence that he would thereby promote their common welfare, allowed him to place their property on the market, and test what it was worth. By that means he acquired information of a material nature with respect to the value of their property as a whole, which he would

(1) 2 Bing. N.C., 156.
(2) 7 T.L.R., 748.
(3) (1897) A.C., 180.
(4) (1897) A.C., 180, at p. 188.

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not have otherwise acquired. This is the potent fact in the case; it is, in my view, the determining element on this branch. All the other circumstances so strenuously urged by Mr. *Mitchell* as the strongmindedness of Martin Bouffier, his independent will, his frequent rejection of Jones' suggestions, his guidance by Shaw and experts at various times, the ordinary market value of the land and so on, become quite immaterial, in view of the central fact that Jones acquired in the manner described material information affecting the value of the property or what could be obtained for it, irrespective of ordinary values, that was unknown to Bouffier and those advising him when Jones bought from his co-owners. The right to information, and the right to reject advice are independent considerations and are not mutually exclusive: See *Clark* v. *Clark* (1). Now why is the circumstance to which I have referred the controlling factor in this branch of the case? The appellant is clearly entitled to demand that, before being saddled with fiduciary liability, he shall be brought within what Lord *Thurlow* L.C. called in *Fox* v. *Mackreth* (2), "some settled definition of wrong recognized by this Court." The appellant's radical error, in my view, is in assuming that once agency in the strict sense is got rid of, and it is shown that Jones' advice and ideas were rejected, and Bouffier displayed an independent spirit, there is an end of the case. I might observe that, having regard to all the evidence, and particularly the appellant's postscript, Bouffier's evidence at fols. 1655 and 1737 with the qualifications at folio 1677, and Jones' letters of 5th January 1906, and 10th April 1906, and the learned Judge's findings, I should if necessary be prepared to hold there was agency in the true sense. But I do not wish to rest upon that, but to deal with this case upon facts that are either accepted by both sides or are uncontroverted. And so I emphasize the position that agency is unnecessary to the appellant's liability. *Sir George Turner* V.C. said in *Billage* v. *Southee* (3):—"The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed,

(1) 9 App. Cas., 733, at p. 741. (2) 2 Cox Cas. in Eq., 320, at p. 321.
(3) 9 Ha., 534, at p. 540.

or the relation of the parties between whom it has subsisted." The "settled definition" of fiduciary wrong is therefore not so narrow as is contended. Fiduciary relation is nothing else than a confidential relation between the parties in which good faith demands of one of them some special duty towards the other, beyond what is required of complete strangers. The nature and extent of the duty depend upon the circumstances. Agency *per se* cannot be the test. Not every agent is fiduciary: *Piddocke* v. *Burt* (1); even partners do not for all purposes act as fiduciaries: *Ib.*, and *Trevor* v. *Hutchins* (2). The rule of equity is broad and cannot be exhausted by particular instances such as formal trustee and beneficiary, principal and agent, and so on. These are only examples of the application of the principle. The principle itself is dwelt on *In re Hallett's Estate* (3), cited by Mr. *Rich*, and in other cases I have examined since the argument. In *Edwards* v. *Meyrick* (4), Vice-Chancellor *Wigram* stated and reasoned out the rule as applied to contracts between parties said to stand in a fiduciary relation. He said: "The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand." And then the learned Vice-Chancellor goes on to show that communication of knowledge may place the parties on an equality.

Stirling L.J. in *In re Haslam & Heir-Evans* (5) approves of the definition quoted, and refers to its adoption by *Turner* L.J. in a previous case. So we may take that broad and comprehensive rule to be a settled definition applicable to this case.

Then there is the authority of Lord *Eldon* L.C. in *Andrews* v. *Mowbray* (6), which is specially apposite to a case like the present, and which, though in extremely wide terms, is after all an application to a particular class of contracts of the definition stated more generally by Vice-Chancellor *Wigram*. Lord *Eldon* said of a person alleged to be an agent with an obligation to dis-

(1) (1894) 1 Ch., 343.
(2) 76 L.T., 183.
(3) 13 Ch. D., 697.
(4) 2 Ha., 60, at p. 69.
(5) (1902) 1 Ch., 765, at p. 770.
(6) Wils. Ex. Eq., 71, at p. 102.

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close the value of property to his principal, "Whether he had a written or a verbal appointment, or no appointment at all, are questions which have nothing to do with the case, if it be the principle that a man by interfering in my concerns or my property shall not obtain a knowledge which he shall conceal from me if I am treating with him in a bargain about that property, and the knowledge he has got by his agency is that which I have a right to have the benefit of as well as himself." It will be noticed that the word "agency" is there used, as I understand, in the sense of an interference on the footing of an authorized or permitted interference with another's concerns or property.

This language of the Lord Chancellor is better understood when it is read in connection with the judgment he was affirming. Mowling was an agent, but it was contended that he was not such an agent as created the disability relied on. *Sir William Grant* M.R. said (1): "With regard to that, I think the plaintiffs have proved him an agent for all the purposes necessary to their case; that is, they have shown that he was in the employment of the plaintiffs; that he undertook a duty relative to the management of the estate, and had an opportunity, from the situation in which he was placed, to acquire full information respecting all the circumstances belonging to the property with regard to its value. Without entering into the disputed points between the parties relative to the extent of this agency and with regard to the mode in which it was executed, I think that a person placed in that situation is to be considered, in bargaining with his employer, in a different light from that in which a mere stranger would be placed, and that he cannot withhold from his employer when he comes to treat with him relative to that property, any circumstance which it may be material for his employer to know, in order to be able to ascertain the real value of the property."

See too *Sugden on Vendors and Purchasers*, 14th ed., p. 688, which includes with trustees for this purpose "any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing

(1) Wils. Ex. Eq., 71, at p. 72.

such property themselves, except under the restrictions which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent."

Seeing therefore that Jones could not have gained the information by reason of any right in himself, but only by the express or tacit arrangement between the parties, allowing him with a view to their common advantage to interfere, as Lord *Eldon* says, in the affairs and with the property of the Bouffiers, he obtained knowledge of circumstances regarding the value of their property which placed him on a better footing than they were on, and which good faith therefore demanded of him that he should not apply to his own exclusive advantage against them, but should disclose before purchasing. So long as he kept back this information, gained under those circumstances of trust and confidence, he held an advantage, to conceal which in such a transaction equity regards as an act of bad faith: *Tate v. Williamson* (1). "Confidence" in such circumstances is an implication of law.

Here again I quote *Sir William Grant* who considered that he could not hold Mowbray had not communicated all information he had, and then says (2):—"if so, he has by acting fairly, placed himself in the situation of an ordinary purchaser, because from the moment he has discharged all the obligations attached to the character of an agent, he stands just in the same situation as any other purchaser, and is entitled to all the advantage that he may eventually derive from the bargain; and the consequence is that he is not to be deprived of the bargain even supposing it to be proved that the estate was worth at that time more than he contracted to give for it, provided the vendor had the fair opportunity of exercising his own judgment upon full information with regard to all the particulars of the estate, and deciding for himself without misrepresentation or suppression, that it was expedient to let the estate go at the price offered for it."

Jones therefore up to 2nd April was under the obligation to dis-

(1) L.R. 2 Ch., 55. (2) Wils. Ex. Eq., 71, at p. 87.

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close. According to his own account on that day at Singleton he said to Bouffier "Howard Smith or the Caledonian Company are again inquiring about our land, are you inclined to sell?" Up to that moment the attitude of prospective co-principals continued.

Then he induced the Bouffiers to place the land under offer to him. But did he do so with that candour which the law required? On his own showing he did not. He on the contrary actively created an erroneous impression. Not only did he omit to mention the actual price offered which was itself material, but he omitted to say that he had rejected that offer of £6,000 as being too little, and still demanded £30 an acre. But worse than all, his words necessarily led Bouffier to abate his required price of £30 an acre on the supposition that Jones intended to take the price the company was offering. Jones avowedly had no such intention, and had demanded more, and yet the supposition referred to was the basis upon which Bouffier was pressed to reduce the price. As soon, however, as he got the reduction he came to Sydney, and on the 4th April, wrote to the company:—"The best offer that I can and do make to sell these properties is £6,300," &c. That is not accepted, and so on the same day he writes to Bouffier that his attempt has failed, and the parties resume their old relative positions, Jones advising in that letter that the sub-divisional sale should proceed. The co-owners are again taking steps to dispose of the entirety. Then, according to the uncontradicted testimony of Howell, a few days before 11th April he sent for Jones, and asked him to put the land again under offer at the old price, that is, £30 an acre, and Jones agrees to do so with an added £50. Before he does so, however, he writes on the 9th (M3) to Bouffier asking for what he calls "extending your option," or, as he says in M5 "renew your offer." This meant necessarily taking up the old threads where they broke off, and continuing as though there had been no break. Bouffier accedes, plainly on the faith of the old story. The Caledonian Company accepts Jones' offer, and Jones then having secured the sale, without disclosing the least further information, closes with Bouffier. He says that he was clear of all obligation to disclose his knowledge gained in the past. But in the words of Lord *Cottenham* in *Carter* v. *Palmer*

(1) his "disqualification must continue so long as the reasons upon which it is founded continue to operate." The learned Lord's succeeding observations apply in principle very much to the facts here, and show that, there being no disclosure of the knowledge he had confidentially obtained, his disqualification continued.

Tate v. *Williamson* (2) carries the necessity of disclosure to the final acceptance, namely, 14th April.

The fact that the land fetched £30 because in conjunction with O'Brien's land does not affect the question. The reason why the price was obtained is immaterial; the fact that it was possible is all important, and Bouffier should have been left to judge.

If Jones could be regarded as an ordinary purchaser, common honesty would require of him to make a correction of the impression he had created before finally closing on 14th April. See *per* Lord *Selborne* in *Coaks* v. *Boswell* (3), and *per Chitty* J. in *Turner* v. *Green* (4).

The price offered and that ultimately given by the Caledonian Company were both beyond question most—perhaps the most—material elements for the Bouffiers to consider in determining whether to part with or keep their land. By 14th April all had been definitely settled, and the basis of settlement as to price is beyond the power of Jones to deny. The transfers A5 and A9 are decisive. By the first he recites that he paid £3,862 10s. for the Bouffiers' land, and received from the company £4,800, the difference, £937 10s., being paid to him. By the second, relating to O'Brien's land, he stated that he bought for £1,500 and sold for £1,500. The *Stamp Duties Act* 1898 (No. 27), sec. 10, requires the complete truth to be stated, under penalty, and I assume that Jones did not intend to commit an offence. Whether the first actively-created erroneous belief uncorrected would, in the absence of a true fiduciary relation, entitle the respondents to succeed in the present action, it is unnecessary to say. But in the circumstances in which they stood, he was certainly bound to correct it some time before the contract was finally formed: *Davies* v. *London and Provincial Insurance*

(1) 8 Cl. & F., 657, at p. 705.
(2) L.R. 2 Ch., 55.
(3) 11 App. Cas., 232, at pp. 235-6.
(4) (1895) 2 Ch., 205, at pp. 208-9.

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Marine Co. (1). I am of opinion this transaction ought not to be upheld, unless some recognized defence stands in the way.

I now deal with the concealment from the Registrar. That is alleged to have been fraudulent, but concealment is sufficient. As I am resting upon uncontested facts, I pass by the serious question raised by the evidence of actual fraud in this connection. I disregard the allegations of fraud because non-disclosure is necessarily included in concealment, and even at law, where after shutting out an allegation of fraud enough is left to constitute a good cause of action, the pleading is sufficient: *Thom* v. *Bigland* (2), and *Swinfen* v. *Lord Chelmsford* (3). No new case of fraud was suggested or relied on.

The fiduciary position of Jones if established, as I have stated it, and as the learned primary Judge has found it, would impose on him the duty of seeing that the price was disclosed to the Registrar. Jones was not in the position of *Coaks* (4), because there the leave of the Court to bid placed that party in the position of a complete stranger having no primary duty of disclosure. His relation was absolutely severed. There the purchaser could only be made liable for non-disclosure if there were special circumstances calling for it, to which I shall presently refer. Here, on the assumption that Jones had acquired the information by the authorized or trusted interference with the property, it is not a question of severing his connections with the Bouffiers, or assuming an opposite attitude. The obligation of disclosure could not be shaken off in that way. An ordinary trustee (not for sale) may remain trustee and yet buy from his *cestui que trust*, but he must give full information: *Williams* v. *Scott* (5), and *Dougan* v. *Macpherson* (6). Jones could not evade his obligation to disclose; he must disclose before buying, however otherwise he put the owners on their guard, and as he knew some of those owners were infants, his obligation extended to all necessary disclosure for their protection, which for this purpose included the Registrar. But even if he be regarded as a stranger, then as Lord *Selborne*, as to the duty of Bunyon (a

(1) 8 Ch. D., 469, at p. 475.
(2) 8 Ex., 725.
(3) 5 H. & N., 890, 921.
(4) 11 App. Cas., 232.
(5) (1909) A.C., 499, at p. 508.
(6) (1902) A.C., 197.

purchaser) to communicate to the Court, says (1): "I am unable to see what there was to make Mr. Bunyon know, or have any reason to believe, that Mr. Brown did not, in this respect, do his duty. . . . In the absence of any improper collusion between the purchasers and Mr. Brown, or at least clear notice that Mr. Brown was neglecting his duty, I am of opinion that the purchasers were not bound . . . to interfere . . . for the purpose of seeing that all material communications made to him were brought to the personal knowledge of the Judge."

Now I take Lord *Selborne* as intimating that if the purchaser, though a stranger, knows or believes that the vendor's solicitor is neglecting his duty in regard to informing the Court of a material fact, and still more if the purchaser is party to the concealment, the purchase is impeachable.

Jones' position on this branch appears to me irretrievable.

On 24th May the Registrar verbally, and on 28th May he formally approved of the sale to Jones. Although the Caledonian Company's transaction was closed on 14th April, nearly six weeks before, Jones did not disclose it to the vendors or the Registrar.

Reading Shaw's letters of 16th May, Jones' answer of the 17th and Shaw's reply of the 18th, I see no escape for the appellant. Putting it on the lowest possible ground, his attention was directed with reference to the proposed consent to the published reports of a sale to the company; his reply was not only reasonably capable of being understood as a denial of a sale, but he knew that it was so understood by Shaw whose duty it was to place the facts before the Registrar. As a solicitor, and that is the description he gives in the contract, Jones knew, as he had indeed suggested, that the affidavit would not contain a reference to any such sale, and he allowed the matter to go through without this material fact being communicated. I can only say it is even a stronger case than the one supposed by Lord *Selborne* as imposing a liability on the purchaser; as an artifice it was stronger than the nod, wink or shake of the head, or smile that Lord *Campbell* thought fatal (*Walters* v. *Morgan* (2)); it amounted to an industrious concealment, a suppression, and, in

(1) 11 App. Cas., 232, at p. 241. (2) 3 De G., F. & J., 718.

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my opinion, Jones should not be allowed to retain the infants' property in such circumstances.

With respect to the respondents' right to an account of the profits, notwithstanding the transaction must stand so far as is necessary to give effect to the company's rights, see *Kimber* v. *Barber* (1) and *Hall* v. *Hallet* (2).

Then as to the defences:—First, I think Martin Bouffier is not barred by any suggested acquiescence in July 1906 in saying he did not want any law but wanted his money. The judgment of the Court of Appeal in *De Bussche* v. *Alt* (3) is an answer to that. But with regard to Palmer's suit Martin Bouffier and Mrs. Bouffier were *sui juris*, and could act and acquiesce for themselves in anything about to be done to their personal prejudice. I think their standing by while Palmer was claiming half Jones' profits, and not asserting their own claim, bars them after Jones' position had been altered for the worse, to the extent that it had been so altered. The evidence shows that Jones asked for a decisive statement whether a claim would be made by the Bouffiers, and no such claim was made. It is true that the Bouffiers abstained because they had received an adverse legal opinion, but estoppel does not depend on whether the party against whom it is asserted was under a mistake or not, but on the effect of his representation, or conduct equivalent to representation. And silence may be such as to amount to a representation. See *per* Lord *Cranworth* in *Pelly* v. *Wathen* (4).

The administratrix is not estopped so far as she is suing not in her personal right, but as representing the shares of the infants who could no more be bound by her acquiescence than by her direct contract in this respect. She could not waive the infants' rights to the Court's protection. Now Jones is relieved to the extent of one-half. But the other half is not exhausted by the infants' claims, and both Martin and Mrs. Bouffier have an interest in the balance, according to the relative proportionate interest, and to this extent they should recover notwithstanding the estoppel.

With respect to the 25 per cent. agreement it was certainly champertous: *Rees* v. *De Bernardy* (5). If this were an action at

(1) L.R. 8 Ch., 56.
(2) 1 Cox Cas. in Eq., 134.
(3) 8 Ch. D., 286, at p. 314.
(4) 1 D.M. & G., 16, at p. 25.
(5) (1896) 2 Ch., 437.

law to recover back the money paid under it, the respondents would have to rely on the illegality of the executed transactions. That would be a clear answer to Martin Bouffier, who would also be met by the Palmer Case. As to the administratrix suing for the estate in which infants are interested, I think they would fail also, because the contract is executed and they have the benefit of it. But there is over and above all these considerations one short and sharp defence to this particular claim. I leave the charge of improvidence out of sight; the property would not have been recovered but for the bargain which is said to be improvident.

But with regard to the claim to have the champertous agreement declared void and cancelled, equity requires something more than illegality. I will read what *Lindley* L.J. says in *Jones* v. *Merionethshire Permanent Benefit Building Society* (1):—"A plaintiff is not entitled to relief in a Court of Equity on the ground of illegality of his own conduct. In order to obtain relief in equity he must prove not only that the transaction is illegal, but something more: he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and show pressure or undue influence, so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity."

In the result I think the appellant is not entitled to succeed entirely. In my opinion he should be declared trustee in respect of one-half the profits on the Caledonian Co. sale (allowing him £100, the amount he paid for O'Brien's land), the administratrix being entitled to such part as represents the infant's shares, and her proportion of the balance of the half, and Martin Bouffier being entitled to his proportion of such balance.

The cross motion should be refused.

Appeal allowed.

Solicitor, for appellant, *W. A. Windeyer.*

Solicitor, for respondents, *W. M. Daley.*

C. E. W.

(1) (1892) 1 Ch., 173, at p. 182.