[HIGH COURT OF AUSTRALIA.]

JAMES BIRTCHNELL AND ANOTHER . . APPELLANTS;
PLAINTIFFS,

AND

THE EQUITY TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 8, 9; *Oct.* 15.

Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ.

Partnership—Undisclosed profits—Deceased partner—Profits earned in business of partnership—Liability of executors to account to partnership—"Transaction concerning the business of the firm"—Consent to transaction—Non-existence of—Onus of proof—Partnership Act 1915 (*Vict.*) (*No.* 2704), *secs.* 4, 33, 34. *Practice—Appellate Court—Point not taken in lower Court.*

The appellants and P. carried on in partnership the business of land and estate agents and also invested and speculated in specific transactions in land and acted in relation to the purchase and sale thereof in terms of receiving a share in the profits therefrom. S. was a client of the firm's and through the firm he bought land and again through the firm sold it in subdivision, giving terms to the purchasers. The appellants alleged that P. had received a share in the profits of the land sold by S. in pursuance of an arrangement with him without disclosing the agreement to the appellants and had not accounted for the profits to the partnership.

Held, by *Isaacs*, *Rich* and *Dixon* JJ. (*Gavan Duffy* and *Starke* JJ. dissenting), that on the facts the transaction between P. and S. was within the scope of the fiduciary relationship arising from the partnership business and that P. and, after his death, his executors were liable to account to the appellants for two-thirds of the profits received by P. from S.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

The appellants, James Birtchnell and Lawrence Alfred Birtchnell, brought an action in the Supreme Court of Victoria against the respondents, the Equity Trustees Executors and Agency Co. Ltd. and Reginald Stanley Porter, as the executors of the will of John Porter deceased, claiming an account of all moneys paid by one Spreckley to the said John Porter in respect of and arising from sales of land and of all moneys which the respondents had received or were entitled to receive in respect of or arising from such sales from the said Spreckley or his legal personal representatives, payment to each of the plaintiffs of one-third of such moneys, and such other relief as might be just.

It was alleged by the statement of claim that in 1889 the appellants, one Barridge and John Porter entered into partnership as estate and financial agents and auctioneers, and that subsequently it was orally agreed that the scope of the business of the partnership should be extended so as to include the business of investing and speculating in land and acting in relation to the purchase and sale thereof in terms of receiving a share of the profits therefrom; that Barridge retired from the partnership in 1896; that the partnership was subsequently carried on by the appellants and Porter under various agreements until 16th June 1913, when it was agreed between them that they would continue to carry on the partnership business of land and estate agents, and that the capital of the partnership should include the net value of the stock-in-trade, fixtures, book debts, real estate and interest in real estate and all other assets of the business formerly carried on by the parties less the outstanding liabilities of that business. At the date when the last-mentioned agreement was entered into the assets of the partnership business formerly carried on included considerable real estate and interests therein and interests in profits to be shared as aforesaid. Subsequently it was agreed between the appellants and Porter that the scope of the partnership business should be extended so as to include the business of investing and speculating in land and acting in relation to the purchase and sale thereof, in terms of receiving a share of the profits therefrom. The appellants and Porter carried on such partnership business under the two last-mentioned

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agreements and under an agreement dated 3rd November 1925 until the death of Porter in April 1927. It was a term of the agreement of 16th June 1913 that the profits of the business should be divided equally between the partners, and that each of the partners would devote his whole time to the partnership business, and that neither partner would without the consent of the others either directly or indirectly engage in any other business. It was further alleged that during the subsistence of the partnership one Spreckley from time to time purchased and sold land through the agency of the partnership, and that in breach of his agreement and of his duties as a partner Porter (a) in or about the year 1921 entered into an arrangement with Spreckley for a division between himself and Spreckley of profits to be made on the sale through the firm of lands acquired and to be acquired by Spreckley; (b) devoted portion of his time and attention to the selling of such lands for the purpose of procuring his share of the profits on the sale thereof; (c) thereby engaged in the business of speculation in land on his own account and acting in relation to the purchase and sale thereof in terms of receiving a share of the profits therefrom, and (d) for the purpose of making sales, utilized the premises, motor-cars and goodwill of the said firm without accounting to the said firm for his share of such aforesaid profits: that pursuant to the aforesaid arrangement Porter had received or become entitled to receive sums of money from Spreckley in respect of sales of the "Belgravia" estate, the "Whitethorn" estate and other lands effected by the said Porter or the partnership, and that Porter failed to account to the firm for such sums of money and the respondents refused to do so.

The defence in substance alleged that if Porter entered into the alleged arrangement with Spreckley such arrangement was for purposes wholly without the scope of the business of the firm of Birtchnell Bros. & Porter and that the respondents were not liable to account for any benefit received therefrom; that if Porter devoted part of his time and attention to the selling of lands for Spreckley or utilized the premises, motor-cars and goodwill of the firm for the purpose of making sales of the land, he did so on behalf of the firm and not otherwise, and the firm was paid and received

commission for such sales; and that if Porter did any of the things above alleged in the statement of claim, the appellants at all times material knew that the same were done and elected to treat such sales as being for purposes other than those of the partnership, and were estopped from alleging that such sales were made on account of or for the benefit of the partnership.

Spreckley died in November 1926 and Porter died in April 1927. The appellants were not in a position to give direct evidence of the transaction between Porter and Spreckley, but were compelled to rely upon the inferences to be drawn from some accounts bearing a note in Porter's handwriting, signed by Spreckley, which acknowledged that profits were to be divided, and some by entries in Porter's diary for the years 1921-1926, considered in conjunction with the general circumstances. The facts and circumstances are fully stated in the judgments hereunder; and therefrom it appeared that Porter and Spreckley arranged not later than 27th June 1925, to share the profits to arise from the realization of land through the agency of the firm by subdivision, sale of allotments on terms, and collection of the instalments, and that much of this land was acquired by Spreckley through the firm in order that it might be realized in that manner.

The action was heard by *Irvine* C.J., who held that the purchases and sales involved in the dealings under consideration were carried through the books of the partnership for convenience, and was satisfied that there was at no time an agreement either expressed or implied that the scope of the business of the firm was to be extended to include the carrying on of a general business in land speculation, and also that there never was any intention that a new partnership distinct from that of the agreement of 1913 was to exist in such business. He also held that each of the transactions in question was entered into as a separate adventure on its own merits and as the subject of a separate verbal agreement; and he held that the plaintiffs must fail.

From this decision the plaintiffs now appealed to the High Court.

Gorman K.C. and *Hudson*, for the appellants. This transaction concerned the partnership whether Porter was part owner or was

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receiving a sum as an additional commission. He was using the partnership business connection for carrying out this transaction, and he or his estate is liable to account to the firm for a proportion of what he has received (*Partnership Act* 1915 (Vict.), secs. 23, 32, 33 and 34; *Trimble* v. *Goldberg* (1); *Re Hulton*; *Hulton* v. *Lister* (2)). The relationship of Porter and Spreckley was such that Porter should have disclosed the relationship to his partners. Every partner is under an obligation to communicate his knowledge to the other partners and give them an opportunity to come into the transaction if they so desire; particularly in this case, where the knowledge of Porter was acquired in the service of the firm. The partnership deed contains a similar clause to the provision in sec. 32 of the *Partnership Act* 1915, but whether the clause is present or absent in the deed the responsibility of disclosure is not affected. The principle of disclosure is the same in the case of partners, agents and directors of companies (*Reid* v. *MacDonald* (3); *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (4); *Trimble* v. *Goldberg* (5); *Cassels* v. *Stewart* (6); *Fawcett* v. *Whitehouse* (7); *Burton* v. *Wookey* (8); *Lindley* on *Partnership*, 8th ed., p. 372). The onus of proving consent and acquiescence in the transaction is upon the defendants in the action (*Rothschild* v. *Brookman* (9); *Kuhlirz* v. *Lambert Bros. Ltd.* (10)). On the question of the amendment of the statement of claim, the appellate Court will consider a new argument or new question of law and will give full power to amend, and simply punishes the party in default on the question of costs (*Davison* v. *Vickery's Motors Ltd. (In Liquidation)* (11); *Shannon* v. *Lee Chun* (12); *Wilson* v. *United Counties Bank Ltd.* (13)).

[DIXON J. referred to *Leggo* v. *Brown & Dureau Ltd.* (14) and to *Cock* v. *Howden* (15).]

Martin (with him *Fullagar*), for the respondents. In so far as the findings of the trial Judge are based on questions of fact, they will

(1) (1906) A.C. 494.
(2) (1890) 62 L.T. 200, at p. 202.
(3) (1907) 4 C.L.R. 1572, at p. 1596.
(4) (1873) L.R. 6 H.L. 189.
(5) (1906) A.C., at p. 496.
(6) (1881) 6 App. Cas. 64.
(7) (1829) 1 Russ. & M. 132, at p. 148.
(8) (1822) 6 Madd. 367.
(9) (1831) 2 Dow & Cl. 188.
(10) (1913) 108 L.T. 565.
(11) (1925) 37 C.L.R. 1.
(12) (1912) 15 C.L.R. 257.
(13) (1920) A.C. 102, at p. 106.
(14) (1923) 32 C.L.R. 95.
(15) (1915) 20 C.L.R. 552.

not be overruled by this Court unless they are manifestly wrong. A claim against the estate of a deceased person will not be admitted unless corroborated (*In re Finch*; *Finch* v. *Finch* (1)). The partners were not estate agents within the ordinary meaning of that term. On every occasion when property was purchased there was either a prior agreement between the parties or else a subsequent ratification. Spreckley was unable to finance these transactions, and requested Porter to assist him in doing so, and unless the appellants can show that the transaction was within the scope of the partnership business they must fail (*In re Finch*; *Finch* v. *Finch* (2)). Sec. 33 of the *Partnership Act* 1915 relates solely to the business of the partnership. The only things comprehended in it are the three principles stated in *Dean* v. *MacDowell* (3). There was here no conflict with the partnership interest (*Fuller* v. *Duncan* (4)).

Hudson, in reply.

Cur. adv. vult.

Oct. 15.

The following written judgments were delivered :—

ISAACS J. The appellants' claim may be succinctly described as a claim to share profits which a former partner, now deceased and represented by the respondents, made or became entitled to illicitly and in breach of faith, in connection with the firm business of the appellants and the deceased partner. Passing by an alleged specific oral agreement, which has not been accepted by the learned Chief Justice of Victoria, the claim may be said to be rested on three grounds: first it was said that the partnership deed of 16th June 1913 on its proper construction included in the scope of the firm business the purchase of an interest in land, such as that impeached in this case; next, if that were not so, that there had been a recognized course of partnership conduct which brought the purchase within the scope of partnership affairs; lastly, that the transaction from which the deceased partner derived the profits in question was "a transaction concerning the partnership" within the meaning

(1) (1882) 23 Ch. D. 267.
(2) (1882) 23 Ch. D., at p. 269.
(3) (1878) 8 Ch. D. 345, at p. 355.
(4) (1891) 7 T.L.R. 305.

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of sec. 33 of the *Partnership Act* 1915, and was entered into by him without the appellants' consent, or, at all events, was not proved to have been entered into with their consent.

As to the first ground, it is clear on inspection of the deed, without more, that the firm's business extended beyond selling on commission. It necessarily included selling partnership land at a profit. With respect to the second ground, both sec. 23 of the Act and general principles of law (see *Const* v. *Harris* (1)) establish that the actual scope of the firm's business for the purposes of this proceeding was not necessarily limited by the provisions of the deed. In applying the facts to the first and second propositions, a very strong case is made for the appellants that the partners appellant were entitled to have had from their former partner the opportunity of joining in any such venture, if it were a real venture. It would be no answer that, as was suggested for the respondents in argument, one partner alone could not in the first instance have bound his firm by the purchase. If judicial authority were necessary for that position, the opinion of *Joshua Williams* J. in *Gibson* v. *Tyree* (2) is quite clear. Personally, I find it unnecessary to enter into the detailed consideration of facts and law required to pursue those first two positions to a conclusion. I find the third ground so plain and conclusive that nothing more is necessary. For this purpose the essential facts may be thus stated :—The partnership—and I assume it for this purpose to have been one for land and estate agency strictly—had sold certain land to one J. N. Spreckley, and was in course of disposing of it for him on commission and of completing the agency work in connection with the undertaking. Spreckley began to purchase about 1921, and began to sell about 1922. The lands he bought were called respectively " Belgravia " and " Whitethorn " and " Whitethorn Township Estates," and some land at Frankston. Throughout the whole of his transactions with the firm, and until after Porter's death, so far as appears from the evidence, including the affirmative testimony of the appellants, Spreckley was ostensibly the sole principal in respect of the land he bought and sold. He paid the deposits on the three estates to the firm by his own cheque. His subsequent payments to the vendor

(1) (1824) Turn. & R. 496, at p. 523. (2) (1900) 20 N.Z.L.R. 278, at p. 285.

—that is, a man named Cox, who, by agreement with the firm, shared with the firm profits of the sales to Spreckley—were made by deductions from amounts standing to Spreckley's credit in his account in the firm's books, as receipts from his purchasers. In June 1925 Porter instructed some employees of the firm to make a statement of accounts in respect of the three estates, up to 31st March 1925. These accounts, as completed by the firm's employees, showed nothing but Spreckley's situation with the firm so far as the agency had proceeded. They showed as to Belgravia and Whitethorn Township the various allotments so far sold by the firm for Spreckley, the names of the purchasers of these allotments, the contract price for each, the portion of that price so far paid, the amounts overdue, the interest overdue and the balances of actual payments so far made. Those balances totalled £8,733 16s. 6d. in respect of Belgravia and £557 9s. 11d. in respect of Whitethorn Township. As to Whitethorn, which appeared on the second sheet, only the headings were written by the employee. Porter himself, as to Whitethorn, wrote in the lots sold, the purchasers, the amounts of interest overdue and the balances representing receipts, totalling £3,324. He then, in consultation with Spreckley, as will be seen, on 27th June 1925, wrote in certain words respecting Spreckley's unsold land. First of all, some land at Frankston—also formerly Cox land—was priced partly at so much per lot and partly at so much per acre, and treated as probably fetching £2,750 in all. Belgravia unsold lots, fifteen in all, were priced per lot, and treated as probably fetching £2,925 in all. That is, the land yet unsold was treated as producing £5,575. To this were added £8,730 (Belgravia), £3,324 (Whitethorn), £557 (Whitethorn Township), and a total arrived at of £18,186. A deduction was made of £1,930 for two mortgages, and of £650 to "R.S.P.," that is, the second respondent, and a trial balance struck of £15,606. That represented gross receipts, actual and expected, from the sale of the Spreckley land by the firm of Birtchnell Bros. & Porter. Then Porter wrote as covering the whole:—"Divide half each of profits. Mr. Spreckley made note of this and placed with his papers. June 27th 1925." "No. 1 J. N. Spreckley to be refunded out-of-pocket moneys and interest to date. Afterwards equal division. J. N. Spreckley and John

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Porter." Spreckley then signed, "J. N. Spreckley." Reading those words, and particularly as they appear in the original document (Exhibit O), their meaning does not appear to me doubtful. The line "Divide half each of profits" seems to have been thought at first entirely sufficient. It was this that Spreckley is said to have noted on his papers. The date is added. Then it seems that Spreckley required some assurance that his capital and interest should be first returned, and only "afterwards," that is, after such refund, there should be "equal division," which to me plainly signifies the equal division of profits first noted.

As I view the case, for reasons to be presently stated, it is quite immaterial whether Porter undertook to contribute capital in the future. If he did, it would make the case stronger against the respondents, for it would be the creation of an additional antagonistic interest in him—the interest of a part proprietor of the land, as well as that of a part sharer of the profits of Spreckley's land. But as a matter of fair and reasonable construction, I entertain no doubt that the words "equal division" are confined to profits, and relate to all profits from the beginning. Certainly, profits cannot be excluded from them, and, if they also include contributions, they must either limit contributions and profits alike to the future or extend them alike throughout. But, clearly, profits go back to the whole £15,606, and contributions would not, and there is no mention either of making future contributions or of deducting past profits before dividing. If inference is needed, Spreckley's purchase-money had probably been already paid out of his receipts, and if he had required more there were future receipts to come.

The problem after about four years apparently was to collect outstanding arrears, and to dispose of lots that still hung fire, so as to realize a tangible profit. In any possible interpretation of the Porter-Spreckley agreement, and even assuming it came into existence for the first time on 27th June 1895, certain features are inherent in it. In the first place, the sum of £15,606 for the purpose of arriving at profits had to be reduced, not only by Spreckley's cost price and interest, but also by *the commission charged and to be charged in the future by Porter's firm.* That commission was an essential, though unexpressed factor in reducing receipts to profits.

And involved in the commission were the personal efforts of Porter to enlarge those profits. There was also involved the amount of commission chargeable by the firm. Now, although 10 per cent to 20 per cent was the usual rate charged, obviously varying according to circumstances, there was no legal limit, and nothing appears which affects the duty of every partner to do his best for the common benefit of his firm. If Spreckley was willing in the circumstances —it may be from the difficulties of further disposal or collection— to give up half his profits on completion, why should not Porter secure that advantage for his firm and not for himself ?

It was argued before us, as it was successfully argued before the learned Chief Justice of Victoria, that although the Porter-Spreckley agreement was made while the agency was uncompleted and was in course of completion, the evidence left it to conjecture as to the consideration, if any, Porter gave for the benefit he acquired. Before the learned trial Judge it was urged that Spreckley was a personal friend of Porter, and that the benefit might have been a gift, or by way of exchange, or in return for a share of liability taken over. Before this Court the hypothesis of a gift was not urged ; the other possibilities were. At all events, it was said, the appellants left the matter in doubt. That is a crucial point. Sir *William Irvine* C.J., who decided in favour of the respondents, said : " If it could be shown that the half share of profits were a consideration received by Porter for work to be done by the latter in selling the land, or indeed for any extra work to be done by him in selling the land, I should be disposed to hold otherwise." His Honor adds : " That work, however, was already being done by the firm for a different consideration, and that the consideration for the share of profits was any additional work on the part of Porter or his firm is left by the evidence entirely in the region of conjecture." It is at this point that, with the deepest respect to the learned Chief Justice, the decision should have turned the opposite way. The *Partnership Act* 1915 consolidates the law relating to partnership. Many of its provisions reduce to statutory form and force, rights and obligations that previously rested on doctrines of equity. But the Act is careful in sec. 4 to preserve all rules of equity and common law applicable to partnership, where consistent with the express statutory provisions.

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The three grounds of the appellants' claim previously mentioned are covered by several sections. For my purpose, I rely on part of sec. 33 and on the rules of equity saved by sec. 4, which enable us properly to understand and apply sec. 33. Sec. 33 enacts that "(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning" the business of the firm, &c. The section is not new law. (See per *Lindley* L.J. in *Aas* v. *Benham* (1), since that case, as pointed out in *Pollock's Digest of the Law of Partnership*, p. 95, was commenced before the Act was passed.) The section plainly cannot be confined to matters within the scope of the partnership. The contrary view would open a wide door to fraud, besides being opposed to what *Lindley* L.J. says at the page mentioned. If, for instance, A and B are in partnership as wholesale grocers, and B arranges with C, a retail grocer, to share C's profits if B influences A to agree to supply C, I take it as clear that B's arrangement with C is a "transaction concerning the partnership," though C's business itself is wholly outside its scope. The case would fall within the observations of *Cotton* L.J. in *Dean* v. *MacDowell* (2), "acquired by him by reason of his connection with the firm."

The relevant proposition then, I apprehend, is this: If the Porter-Spreckley agreement was a "transaction concerning the business of the firm," and if he derived benefit from that transaction "without the consent of the other partners," he, and now his estate, must account to the firm for that benefit. As already seen, *Irvine* C.J. had little difficulty about the first branch of that proposition. My only difficulty is to see how there can be the least doubt on the subject. The mere facts that the agency had not terminated, that it was in process of performance, that commission had yet to be earned and substantial services had yet to be rendered, that questions of adequate remuneration might still arise, that disputes might develop between the firm and Spreckley, as purchaser or as vendor, and that in any case relative attention to the Spreckley land and to other affairs of the firm, possibly more profitable to the firm, to which Porter might be called upon to attend to, remained to be

(1) (1891) 2 Ch. 244, at p. 255.

(2) (1878) 8 Ch. D. 345, at p. 354.

bestowed, seem to me to place beyond any possibility of hesitancy the question of whether the transaction was one "concerning the partnership." Porter, by reason of that agreement, placed himself in the position that his interest conflicted, or might conflict, with his duty. On the one hand he had a distinct interest in devoting special attention to the difficulties of Spreckley's land, and, to that extent, in disregarding other clients' affairs and the general welfare of the firm in relation to those affairs, and he clearly had the greatest interest in not endeavouring to get the best commission he could, whether within the limits of 10 per cent and 20 per cent, or beyond the latter limit, whatever trouble, difficulty or even expense the firm should have in completing the Spreckley resales. It is also manifest that suppression of the fact that Porter was interested adversely to the firm might materially affect the decision of the majority upon any question whatever, dispute or otherwise, that arose between Spreckley and the firm.

In *Parker* v. *McKenna* (1) Lord *Cairns* L.C. (2), *James* L.J. (3) and *Mellish* L.J. (4) state the relevant propositions of law with respect to a still current agency. Sec. 33, though now standing as a statutory regulation, is only an instance of the fundamental principle enunciated by equity and illustrated by the cases. The principle is the maintenance of fiduciary loyalty (see *Lady Ormond* v. *Hutchinson* (5); *Peacock* v. *Peacock* (6)). Founding on that principle, the responsibility of agents to be faithful to their principals has been insisted on. And, that being established, partners have been regarded for this purpose as agents, and forbidden to make profits out of the concerns of their principals, namely, their copartners (see per Lord *Blackburn* in *Cassels* v. *Stewart* (7)). In the same case, Lord *Selborne* L.C. (8) speaks of a partner entering into dealings with present or future partnership assets or liabilities. Among those I apprehend must be included the activities of a firm of land and estate agents, their remuneration and their responsibilities. Lord *Selborne* says: "A man obtaining his *locus standi*, and his opportunity for making such arrangements,

(1) (1874) L.R. 10 Ch. 96.
(2) (1874) L.R. 10 Ch., at p. 118.
(3) (1874) L.R. 10 Ch., at pp. 124, 125.
(4) (1874) L.R. 10 Ch., at pp. 125, 126.
(5) (1806) 13 Ves. 47, at p. 51.
(6) (1809) 16 Ves. 49, at p. 51.
(7) (1881) 6 App. Cas., at p. 79.
(8) (1881) 6 App. Cas., at p. 73.

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by the position he occupies as a partner, is bound by his obligation to his copartners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them." The two rules stated by *Lindley* L.J. in *Aas* v. *Benham* (1) equally spring from the fundamental principle mentioned, and therefore the following observations of *Story* on *Partnership* (sec. 177), with reference to a partner engaging in another business or speculation, apply very cogently to the present case. The learned author says: —"The object of this prohibitory rule is, to withdraw from each partner the temptation to bestow more attention, and to exercise a sharper sagacity in respect to his own purchases, and sales, and negotiations, than he does in respect to the concerns of the partnership, in the same or in a conflicting line of business. It is, therefore, a rule founded in the soundest policy." The same principle is stated by Sir *Lawrence Jenkins* for the Privy Council in the recent case of *Deonandan Prashad* v. *Janki Singh* (2). Speaking of co-sharers of property, his Lordship said that "the law demands from each owner such measure of candid dealing and good faith as would *ensure* that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property." (I have italicized the word "ensure.") It is the most authoritative affirmation of what Sir *John Leach* said in *Burton* v. *Wookey* (3). (See also *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (4), per *Cotton* L.J. (5) and per *Bowen* L.J. (6).) Mere communication by the fiduciary that he is about to acquire, or has acquired, the benefit, is not sufficient to exonerate him. (See per *Turner* L.J. in *Clegg* v. *Edmondson* (7) and per *James* L.J. in *In re Canadian Oil Works Corporation—Hay's Case* (8).) The Act, sec. 33, requires "consent" of the other partners to prevent the liability to account arising. On whom does the burden of proof as to consent rest?

I may interpose one observation. So far as this case is concerned, even if that burden rested on the appellants, it has, in my opinion,

(1) (1891) 2 Ch. 244.
(2) (1916) L.R. 44 Ind. App. 30, at p. 34; 44 Calc. 573, at pp. 583-584.
(3) (1822) 6 Madd., at p. 368.
(4) (1888) 39 Ch. D. 339.
(5) (1888) 39 Ch. D., at p. 357.
(6) (1888) 39 Ch. D., at pp. 363-364.
(7) (1857) 8 DeG. M. & G. 787, at p. 807.
(8) (1875) L.R. 10 Ch. 593, at p. 601.

been satisfactorily discharged. It is impossible to believe that had Porter communicated to them in June 1925 his acquisition of the right to share Spreckley's profits, they would have refused to participate. Again, it is inconceivable that if in January, July and September 1926, Porter had disclosed his actual receipt of half profits, they would have renounced any interest in them. Porter's secrecy with respect to Exhibits "O" and "P," recording his agreement with Spreckley, is cogent to negative his partners' consent. There is no reasonable ground for denying the story of the appellants as to their discovery of the claim of Porter on the Spreckley estate. And further, since *Irvine* C.J. says he would have been disposed to hold otherwise had the evidence shown that Porter was to do extra work, it follows that the learned Chief Justice must have been convinced that the appellants had not given their consent to the transaction. He manifestly did not regard either of the plaintiffs as *caput lupinum*. It was argued on the strength of *In re Finch*; *Finch* v. *Finch* (1), that the Court should reject the appellants' claim, because Porter was dead and the appellants had produced no corroborative evidence. I hardly know what it is suggested should be corroborated, except the want of consent. *Finch's Case* has not been followed. (See *In re Hodgson*; *Beckett* v. *Ramsdale* (2) and *Rawlinson* v. *Scholes* (3).) The governing rule is stated in *Lachmi Parshad* v. *Maharajah Narendro* (4) by Lord *Morris* (for Lord *Watson*, Lord *Hobhouse*, Lord *Shand*, Sir *Richard Couch* and himself) in these terms: "In an action brought to recover money against an executor, or, as in this case, the heir of a deceased person, it has always been considered necessary to establish as reasonably clear a case as the facts will admit of to guard against the danger of false claims being brought against a person who is dead, and thus is not able to come forward and give an account for himself."

In this case the want of consent is a negation, and what could be suggested as lacking in the reasonable conduct of the appellants' case to establish the absence of consent? It is very different from a claim based on an alleged positive act which might be reasonably

(1) (1882) 23 Ch. D. 267.
(2) (1885) 31 Ch. D. 177, at p. 183.
(3) (1898) 79 L.T. 350.
(4) (1891) L.R. 19 Ind. App. 9.

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corroborated but is not. So far as Porter's positive acts which are relied on by the appellants in connection with the branch of the case I am discussing, are concerned, they are proved by Porter's own handwriting, coming out of the custody of the respondents, and by other writings independent of the appellants. The point taken cannot be maintained. But assuming the respondents' point were sound, that the appellants had not affirmatively proved the non-existence of their consent, the question arises: on whom does the onus rest of satisfying the Court with respect to consent? The case of *Kuhlirz* v. *Lambert Bros. Ltd.* (1), cited by Mr. *Gorman*, is distinct that it rests on the partner receiving the benefit. That case (reported also in *Commercial Cases* (2)) followed *Rothschild* v. *Brookman* (3). The principle was stated by *Turner* L.J. in *Clegg* v. *Edmondson* (4):—"The onus of this case rests, as I think, upon the defendants, the managing partners. Having stood in a confidential relation, both as partners and as managers, the consequences which, according to the ordinary rules of this Court, flow from that relation must attach upon them, unless they can by some means exonerate themselves from those consequences." It is not at all like a case in which the adverse litigants are, so to speak, strangers, and unconnected by any relation which begins by creating an obligation. If A sues B for fraudulent concealment producing damage, the concealment is an essential element in the cause of action. But in a case like the present, equity has always held that the fiduciary relation itself imposes on the party bound to fidelity the obligation of justifying any private advantage he obtains in the course of his trust, or by reason of an interest conflicting or possibly conflicting with his duty. This is invariable. *Massey* v. *Davies* (5) is a notable instance. *Lowther* v. *Lowther* (6) is in accord. *Dunne* v. *English* (7) is another instance. (See also *Fullwood* v. *Hurley* (8).)

One phase of the argument was that as the firm were already charging their commission, namely, 10 per cent to 20 per cent, no harm arose. I have already indicated some reasons which in fact

(1) (1913) 108 L.T. 565.
(2) (1913) 18 Com. Cas. 217.
(3) (1831) 2 Dow & Cl. 188.
(4) (1857) 8 DeG. M. & G., at p. 806.
(5) (1794) 2 Ves. Jun. 317.
(6) (1806) 13 Ves. 95, at p. 103.
(7) (1874) 18 Eq. 524.
(8) (1928) 1 K.B. 498.

displace the contention. But it is necessary to recall the stringent rule of law that is applied to such considerations. It is stated in *Parker* v. *McKenna* (1) by Lord *Selborne* L.C. (2) and by *James* L.J. (3). The rule as stated by *James* L.J. is that the Court is "not entitled . . . to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an injury as that." *Scrutton* J. (as he then was) recognizes and applies this rule in *Kuhlirz's Case* (4). Consequently, we cannot consider whether the commission could or would have been increased, or whether in any other way the business could have been made more profitable for the firm. Porter in his lifetime was, and his legal representatives after his death are, therefore, liable to account to the appellants. Whatever was the consideration or motive for sharing the profits made after 27th June 1925 must have equally operated with respect to any profits arising earlier. The agreement makes the transaction entire and indivisible.

This appeal, in my opinion, should be allowed, and the account asked for should be ordered.

GAVAN DUFFY J. In the judgment appealed against, *Irvine* C.J. distinctly states the issues which were discussed before him and his findings in respect of those issues. I think that his findings ought not to be disturbed, and I do not think that we should be astute to support this claim against the estate of a dead man on any issue not raised at the hearing before the Chief Justice even if on a proper construction of the pleadings such an issue could be spelled out of them.

In my opinion the appeal should be dismissed.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it. As, however, I am differing from the learned primary Judge I think I should state shortly my reasons in my own words. The action is an ordinary suit based upon

(1) (1874) L.R. 10 Ch. 96.
(2) (1874) L.R. 10 Ch., at p. 118.
(3) (1874) L.R. 10 Ch., at pp. 124-125.
(4) (1913) 18 Com. Cas., at p. 226.

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a typical fiduciary relationship. The amended statement of claim sets out clearly enough that the partners whose transactions are in question were engaged in a land and estate agency business which included investing and speculating in land and acting in relation to the purchase and/or sale thereof in terms of receiving a share of the profits therefrom, and that in breach of his duties as a partner the late John Porter made an arrangement with one Spreckley, a client who from time to time purchased and sold land through the agency of the firm, to divide profits to be made on the sale through the firm of land acquired and to be acquired by Spreckley. This allegation of the nature of the business was established by the terms of the partnership instruments and the fact that a great number of large transactions were conducted upon terms that the firm should receive a share of the profits derived by its clients and by the balance-sheets and statements of land ventures.

As I read the judgment of *Irvine* C.J. his decision against the plaintiffs depends entirely upon the following passage in his judgment: —" In all cases, earlier or later, such transactions were either entered into after consultation amongst the members of the firm, or if entered into, as happened in three instances, by a member of the firm, were at once submitted by him for the approval and adoption of the other members. The purchases and sales involved in such dealings were carried through the books of the partnership for convenience, but I am satisfied that there was at no time an agreement either expressed or implied that the scope of the business of the firm was to be extended to include the carrying on of a general business in land speculation. I am satisfied too that there never was any intention that a new partnership distinct from that of the deed of 1913 was to exist in such a business. Each of these transactions was entered into as a separate adventure on its own merits and as the subject of a separate verbal agreement."

I would observe that this view appears to assume that fiduciary relationship springs only from contract express or implied. If I were of opinion that partners in a land agency business had on thirty-three distinct occasions considered together the propriety of associating themselves with their clients' ventures, had carried the

proceeds through the partnership books, effected the transaction with the partnership organization, and included the prospective gains in the partnership balance-sheet, but had, nevertheless, made each separate transaction the subject of a separate verbal agreement, I should still think that these operations gave rise to a plain duty of a fiduciary character preventing a partner from secretly sharing with a client the profits derived from the business which the firm conducted on the client's behalf. But in my opinion the inference that the partners when they met and concurred in these projected transactions made on each occasion a separate verbal contract outside the partnership enterprise is opposed to the terms of the partnership instruments as well as to all business probabilities. The partnership articles dated 27th June 1908 specifically mention real estate belonging to the firm or in which the firm may have an interest and moneys which may be owing or thereafter accrue due and owing by any person to the firm for or in respect of the sale or contemplated sale of any properties in respect of which the firm may have a contract or contracts for the division or application of the proceeds of such sale. The articles of 16th June 1913 recite that the firm has acquired large interests in real estate and includes the real estate and the interests in real estate in its capital. In addition it appears that general agreements existed with one or two clients by which the firm engaged to perform the work of subdividing land acquired for that purpose for the client upon profit-sharing terms. In these circumstances I think it is clear the fiduciary obligations of the partners extended to all profit-sharing arrangements with clients. It follows that the late John Porter was not at liberty to conceal from his partners information that a client was ready to or likely to share profits with the firm or secretly to turn to his own account any opportunity of such profit-sharing or, whilst ostensibly performing as a partner the work of subdividing and selling land for a client, to share with that client the profits derived from the transaction. I am at a loss to understand the suggestion that in some way the plaintiffs precluded themselves by the conduct of their case at the trial from relying upon this duty. According to the Judge's notes Mr. *Ham*, who

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appeared for the plaintiffs, applied for the very amendments of the statement of claim which allege the facts which result in this duty. His junior, who opened the case, cited *Dean* v. *MacDowell* (1) and opened his argument in summing up by the statement that the Spreckley transaction was within the deed of 1913. The remaining question is whether the transaction between Spreckley and Porter was a violation of the duty. It is quite plain upon the evidence that the partner and the client had long before the completion of the transaction entered into a profit-sharing arrangement, and that Porter had concealed this from his partners. It is true that it does not precisely appear at what time the arrangement was made, nor what *quid pro quo* Spreckley was to get. My brother *Dixon* has examined the suppositions with which the evidence is consistent, and I agree with him that there is no assumption which may be reasonably made upon which Porter would not be accountable for the profits. It is said that adverse inferences should not be drawn against a dead man. The fact that the dead man shared the profits is proved to demonstration, and the process of imagining possible explanations of his conduct and considering whether there are any which have been or can be suggested consistent with the discharge of his duty is, in my opinion, unduly favourable to him. I see no reason why his death should deprive the circumstance that he did share profits from the prima facie effect which it would certainly have in his lifetime. It should be noted in this connection that his son Reginald Stanley Porter is mentioned in the accounts as receiving a sum out of the profits and was in constant association with his father as the diaries show. It would be surprising if an innocent explanation were available and he was not aware of it. The defendants, however, abstained from calling his or any other evidence. I would add that I am by no means sure that the hypothesis that Spreckley allowed Porter to share profits as a gift or as a matter of bounty should be considered. It seems so improbable and unusual in these latter days as to merit exclusion as unreasonable and fantastic.

In my opinion the case was sufficiently pleaded, properly conducted and amply proved.

(1) (1878) 8 Ch. D., particularly at pp. 351, 354, 356.

STARKE J. This is an action brought by surviving partners against the legal personal representatives of a deceased partner. It is not an action for a general partnership account, but for a limited account, namely, an account of all moneys paid by one Spreckley to the deceased partner Porter in respect of and arising from sales of land, and of all moneys which the defendants have received or are entitled to receive, in respect of or arising from such sales, from Spreckley or his legal personal representatives.

At the trial, the plaintiffs put their case upon alternative views of the facts :—(1) That pursuant to the articles of the partnership and to certain written agreements, the partners carried on the business of land and estate agents, investors and speculators in land, and of acting in relation to the purchase and sale thereof in terms of receiving a share in the profits therefrom : (2) that an agreement to carry on such business was to be implied from the conduct of the parties : (3) that the partners, from about the year 1896 to the death of Porter in 1927, carried on, in copartnership, the business of investing and speculating in land and acting in relation to the purchase and sale thereof in terms of receiving a share of the profits therefrom, and dividing equally between them the profits derived from the said business, and by implication of law the said copartnership was subject to the following terms and conditions—(a) that the profits should be divided equally between the copartners ; (b) that none of the partners should engage in any business or transaction within the scope of the said business or of a similar kind, either in his own name or any other name, otherwise than for the benefit of the partnership ; (c) that none of the partners should use the partnership property or assets, business connection, or his position as a partner, to obtain for himself a profit for his own benefit and separate use ; (d) that each partner should exercise the utmost good faith between himself and his copartners in partnership matters, and not seek to make any clandestine profits for himself.

The learned Chief Justice of the Supreme Court of the State of Victoria negatived the allegations as laid. He was not favourably impressed with the plaintiffs as witnesses, and did not implicitly rely upon their statements. He found that the business of the

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partnership was that of land and estate agents as defined in an agreement between the partners of June 1913, and that it never extended to a general business in land speculation. So far as the partners entered upon land speculations, each of the transactions was entered into as a separate adventure, on its own merits and pursuant to a special agreement. As I understand the Chief Justice, these speculations were outside the general partnership adventure, and the partners were co-owners, as among themselves, and in some cases as among themselves and their clients, of the various lands in which they speculated.

There is, I fear, too great a tendency in this Court to interfere unnecessarily with the findings of fact of trial Judges. The Chief Justice was quite entitled, on the evidence before him in this case, to find that the business of the partnership did not extend to a general business of speculating in land, and that each land speculation was entered into separately and pursuant to some particular arrangement among the partners, or the partners and their clients. I do not think the Chief Justice was right, however, in treating—if that be his view—these special adventures as outside the partnership affairs, and merely instances of the co-ownership of property between the individuals who formed the partnership and some of their clients. The firm's balance-sheets and profit and loss accounts disclose that the profits and losses on these special adventures were treated as part of the partnership business, and proper to be brought into the partnership accounts of that business. My brother *Dixon*, in his close examination of the evidence, finds that the partners entered into thirty-three land speculations, in which they received, or were entitled to, a share of the profits as well as their commission. Of these, thirteen fell under a special agreement with one Cox, five with another client of the partnership, eleven apparently with other clients, and four were transactions in which the partners alone were interested. But there is nothing in the evidence, to my mind, which displaces the conclusion of the trial Judge that these transactions were particular adventures, and entered into under special arrangements by the partners.

Now, the complaint in this action is that Porter, the deceased partner, entered into an arrangement with Spreckley for a division

between himself and Spreckley of profits to be made on the sale, through the firm, of lands acquired by Spreckley. The evidence establishes that Spreckley purchased land through the partnership firm, and some of it was land in which the firm was interested with Cox. But it is by no means clear when the land was purchased or what were the terms of purchase. Spreckley, however, proceeded to resell these lands through the firm, and to allow them a commission agent's remuneration, ranging, apparently, from 10 to 20 per cent. At some time, which does not clearly appear, Spreckley agreed with the deceased partner, Porter, that he should have one-half share of the profits upon the sales of various parcels of land held by Spreckley and being sold through the partnership firm. If these profits were paid or agreed to be paid to Porter as remuneration for his services, or even as a present in recognition of his services, in disposing of the land, there could be no doubt as to his accountability. But the Chief Justice said that the work of disposing of the land was already being done by the firm for a different consideration, and that the consideration for the share of the profits was left by the evidence entirely in the region of conjecture. I agree with this statement, and I cannot think that the Court should infer against a dead man that he corruptly took secret profits for the services rendered by him, as a member of the partnership, in disposing of a client's land, unless the evidence put the inference beyond conjecture, suspicion or a mere guess at the truth.

Another position is then relied upon. A partner is not "at liberty to acquire gain at the expense of his copartners without their full knowledge and consent, either by directly making a profit out of them or by appropriating to himself benefits which he ought to have acquired, if at all, for the common advantage of the firm" (*Lindley* on *Partnership*, 7th ed., p. 344). This principle is enacted in the *Partnership Act* 1915, sec. 33, sub-sec. 1: "Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property name or business connection." Sec. 34 enacts: "If a partner without the consent of the other partners carries on any business of the same nature as and competing with that of the firm he must

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account for and pay over to the firm all profits made by him in that business." "If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purposes of the partnership" (*Dean* v. *MacDowell* (1)). He cannot divert in his own favour business which should properly belong to the firm (cf. *Cook* v. *Deeks* (2)).

In the present case, the trial Judge has found that speculating in land was not within the scope of the partnership business. It was not the ordinary business of the partnership: the firm only entered into such transactions in specific cases and upon special arrangements made by the partners. The fact that a partner entered into somewhat analogous transactions as to other lands established no fiduciary position in relation to those lands, between him and the other partners (cf. *Fuller* v. *Duncan* (3)). That duty if it arises at all, must flow from the nature and scope of the business of the partnership. And, in my opinion, the finding of the Chief Justice negatives such a duty. In the absence of such a duty the partnership was not entitled to avail itself of any opportunity to embark upon the land speculations of the deceased partner. So far as land speculations were concerned, the business of the partnership related only to specific transactions agreed upon by the partners, and each partner was entitled, but not bound, to suggest particular transactions for the consideration of the firm.

Again, a partner must not "derive any exclusive advantage by engaging in transactions in rivalry with the firm." But here too, in my opinion, the finding of the Chief Justice negatives any breach of this obligation. If the business of the firm in land speculation were confined to specific and particular cases, then it cannot be in competition or in rivalry with the firm to engage in other and distinct transactions. Further, I would observe that the use now made of secs. 33 and 34 of the *Partnership Act* does not seem to have been clearly put to the Chief Justice. Apparently the issue before him was that land speculation was within the ordinary scope

(1) (1878) 8 Ch. D., at p. 354.
(2) (1916) 1 A.C. 554.
(3) (1891) 7 T.L.R. 305.

of the partnership business. When that issue was negatived the pleadings did not, I think, make the case that the partnership engaged in land speculation in specific and agreed cases, and that from those cases and transactions a fiduciary relationship was established, from which flowed the obligations and duty of Porter, the deceased partner, now insisted upon. That case was made in this Court, and made mainly from the Bench. I venture to recall the words of warning of Lord *Herschell* in *Owners of Ship "Tasmania"* v. *Smith* (1):—"My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them."

For these reasons, the appeal ought, in my opinion, to be dismissed.

DIXON J. The respondents, who are the defendants in the action, are the executors of John Porter, who died on 15th April 1927. He and the two appellants, the plaintiffs in the action, were partners in a land agency business which they had carried on since 1889. After Porter's death the surviving partners discovered that he was sharing in the profits arising from some speculations in land which were carried out through the firm's agency by one of its clients. They sued Porter's executors to compel them to account as for profits obtained by their testator without disclosure by availing himself of his position as a partner.

The relation between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. "Their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on" (per *Bacon* V.C. in *Helmore* v. *Smith* [1] (2)). The relation is based, in some degree, upon a mutual confidence that the partners

(1) (1890) 15 App. Cas. 223, at p. 225. (2) (1886) 35 Ch. D. 436, at p. 444.

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will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord *Blackburn* found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels* v. *Stewart* (1)). The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm. Once the subject matter of the mutual confidence is so determined, it ought not to be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties. Of the duties imposed by these doctrines, one which is material for the decision of this case is that which forbids a partner from withholding from the firm any opportunity of advantage which falls within the scope of its undertakings, and from using for his own exclusive benefit, information, knowledge or resources to which the firm is entitled. (See *Dean* v. *MacDowell* (2) ; *Aas* v. *Benham* (3) ; and cf. *Trimble* v. *Goldberg* (4), and also secs. 33 and 34 of the Victorian *Partnership Act* 1915.) Another duty of present materiality is that which requires a fiduciary to refrain from engagements which conflict, or which may possibly conflict, with the interests of those whom he is bound to protect. (*Aberdeen Railway Co.* v. *Blaikie Bros.* (5).) Moreover, in considering such a matter it is important to remember that, in the language of *James* L.J., "the general principle that . . . no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal . . . is an inflexible rule, and must be applied inexorably by the Court, which is not entitled . . . to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the

(1) (1881) 6 App. Cas., at p. 79.
(2) (1878) 8 Ch. D. at p. 354, per *Cotton* L.J.
(3) (1891) 2 Ch., at p. 258, per *Bowen* L.J.
(4) (1906) A.C., at p. 499.
(5) (1854) 1 Macq. 461.

agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that" (*Parker* v. *McKenna* (1)). Further, and this, perhaps, is a necessary corollary, the partner is responsible to his firm for profits, although his firm could not itself have gained them. See *Costa Rica Railway Co.* v. *Forwood* (2), where *Vaughan Williams* L.J. formulates the principles and concludes:—"As I understand, the rule is a rule to protect directors, trustees, and others against the fallibility of human nature by providing that, if they do choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby, and will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their cestuis que trust, and although the profits may be such that their cestuis que trust could not have earned them" at (*) "all. With reference to this last point, there is a recent and direct decision that the fact that the profits could not have been earned by the cestuis que trust is wholly immaterial; and that is a decision of the Court of Appeal in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3)."

In considering the operation of these rules in this case, it is necessary to begin by ascertaining the subject matter over which the fiduciary obligations extend.

Irvine C.J., from whose judgment this appeal is brought by the plaintiffs, adopted an interpretation both of the documents and of the facts which would result in the conclusion that the partnership was neither established nor conducted upon such a basis that a partner would be disabled from investing and speculating in land for his own separate advantage. Such a conclusion is doubtless correct. But it does no more than negative the rather extreme contention on the part of the plaintiffs that the parties had explicitly or implicitly bound themselves to speculate in land not otherwise than as part of the partnership enterprise. It does not follow that a partner could, consistently with his duty, secretly share with a client of the firm the profits of a speculation which the client

(1) (1874) L.R. 10 Ch., at p. 124.
(2) (1901) 1 Ch. 746, at p. 761; 84 L.T. 279, at p. 286.
(3) (1888) 39 Ch. D. 339.
(*) Corrected from the report in 84 L.T., at p. 286.

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employed the firm to carry out on his behalf. A consideration of the course of business pursued by the firm, and of the written instruments which regulated the partnership, shows that for very many years a large part of the business conducted by the partnership consisted of subdividing and selling land and collecting the purchase-money under arrangements which entitled them to a share of the profits in addition to a selling commission. Before 1922, during the partnership, interests were acquired by the partners in the profits of thirty-three speculations. In four of these cases the land was bought by the partners as owners. In the remaining twenty-nine cases they became entitled to a share in the profits only. Thirteen of these fell under an agreement or arrangement made with a speculator named Benjamin Cox. Five were speculations of another client. The firm's balance-sheet for the year ending 30th June 1921 included on the assets side under the heading " Sundry estates at a Valuation " twenty-one of such speculations, the value of which to the firm is set down at £48,189 16s. 4d. No doubt in some of these cases the firm supplied some of the capital needed for the acquisition of the land, although in many it contributed only its services in finding, cutting up, and converting into money the land. It is true that in every case but three the transaction was entered into only after discussion among and with the concurrence of all three partners, and in those three cases the approval of all was subsequently given. But this does not necessarily show more than that these transactions were so important that one partner would or could not embark upon them on his own responsibility. *Irvine* C.J. said : " Each of these transactions was entered into as a separate venture on its own merits and as the subject of a separate verbal agreement." But it seems almost undeniable that they were part of the business. Indeed, together with the transaction now in question they came to be a principal part of the business. A consideration of the terms of the partnership articles, the contents of the balance-sheet and the evidence as to the manner in which the transactions were dealt with in the books, a comparison of this material with the entries of the cash book put in for the period commencing July 1924, and a collation of the entries in Porter's

diaries which are in evidence for the six years 1921-1926, all make this conclusion appear inevitable.

The partnership, which originally included a fourth member, was established under articles dated 19th September 1889, which described the business to be carried on as that of "estate and financial agents and auctioneers." In a variation of the partnership articles made 27th June 1908, a provision is made which supposes that the firm itself has acquired or will acquire interests in land. This provision created a charge in case of death "upon the share of such deceased partner in any real estate belonging to the said firm, or in which the said firm may have an interest and also upon the share of such deceased partner in any moneys which may be owing or may thereafter accrue due and owing by any person or persons or company to the said firm for or in respect of the sale or contemplated sale of any properties in respect of which the said firm may have a contract or contracts for the division or application of the proceeds of such sale or contemplated sale." It does not appear from the evidence in how many estates the partners had become interested before this date, but it seems clear that in the case of at least four parcels of land their interest had then been acquired. In 1906 the partners had entered into an agreement with Benjamin Cox, a relative of one of the plaintiffs by marriage, by which he agreed to them acting as his agents irrevocably in the subdivision and sale of any property, which his attorney under power might purchase on his behalf, and agreed that they should take a share of the profits. This agreement was acted under, and in 1912 its terms were embodied, varied and explained in a new agreement. In June 1913, fresh articles of partnership were entered into between John Porter and the plaintiffs, and these first recited that they had for many years carried on at Melbourne in the State of Victoria in copartnership the business of land and estate agents, and had acquired large interests in real estate in the said State, and then went on to provide that the capital of the partnership should consist of the net value (among other things) of the real estate and all other assets of the business. This is a recognition by the articles of partnership of the long-continued course of business which the agreements with Benjamin Cox seem so well

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to exemplify. The partnership secured land for clients for the purpose of subdivision. It subdivided land for clients, and sold it in allotments, and it performed the perhaps more difficult service of collecting the purchase-money, for which it accounted after deducting commission. There can be little doubt that in all such business the firm looked for opportunities to secure, in addition, a share of the proceeds, and it obtained such a share, sometimes as a further reward for services or as an incitement to additional exertion in realizing the land, and sometimes as a result of investing capital in the speculation. If this view is right, it follows that the partnership was entitled to avail itself of any opportunity to embark upon such a transaction which came to the knowledge of the partners or any of them, and knowledge and information acquired by a partner as to the readiness of a client to share such profits, as to the conditions upon which he would do so, and generally as to every fact bearing upon the terms which the partnership might negotiate with him, were all matters which no partner could lawfully withhold from the firm and turn to his own account. The relation between such a client and the partnership is a matter affecting the joint interests which each member was bound to safeguard and protect, and no member could enter into dealings or engagements which conflicted or might conflict with those interests or which gave him a "bias against a fair discharge of his duty" in that respect (see per *Leach* V.C. in *Burton* v. *Wookey* (1)).

The remaining difficulty in the case, and perhaps the greatest, is that of ascertaining how precisely the late John Porter acquired a share of profits and of determining whether it was established that in doing so he must necessarily have infringed upon these rules. The client in the profits of whose speculation Porter shared, one J. N. Spreckley, died on 16th November 1926, just five months before John Porter himself. The plaintiffs were not in a position to give direct evidence of the transaction, but were compelled to rely upon the inferences to be drawn from some accounts bearing a note in Porter's handwriting, signed by Spreckley, which acknowledged that profits were to be divided, considered in conjunction

(1) (1822) 6 Madd., at p. 368.

with the general circumstances, and eked out by entries in Porter's diary for the years 1921-1926.

From a scrutiny of the plans put in, the contents of the diaries, and the other documents in evidence aided by some oral testimony, it seems that the following facts were proved :—Spreckley was a client of the firm's for some fifteen to twenty years, before his death, and through the firm he bought land and sold it in subdivision, giving terms to the purchasers. The firm collected the instalments and accounted to him periodically. John Porter is described as of Belmore Road, and lived in a residence called " Belmore Grange." Belmore Road runs east and west through Balwyn at a distance of two miles from the Surrey Hills Railway Station. At right angles to it, running north to Doncaster Road (a road running south-west to north-east) is a road about a mile in length called at first " Whitethorn Road," but afterwards renamed " Greythorn." On the east side of this road is a large area of land running almost from Belmore Road to Doncaster Road, and containing over 250 acres. The whole of this land had, at some date before 1921, become available for subdivisional sale, and under the general description of " Whitethorn Estate " was in the firm's hands. It was subdivided into 61 blocks of 1 to 3 acres in area, and these the firm was offering for sale as sole agents. Of this land 12 acres 1 rood and 27 perches, situated at the corner of Whitethorn Road and Doncaster Road (subdivided into two blocks), was, at some time before 1921, given the separate name of " Whitethorn Township Estate." This area was further subdivided into building lots, but when, does not appear, save that it must have been before 1921. Adjoining it were two blocks, numbered 8 and 9, which together contained $10\frac{1}{2}$ acres. In 1921 these $10\frac{1}{2}$ acres had been acquired by Spreckley. Land situated in the vicinity, but not, it would seem, forming part of Whitethorn Estate, had already been acquired by Benjamin Cox, and had been brought under the terms of his profit-sharing agreement with the firm. At some date, not precisely fixed by the evidence, but between 4th August 1920 and 2nd October 1922, Cox's attorney brought under this agreement lots 26 to 32 of Whitethorn Estate and afterwards, but between the same dates, lots 19 to 25. The total area of these lots is 48 acres 3 roods 10

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perches. They lie on the northern side of the Whitethorn Estate, and correspond with the land afterwards called "Belgravia Estate." Between 7th March and 21st June 1921 Porter tried to induce Spreckley to buy this land or some part of it, and on the last date, in his own language, he "eventually got him to look at the proposition from a common-sense standpoint" and after seeing Belmore Grange and returning and lunching in the city, Spreckley agreed "to buy under certain conditions." Two days afterwards a deposit of £400 was paid, leaving a balance of purchase-money owing to Cox amounting at least to £3,240. The subdivision of this area was put in hand immediately, and in September 1921 the estate was named "Belgravia." From this time forward, Porter was much occupied in planning the subdivision of Belgravia and in selling its allotments, which were 95 in number. Many efforts were made by Porter to sell Spreckley's 10½ acres at Whitethorn, lots numbered 8 and 9. At length, in December 1923, one Johnstone bought them. In what circumstances and when Spreckley bought the remainder of Whitethorn Estate (i.e., parts other than lots 8 and 9 and Belgravia lots 19-32) does not clearly appear from the diaries, and is not a matter dealt with by the evidence. One witness swore that Cox was vendor of Belgravia only. However this may be, it is quite clear that Whitethorn Estate was in the firm's hands for sale in subdivision before parts of it were further subdivided into building lots, and it is clear that in the process of further subdivision fresh names were given to parts which were offered for sale—such as Clifton Estate, Highbury, Mt. Prospect Estate and Grand View Estate. The 10½ acres, when subdivided on behalf of Johnstone, seem to have become the Clifton Estate. Porter showed considerable activity in dealing with these various estates, although in 1924 his health appears to have begun to fail. There are very many entries in his diaries of visits of inspection with buyers, and a considerable number of records of interviews with Spreckley. Spreckley ratified contracts of sale when made, and such ratifications are repeatedly recorded. According to oral evidence payments to Spreckley were made by the firm, but little appears about them in the diary (a payment of £300 is, however, noted on 5th September 1924). Little or nothing else is noted of what was transacted at the interviews

with Spreckley, a common phrase being "*re* general." On Saturday, 27th June 1925, there is an entry that Porter went by car to inspect, and called on several people including "J.N.S." (Spreckley). A statement of accounts for the month ending 31st May 1925 for Belgravia Estate and Whitethorn Township had been made up by the firm's clerk Spence, upon a form prepared by another clerk named Miss Colvin (both of whom are often mentioned in the diary). It showed: lots sold; the purchaser's name; the price; the amount paid; the amounts overdue for principal and interest, and the balances of principal after deducting from the price the amount paid for principal. Unsold blocks were not mentioned. A similar sheet, prepared in blank by Miss Colvin in the same way, bears in Porter's handwriting the date 26/6/25 and the heading Whitethorn Estate. In his writing are inserted the amounts of overdue interest, and the balance of principal for certain allotments in the original Whitethorn Estate. On the lower portion of the sheet are enumerated certain lots in Whitethorn, Belgravia and Whitethorn Township Estates, with prices, together with another piece of land—Frankston, Cranbourne Road. These prices are added together at £5,575, and under this sum are shown the totals of the balance of unpaid purchase-money for Belgravia, Whitethorn, Whitethorn Township, and the unsold allotments. From the total, £18,186, is deducted £1,930 for mortgages, and a balance is struck of £16,256. From this again is deducted "R.S.P. £650" leaving £15,606. Diagonally to the right is written:—"Divide half each of profits. Mr. Spreckley made note of this and placed with his papers. 27th June 1925." "No. 1 J. N. Spreckley to be refunded out-of-pocket moneys and interest to date. Afterwards equal division. J. N. Spreckley and John Porter." All of this is in Porter's handwriting. Underneath Spreckley has signed his name. According to the diary the next meeting after this date (namely, 27th June 1925) between Spreckley and Porter took place on 1st July 1925. Then Porter went for a holiday from which he returned on 20th July. On 22nd July 1925 the diary says he met Spreckley "as arranged and went through fully." On 1st August 1925 there is an entry "Left 12.40 p.m. for Kew" (where Spreckley lived) "and had a good talk with Mr.

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Spreckley, gave him cheque & as per statement." On 19th January 1926 the firm paid Spreckley £473. On 26th January Spreckley paid Porter £200. This Porter paid into his bank on 27th January 1926. In recording the payment into the bank in his diary, he writes the figures in a cipher which he sometimes uses for numbers. On 16th July 1926 Spreckley received from the firm £300, and on 21st July Porter received £135 from Spreckley. There is no mention of this in the diary. On 4th September 1926 Spreckley received £400 from the firm, and on 8th September Porter received £200 from Spreckley. The diary for 8th September 1926 contains the following:—"Mr. Spreckley . . . called gave me cheque for Mr. Stanley *re* interest due on lots 8 & 9 Whitethorn." Porter's son, who was employed in the business, is named Reginald Stanley, and is the "R.S.P." to whom the £650 is credited in the account. On 16th November 1926 Spreckley died. On 18th November the diary says:—"Saw Mr. Horsfall" (Porter's and the firm's solicitor) "*re* finding out position and papers necessary J.N.S. estate. Went to 4 Stawell St. & introduced Mr. Horsfall to Mrs. Jackson. Long interesting talk nothing of importance found amongst the papers." According to Horsfall, Porter handed to him some time in 1926 a sealed envelope which he locked in a private drawer of his safe, where it remained until after Porter's death. It was then opened and found to contain the accounts for the month ending 31st May 1925, already described, bearing the note dated 27th June 1925 signed by Spreckley.

The plaintiffs swore that they knew nothing of any profit-sharing between Porter and Spreckley, and that the selling of the estates had been done by the firm for a commission of 10 per cent to 20 per cent. No evidence was called for the defence.

From these circumstances it appears that Porter and Spreckley arranged not later than 27th June 1925, and probably long before that date, to share the profits to arise from the realization of land through the agency of the firm by subdivision, sale of allotments on terms, and collection of the instalments, and that much if not all of this land was acquired by Spreckley through the firm in order that it might be realized in that manner. It is implied in the judgment of *Irvine* C.J. that he thought that Porter had concealed

from his partners the fact that he possessed or had acquired any special advantage over them in the transaction, and a consideration of all the materials in the case leaves no doubt that this was so. But the specific occasion and cause of Porter being admitted to participate in the profits is not shown, and more than one possibility is open.

He may have acquired his right to share in the anticipated profits because he or his son Reginald Stanley invested funds in the transaction whether by loan or otherwise. If so, he took advantage for himself of an opportunity which arose in the transaction of the firm's business in connection with one of its clients and of a nature which the firm was entitled to consider, and use for itself. The knowledge of Spreckley's readiness to share profits at all was information to which the firm was entitled, and this information Porter failed to disclose. He pursued his separate interests, where the joint interests should have been consulted, and excluded the partnership from a benefit or chance of benefit which arose out of the connection of the firm.

Again it may have been the case that Spreckley agreed to share profits with him in order to induce him to devote his energies and talents to the speedier or better subdivision of the land, sale of allotments or collection of the proceeds. But, if so, Porter simply diverted to himself remuneration he was bound to earn for the firm.

A supposition which seems extremely improbable, but which is perhaps possible, is that Spreckley made a gift to Porter of a share of the profits. But if this were the true character of the transaction, it can scarcely be differentiated from additional remuneration. Even if the actual object of such a gift was not to induce Porter to give to Spreckley's business energy, time and care which ought to have been more equally distributed over the various concerns of the firm, its tendency would manifestly be to do so. Indeed, the diaries disclose a preoccupation on Porter's part with the subdivision and sale of Whitethorn and Belgravia which goes far to justify the plaintiffs' complaint that he devoted himself almost exclusively to Spreckley's business. A partner, who is apparently performing the functions undertaken by the firm but is really advancing his separate interest, has a bias against the fair discharge of his duty

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to his partners. This alone might suffice to disable Porter from secretly taking the gift supposed, and keeping it for himself. But in fact it is only a part, one aspect, of the considerations from which this consequence ensues. The thing given, a right to participate in the client's profits, was an advantage the pursuit of which fell within the scope of the partnership business. The inducement which the firm could hold out to a client in order to obtain this advantage on the joint account consisted in the promise or expectation of an expenditure upon his affairs of greater energy, time, care and enthusiasm. This is the very thing that the acquisition of such a right would tend to promote in the individual partner whether he acquired it by gift, contract or otherwise. Finally the willingness of the client to divide the profits with one partner formed ground for thinking that he might be ready to make some profit-sharing agreement with the firm itself for their mutual advantage, and this was information which one partner could not suppress to forward his separate interest. These considerations combine to make it inconsistent with his fiduciary obligation to conceal the fact, and to take a separate interest without the partners' knowledge and consent.

Irvine C.J. considered that it was not shown that Porter had acquired any interest in the transaction before 27th June 1925, but, on the contrary, that it rather seemed that he had not done so. But, even so, at that date, as the account itself shows, all the land had not been sold, and few of the contracts of sale had been completed. The realization of land by subdivisional sale is often only begun when the contracts of sale are made. In this case Porter's diary shows how much in fact was required of the agents after the sale of the allotments. There seems to be no reasonable hypothesis upon which the known facts can be explained save those examined, and these are not consistent with a due discharge of Porter's obligations to his partners. From this it follows that it has been established that in acquiring a share of profits John Porter must necessarily have infringed upon the rules which prescribe his fiduciary duty.

It will be noticed that Belgravia was land bought by Spreckley from Benjamin Cox which had been brought under his profit-sharing

arrangement with the firm. If, at the time when this land was acquired by Spreckley, a profit-sharing arrangement with Porter was made or contemplated, Porter might be accountable upon the ground that he derived a secret profit from his dealing with property in which the partnership was interested. But no such case was made in the pleadings or at the trial, and it cannot be considered on this appeal. On the other hand, it is difficult to see what ground there is for the suggestion that we are relieved or precluded by the conduct of the case before *Irvine* C.J. from considering the application of the principles of equity and investigating the two questions of fact upon which this judgment depends, which are in short, first, whether it was a part of the partnership business to which the fiduciary relation attached to secure from the clients a share of the profits from subdivisions conducted by the firm, sometimes as a reward for services, or as an inducement to greater efforts, sometimes by investing capital; and, second, whether the transaction between Porter and Spreckley is proved to have been of such a character as to come within the relation, or to involve a conflict with the duties which arise from it.

It is true that the plaintiffs' pleader alleged that the partnership business had a greater ambit than has ultimately been proved. But as a result of amendments made at the trial the statement of claim distinctly alleged that the scope of the business included not only investing and speculation in land but acting in relation to the purchase and/or sale thereof in terms of receiving a share of the profits therefrom. It was further alleged that Spreckley from time to time purchased and sold land through the agency of the partnership, and that in breach of his duties as a partner Porter entered into an arrangement with him for a division between himself and Spreckley of profits to be made on the sale through the firm of lands acquired and to be acquired by Spreckley, and devoted portion of his time and attention to selling such lands for the purpose of procuring his share of the profits on the sales thereof.

In his reasons for judgment *Irvine* C.J. deals specifically with the question whether he should find as an inference of fact "that the business of investing and speculating in land was in fact carried on by the partners on terms of an equal division of profits, none

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of the partners to engage in any transaction of a similar kind except for the benefit of the partnership, or to use the partnership property, business connection, or position as a partner to obtain a profit for himself."

Having negatived this *in toto* without distinguishing the kinds of business contained within this summary of the pleader's allegation, he turns to the question whether Porter's share of the profits was a remuneration to him in addition to the firm's commission for selling Spreckley's land. He decides that it was not proved to be so, because the evidence is consistent with the profit-sharing arrangement having been made for the first time on 27th June 1925. His Honor said that it might be that whilst the sale of the subdivided properties was being carried through by the firm on the usual commission basis, Spreckley asked Porter to aid him in financing the purchase in which he had entered in consideration of receiving a share of the profits. He added that other, perhaps equally plausible, conjectures were suggested. His Honor did not proceed to consider whether these hypotheses were consistent with a discharge of Porter's fiduciary duty, the reason, no doubt, being because he had already confined that duty within such narrow limits. But his Honor was traversing the very ground where the considerations arise upon which this judgment proceeds. These considerations, when examined, seem to require the conclusion that the appeal should be allowed with costs and the judgment below discharged. An account should be ordered of moneys derived by Porter from his dealings with Spreckley in relation to Whitethorn, Belgravia, and Whitethorn Township Estates and further consideration in the Supreme Court adjourned. The case should be remitted to the Supreme Court for the execution of this judgment.

Appeal allowed. Judgment of Irvine C.J. discharged. Limited account ordered.

Solicitor for the appellant, *C. J. Horsfall.*

Solicitors for the respondents, *Henderson & Ball.*

H. D. W.