[HIGH COURT OF AUSTRALIA.]

WICKS AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

BENNETT AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 14-17; *Dec.* 16.

Knox C.J., Higgins and Rich JJ.

Vendor and Purchaser—Sale of land—Transfer from registered proprietor—Transferee becoming registered proprietor—Fraud—Knowledge of unregistered interest—Remedy of person having unregistered interest—Remedy against vendor—Partnership—Accounts of profits of partner—Secret profits—No claim for relief—Real Property Act 1900 (*N.S.W.*) (*No.* 25), *secs.* 42, 43.

Sec. 42 of the *Real Property Act* 1900 (N.S.W.) provides that "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same, subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates or interests whatsoever" &c. Sec. 43 provides that "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall . . . be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

A, a member of a partnership which held land under an unregistered agreement for a lease, without the knowledge of the other partners purchased the land and became registered proprietor thereof, and subsequently sold and transferred it to B, who became registered as proprietor. The latter,

before he purchased, on stating to one of the other partners that he was thinking of negotiating for the land, was told that he could not do so because it was held by the partnership under an agreement.

Held, by the whole Court, that the sale by A to B was not a "sham," and that the conduct of B did not amount to fraud within the meaning of secs. 42 and 43 of the *Real Property Act* 1900, so as to deprive him of his right as registered proprietor as against the unregistered rights of the partnership.

In a suit by the other partners against A and B, facts were alleged by the plaintiffs which were sufficient to base a claim for an order that A should account to the partnership for the profits made by him on the sale of the land, but no claim was made specifically for such an order and no argument presented for such relief. On appeal to the High Court,

Held, by *Knox* C.J. and *Rich* J. (*Higgins* J. dissenting), that no order for such relief ought to be made in the present action under the general prayer for such further or other relief as the circumstances of the case may require; but without prejudice to any further proceedings to be taken by the plaintiffs.

Per Higgins J. :—Where there is nothing but knowledge of an unregistered interest, it is not a fraud to buy from the registered proprietor; though such knowledge may be an element in building up a case of fraud. Whenever a person clothed with a fiduciary position gains some personal advantage by availing himself of that position, a constructive trust is raised, and the advantage must be held for the benefit of the cestui que trust. This principle applies to a partner purchasing the freehold of land of which the members of the partnership are tenants. It is the duty of the Court to grant such relief against A as is justified by the allegations proved, whatever the plaintiffs' omissions in argument.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed with a variation.

APPEAL from the Supreme Court of New South Wales.

On 21st December 1914 a partnership was formed between John Henry Wicks, Thomas Nicholls and John Erridge Johnson, for the purpose of acquiring the freehold of one of two adjoining blocks of land at Broken Hill and a lease of the other block for a term of twelve years and erecting thereon a picture theatre. Of the former (hereinafter called the freehold property) the three partners became the registered proprietors on 18th May 1915. Of the latter (hereinafter called the leasehold property) the South Australian Brewing Co. was the registered proprietor, and it was subject to a registered lease to one Charles Joseph Moore for a term of five years from 28th April 1914. On 21st November 1914 Moore agreed to give the partners

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a sub-lease of the leasehold property for a term of twelve years at a rental of £2 per week; and by arrangement between the partners and Moore the latter subsequently obtained from the company an extension of his lease to 27th April 1926, to cover the period of the sub-lease. No caveat was lodged to protect Moore's extended lease or the interest of the partners. After the agreement for the sub-lease was made, a picture theatre was erected on the two blocks of land in 1915, and when completed was leased by the partnership to Johnson, who carried on there a picture-show business. On 15th September 1915 Frederick James Bennett bought part of Johnson's interest in the partnership, and an agreement was entered into between Wicks, Nicholls, Johnson and Bennett that they should become partners in the property consisting of the freehold property and the leasehold property and the buildings, &c., thereon, the interests of the partners being Wicks, Nicholls and Bennett two-ninths each and Johnson one-third. The value of the whole partnership property was then estimated to be £7,000. On the same day the four partners agreed to lease the premises and fittings, &c., to Johnson for eleven years as from 1st August 1915 at the rent of £1,340 14s., and agreed to execute at his request a proper lease. On 8th November 1915 Johnson sold to Bennett, with the consent of the other partners, one-half of his one-third interest in the partnership. In 1917 certain disputes between the partners were referred to arbitration, and by an award made on 20th August 1917 the arbitrators directed (*inter alia*) that Wicks, Nicholls and Johnson, who were then still the registered proprietors of the freehold property, should transfer it to Wicks, Nicholls, Johnson and Bennett as tenants in common in the several shares held by them in the partnership respectively, and that the four partners should obtain from Moore or from the company a lease of the leased property in terms of the original agreement between Moore and Wicks, Nicholls and Johnson, and should sub-let the leasehold property to Johnson in terms of the agreement with him. Before the award was made Johnson and Bennett, without the knowledge of Wicks and Nicholls, had arranged with Moore that the latter should surrender his registered lease of the leasehold property, and had purchased the freehold of that property from the company, and on 28th August 1917

Bennett by direction of Johnson became the registered proprietor of the leasehold property by transfer from the company. On 30th August 1917 the surrender by Moore of his lease was registered; and thereupon Bennett's title on the face of the register was absolute and unencumbered. At some date between August 1917 and March 1918 Johnson sold his remaining interest in the partnership to Bennett. In April 1918 the freehold property was transferred to Wicks, Nicholls and Bennett according to their respective interests in the partnership. On 30th May 1918 Bennett by letter informed Wicks and Nicholls that he had purchased the leasehold property and required them to pay a rental of £12 a week for it. In reply Wicks and Nicholls stated that they accepted no indebtedness and referred Bennett to the arbitration award. On 10th December 1918 Bennett transferred the leasehold land to John Henry Diplock as upon a purchase, the purchase-money being expressed in the transfer to be £1,100. On the same day Diplock mortgaged that land back to Bennett for £1,100, and on 3rd March 1919 Bennett executed a discharge of the mortgage, the consideration stated being a payment by Diplock of £900. On 8th February 1919 Diplock wrote to Nicholls notifying him of the purchase by him of the leasehold property, and stating that he required Johnson, Wicks, Nicholls and Bennett to pay as a weekly rental the sum of £4. Wicks and Nicholls replied to this letter through their solicitor, stating that the leasehold land was leased to the partnership for £2 a week; and on 15th February 1919 they lodged a caveat in respect of the leasehold land. On 1st March 1919 Diplock sent to Nicholls a notice addressed to Wicks, Bennett, Johnson and Nicholls, demanding possession of the leasehold property and the buildings and fixtures thereon before 10th March 1919.

Wicks and Nicholls then instituted a suit in the Supreme Court in Equity against Bennett, Johnson and Diplock, alleging in their statement of claim that Bennett and Johnson had induced the company to sell the leasehold property to Bennett by a false representation that he was purchasing on behalf of the partnership; that Diplock was not a *bonâ fide* purchaser of the leasehold land; that the consideration money was not paid; that Diplock was a purchaser in name only and was a trustee for Bennett;

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that Diplock, before he purported to purchase, knew of the agreement for a lease from Moore to the partners, and that Bennett and Diplock had conspired together in carrying out the sale and purchase in order to deprive the plaintiffs of their rights in respect of the leasehold property; and that Johnson and Bennett had conspired together to procure the leasehold property to be sold to Bennett and the lease of it to Moore to be surrendered with intent to deprive the plaintiffs of their rights under the agreement for a sub-lease. The following claims were then made :—

The plaintiffs therefore pray :—

(1) That it may be declared that the defendants John Henry Diplock and Frederick James Bennett are trustees of the said agreement for lease mentioned in the second paragraph of the statement of claim (the lease from Moore to Wicks, Nicholls and Johnson) for its unexpired term for and on behalf of the plaintiffs John Henry Wicks and Thomas Nicholls;

(2) That it may be declared that the said agreement for lease ought to be specifically performed and carried into execution and converted into a properly drawn lease under the provisions of the *Real Property Act* 1900 by the defendants John Henry Diplock and Frederick James Bennett, and that the same may be decreed accordingly;

(3) That in addition to or in lieu of specific performance of the said agreement for lease the defendants John Henry Diplock and Frederick James Bennett and the defendant John Erridge Johnson may be ordered to pay to the plaintiffs John Henry Wicks and Thomas Nicholls the damages which the plaintiffs have sustained by reason of the said refusal and neglect of the defendants John Henry Diplock and Frederick James Bennett to perform the said agreement for lease, and that it may be referred to the Master in Equity to inquire what is the amount of such damages;

(4) That it may be declared in the alternative that the defendant Frederick James Bennett purchased the said block of land (describing the leasehold property) as trustee for the plaintiffs and himself, and that the defendant John Henry Diplock now holds the said block of land as trustee for the plaintiffs and the defendant Frederick James Bennett;

(5) That the defendant John Henry Diplock may be restrained by the order and injunction of this Honourable Court from ejecting the plaintiffs and the defendants Frederick James Bennett and John Erridge Johnson from the possession of the said block of land;

(6) That the defendants John Henry Diplock and Frederick James Bennett may be restrained by the order and injunction of this Honourable Court from selling, mortgaging, alienating, leasing or otherwise dealing with the said block of land except under the direction of the plaintiffs;

(7) That the defendants John Henry Diplock and Frederick James Bennett may be ordered to pay to the plaintiffs the costs of the plaintiffs of this suit;

(8) That the plaintiffs may have such further or other relief as the nature of the case may require.

Before the suit came on for hearing Diplock died and his executrix, Nellie Diplock, became a defendant in his place.

The suit was heard by *Harvey* J., who held that no fraud within the meaning of sec. 43 of the *Real Property Act* 1900 on the part of Diplock had been established, and that no relief could be given against him; and he made an order dismissing the suit and ordering the plaintiffs to pay the costs of the defendants Johnson and Diplock.

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

Other facts are stated in the judgments hereunder.

Loxton K.C. (with him *Delohery*), for the appellants. There was no real sale of the land by Bennett to Diplock, but there was a pretended sale which was merely part of a scheme by which Bennett attempted to defeat the rights of his partners. If there was in fact a sale, the transaction was of such a nature that Diplock is not entitled to the protection of sec. 43 of the *Real Property Act* 1900. The evidence shows that he was actively participating in the fraud of Bennett. Diplock knew of the existence of the unregistered interest of the partnership in the land, and that if he bought the property he would be acting dishonestly. His conduct amounted to fraud within the meaning of the section. The claim should be

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amended by asking as against Bennett for a dissolution of the partnership and for an assessment of damages in respect of the destruction of the basis of the partnership. [Counsel referred to *Oertel* v. *Hordern* (1); *Cullen* v. *Thompson* (2); *Colonial Bank of Australasia* v. *Pie* (3); *Gregory* v. *Alger* (4); *Merrie* v. *McKay* (5); *Butler* v. *Fairclough* (6); *Locher* v. *Howlett* (7); *Smith* v. *Essery* (8); *National Bank* v. *National Mortgage and Agency Co.* (9); *Biggs* v. *McEllister* (10); *McEllister* v. *Biggs* (11); *Loke Yew* v. *Port Swettenham Rubber Co.* (12); *Assets Co.* v. *Mere Roihi* (13); *Josephson* v. *Mason* (14); *Robertson* v. *Keith* (15); *Cooke* v. *Union Bank* (16).]

[HIGGINS J. referred to *Watkins* v. *Cheek* (17).

[RICH J. referred to *In re Monolithic Building Co.*; *Tacon* v. *The Company* (18).]

Maughan K.C. (with him *Miles*), for the respondent Diplock. The onus was on the plaintiffs to prove fraud, and they have not proved it. The evidence does not establish either that the sale was a pretence or, if it was a genuine sale, that Diplock was guilty of fraud so as to disentitle him to the protection of sec. 43 of the *Real Property Act*. At most, all that is proved is that Diplock knew of the lease to the partnership; and that is not fraud (*Smith* v. *Essery* (19); *Gregory* v. *Alger* (4); *Butler* v. *Fairclough* (20)). This case falls within *Oertel* v. *Hordern* (1). The Court should not interfere with that decision, which has stood so long (*Pugh* v. *Golden Valley Railway Co.* (21); *Ex parte Willey*; *In re Wright* (22); *Smith* v. *Keal* (23)).

Innes K.C. (with him *Wickham*), for the respondent Bennett. An amendment so as to raise a claim against Bennett was properly refused in the Supreme Court, and this Court should not interfere

(1) (1902) 2 S.R. (N.S.W.) (Eq.), 37.
(2) (1879) 5 V.L.R. (Eq.), 147.
(3) (1880) 6 V.L.R. (Eq.), 186.
(4) (1893) 19 V.L.R., 565; 15 A.L.T., 22.
(5) (1898) 16 N.Z.L.R., 124, at p. 128.
(6) (1917) 23 C.L.R., 78, at pp. 90, 98.
(7) (1895) 13 N.Z.L.R., 584.
(8) (1891) 9 N.Z.L.R., 449.
(9) (1885) 3 N.Z.L.R., 257.
(10) (1880) 14 S.A.L.R., 86.
(11) (1883) 8 App. Cas., 314.
(12) (1913) A.C., 491.
(13) (1905) A.C., 176.
(14) (1912) 12 S.R. (N.S.W.), 249, at p. 256.
(15) (1870) 1 V.R. (Eq.), 11, at p. 14.
(16) (1893) 14 N.S.W.L.R. (Eq.), 280.
(17) (1825) 2 Sim. & St., 199, at p. 205.
(18) (1915) 1 Ch., 643.
(19) (1891) 9 N.Z.L.R., at p. 464.
(20) (1917) 23 C.L.R., 78.
(21) (1880) 15 Ch. D., 330.
(22) (1883) 23 Ch. D., 118, at p. 127.
(23) (1882) 9 Q.B.D., 340, at p. 352.

with that refusal. Under the pleadings as they stand a decree cannot be made against Bennett.

[HIGGINS J. referred to *Lewin on Trusts*, 10th ed., p. 198; *Lindley on Partnership*, 6th ed., p. 318.]

A partner is entitled to make a profit so long as he does not use information which is the property of the partnership and does not compete with his partners. [Counsel referred to *Hancock* v. *Heaton* (1); *Brindley* v. *Scott* (2).]

[HIGGINS J. referred to *National Bank of Australasia Ltd.* v. *United Hand-in-Hand and Band of Hope Co.* (3).]

Bethune (with him *Wilson*), for the respondent Johnson. Johnson was not a proper party to the action. He was not interested in the subject matter of the suit.

Loxton K.C., in reply.

Cur. adv. vult.

Dec. 16.

The following written judgments were delivered :—

KNOX C.J. AND RICH J. This is an appeal against the order of *Harvey* J. dismissing the suit. We see no reason to doubt that the facts are substantially as found by the learned Judge. We agree with his opinion that the defendant Bennett having bought the land was bound, when called upon, to give a lease of it to the partnership in terms of the agreement for a lease made with Moore. In the view which we take of the pleadings the question whether Bennett was a trustee for the partnership of the freehold in the land purchased, and consequently accountable as trustee for any profit made on the sale to Diplock, does not arise for determination at this stage. Bennett having transferred the land to Diplock, and the transfer having been registered under the *Real Property Act*, the main question is whether the plaintiffs made out a case entitling them to succeed against Diplock or his executrix, the defendant Nellie Diplock.

Mr. *Loxton* put his case against this defendant on two grounds.

(1) (1874) 30 L.T., 592. (2) (1902) 2 S.R. (N.S.W.) (Eq.), 49.
(3) (1879) 4 App. Cas., 391.

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First, he contended that on the evidence the Court ought to hold that the alleged sale by Bennett to Diplock was a mere colourable transaction and that Diplock held the land as trustee for Bennett. Alternatively, he argued that on the facts proved the transfer from Bennett to Diplock was not within the protection afforded by secs. 42 and 43 of the *Real Property Act* 1900 and that the defendant Nellie Diplock, as executrix of Diplock, held the land subject to the right of the partnership to a lease in accordance with the agreement with Moore. In our opinion, the plaintiffs have failed to establish that the transaction between Bennett and Diplock was merely colourable or a sham. Bennett not having been called as a witness and Diplock being dead, the facts relating to this transaction can only be gathered from the documents and from the scanty evidence given on behalf of the plaintiffs. From the documents it appears (1) that the transfer purported to be in consideration of the payment of £1,100 by Diplock to Bennett, (2) that £1,100 was actually paid by Diplock to Bennett in connection with the transaction, and (3) that Diplock by demanding rent for the land and by taking proceedings to eject the plaintiffs asserted his title to the land. This evidence going to show that Diplock was a real purchaser is corroborated by the conversation between Wicks and Diplock deposed to by the former. Wicks says that in this conversation, which took place shortly before the date of the transfer, Diplock volunteered the statement that he was thinking about negotiating for this piece of land. Mr. *Loxton* relied on the letter dated 14th March 1919, from Cameron, as agent for Bennett, to the plaintiff Nicholls, as inconsistent with a genuine sale of the land by Bennett to Diplock in 1918. We do not see how this letter could be used as evidence against Diplock, but, if it were, we do not think it necessarily supports the case made by the plaintiffs. Another circumstance relied on for the plaintiffs is that the price given by Diplock (£1,100) was grossly inadequate in view of the fact that the sale to him of this land placed the partnership, in which Bennett had a substantial interest, at his mercy. It is difficult to understand why Bennett was willing to sell at this price, and the fact that he did so affords ground for suspicion as to the genuine nature of the transaction, but the fact of the sale being at a price likely to be unprofitable to Bennett is not

sufficient to outweigh the proved fact that Diplock paid £1,100 for the property. The case made for the plaintiffs being that the transaction was a sham perpetrated for the purpose of defrauding the plaintiffs, the onus is on the plaintiffs to establish the fraud alleged and this in our opinion they have failed to do.

The transaction being regarded as a genuine sale of the land by Bennett to Diplock and Diplock having become registered under the *Real Property Act* as proprietor, the next question is whether the plaintiffs are entitled to enforce against his executrix performance of the unregistered agreement by Moore to grant a lease to the partnership.

The executrix relies on the provisions of sec. 42 of the *Real Property Act* 1900. The plaintiffs contend that she is outside the protection of that section on the ground that Diplock was guilty of fraud in the transaction with Bennett. Sec. 42 provides that "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same, subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever," with certain exceptions not relevant in this case. Diplock having become registered as proprietor, and the interest of the plaintiffs not being notified on the register, it is plain that unless fraud is established against Diplock his executrix is entitled to hold the land free from the interest claimed by the plaintiffs. This section must be read with sec. 43, which provides that "except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase-money or any part thereof,

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or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." The effect of these sections is, in our opinion, to prevent the plaintiffs as against Diplock or his executrix from asserting or enforcing their unregistered interest in the land unless fraud can be established against Diplock, and it is specifically provided that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud.

The question for consideration, then, is whether the evidence establishes a case of fraud against Diplock within the meaning of these sections. In this connection Mr. *Loxton* relied on the conversation between Wicks and Diplock already referred to. The learned Judge accepted Wicks as a truthful witness, and there is in our opinion nothing in the evidence which would justify this Court in taking a different view, having regard to the fact that *Harvey* J. had the advantage of observing the demeanour of this witness while giving his evidence. Wick's evidence of the conversation is as follows:—"Q. During that interval did you ever come across a man named Diplock? A. Yes, I saw him towards the end of the year 1918. I met him, and he said he was thinking about negotiation for that lease at the rear portion of the picture show. I said 'You cannot, because it is held by the syndicate under an agreement.' He said, 'Oh, is that so.' That practically finished the conversation between us, and he passed on. That was the only occasion I spoke to Mr. Diplock with reference to the matter until I heard that he had actually purchased." Assuming, as we do for the purpose of this part of the case, that the transaction between Bennett and Diplock was a genuine sale and not a mere sham, we think this evidence amounts to no more than that Diplock was told that the syndicate had an unregistered interest in the land. There is nothing to show that at this time Diplock knew who the members of the syndicate were, or that anything was said as to the identity of the person with whom he was about to negotiate. It is consistent with what was said that he knew that Bennett was a member of the syndicate, and believed,

when he dealt with him, that he had authority to act on behalf of the syndicate or would protect its interest. It is to be observed also that no details of the interest of the syndicate were given, and that this interest might have been no more than a tenancy for a short period, a year or less. We think it is impossible to hold judicially on the evidence as to this conversation, taken in conjunction with the other facts proved, that Diplock was guilty of fraud in purchasing the property. Fraud in these sections means something more than mere disregard of rights of which the person sought to be affected had notice. It imports something in the nature of "personal dishonesty or moral turpitude" (*Butler* v. *Fairclough* (1)). In our opinion the evidence in this case falls short of establishing fraud in this meaning on the part of Diplock. This disposes of the case so far as Diplock and his executrix are concerned.

A separate ground of appeal raised the question whether the learned Judge should not have allowed certain amendments to be made at the trial, viz., (*a*) an allegation to be added that the partnership had suffered damage by reason of the wrongful and fraudulent acts of the defendants Frederick James Bennett and John Erridge Johnson, or one of them, in the statement of claim set forth, in the event of the Court being of opinion that the transfer to John Henry Diplock was valid; (*b*) an allegation to be added that the substratum of the partnership was gone in such last-mentioned event: and a prayer for alternative relief (1) that the partnership should be dissolved and wound up by the Court; (2) reference to the Master to inquire as to the damage sustained by the partnership by reason of such wrongful and fraudulent acts; (3) an order that the defendants Frederick James Bennett and John Erridge Johnson, or one of them, do make good to the partnership the damage so suffered; (4) consequential relief. *Harvey* J. refused to allow these amendments to be made, as he was of opinion that the matter sought to be raised by them should form the subject of separate proceedings. On the question whether these matters could be more conveniently investigated in the present suit or in other proceedings, we see no reason to differ from the conclusion at which the learned Judge arrived.

(1) (1917) 23 C.L.R., at pp. 90, 98.

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In the course of the argument before us, it was suggested that even if no relief could be given against the defendant Nellie Diplock, it was open to this Court to make a declaration that Bennett was a trustee for the partnership of the land purchased by him, and that he was consequently liable to account to the partnership for the profit made by him on the sale of that land to Diplock. It may be observed, in passing, that this point is not included among the grounds stated in the notice of appeal, and it was admitted by counsel for the plaintiffs that the claim to this relief was not put forward in the Supreme Court. It is true that in the fourth claim of the statement of claim the plaintiffs ask that it may be declared that Bennett purchased the land in question as trustee for the plaintiffs and himself, but this is put forward not as a separate claim but as the foundation of the claim that Diplock may be declared a trustee of the land for the plaintiffs and Bennett. This view of the pleadings is borne out by the conduct of the case in the Supreme Court, where the real contest was as to the rights of the plaintiffs against Diplock's executrix. The relief specifically claimed is substantially (*a*) a decree for the execution by Diplock and/or Bennett of a lease in accordance with the agreement between Moore and the partnership, and alternatively (*b*) a declaration that Diplock was a trustee of the land for the partnership.

The claim is based on two alternative grounds, viz., (1) that Diplock as purchaser of the land became liable to perform the agreement for a lease made by Moore, and (2) that the sale by Bennett to Diplock was a sham. The former of these grounds adopts the sale by Bennett to Diplock; but the relief claimed in respect of it is solely against Diplock, and appears to be essentially different from relief against Bennett as an accounting party, for it is based on the assumption that whatever equitable rights the partnership had in respect of the land were enforceable against Diplock. The latter ground rests on the allegation that there was in reality no sale by Bennett to Diplock and that Bennett remained in equity the owner of the land. This position is clearly inconsistent with a claim for relief on the footing that Bennett, by selling the land, made a profit for which he is accountable to the partnership. Even if this Court has power to make a declaration that Bennett acquired the property

as a trustee for the partnership and is liable to account accordingly, we do not think it ought to do so, having regard to the fact that no such claim was made before *Harvey* J. This case not having been put forward at the trial, we are not at liberty to assume that Bennett has not a good answer to it; and, if the suit were remitted to the Supreme Court to enable this question to be litigated, we think that, whatever the result of the further hearing might be, the plaintiffs would not be entitled to a more favourable order in respect of the costs already incurred in the Supreme Court than that made by *Harvey* J. Assuming that Bennett is liable to account on the footing suggested, no part of the costs already incurred is referable to any dispute as to that liability, which it was only sought to assert on this appeal, the questions substantially in issue in the Supreme Court having been whether Diplock's executrix was liable either to give up the land or to give effect to the equitable rights of the partnership in respect of it; and on these questions the plaintiffs wholly failed. We cannot see how any part of the plaintiffs' costs of unsuccessfully litigating these issues could properly be thrown on Bennett, however reprehensible his conduct in regard to the transaction may have been. We think, however, that it is desirable that the decree of dismissal should contain a declaration that the dismissal of the suit is to be without prejudice to any proceedings that the plaintiffs may take against the defendants Bennett and Johnson, or either of them, on any ground not covered by the decision that the sale by Bennett to Diplock was not a mere colourable transaction. Probably this declaration adds nothing to the plaintiffs' rights, but it will have the effect of precluding a dispute as to those rights in the event of the plaintiffs electing to institute further proceedings. The appellants, having substantially failed, should pay the costs of the appeal.

HIGGINS J. I concur in the opinion that the plaintiffs have not proved the transaction of sale, Bennett to Diplock, to be unreal or a "sham." There were an agreement made in writing for the sale for £1,100 made on 9th December 1918, £200 paid by cheque of Diplock's on that date, a transfer to Diplock signed on 10th December, a mortgage back for £1,100, registration of the documents in Sydney

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on 21st January 1919, payment of the balance, £900, by Diplock's cheque on 3rd March, and a release of the mortgage. Except for the insertion in the mortgage of £1,100 as the amount left owing instead of £900, and except for the apparent inadequacy of the consideration for the sale, there is really no evidence to show that these documents do not represent a real transaction of sale and mortgage. The insertion of the £1,100 in the mortgage may have been a mere blunder of Cameron, the agent, who filled in the particulars; he may have thought that the consideration should be the same in the mortgage as in the transfer; but in any case the inaccuracy does not show that the transaction was a sham. The inadequacy of the consideration is certainly remarkable; but, although it might well aid any substantial evidence of unreality in the transaction, the burden of proof that the documents showing on their face a real transaction were unreal lay on the plaintiffs, and the burden has not been satisfied.

I concur also in the opinion that no fraud has been proved on the part of Diplock such as would deprive him of his right as registered proprietor under sec. 42 of the *Real Property Act*. "Fraud" implies dishonesty, moral obliquity; and all that is proved is that, before he bought, Diplock was told that the land was held by the "syndicate"—the partnership—under an agreement. Sec. 43 distinctly says that "Except in the case of fraud no person contracting . . . with . . . the registered proprietor . . . shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or registered interest is in existence shall not of itself be imputed as fraud." Assuming that the notice of the unregistered interest of the syndicate is equivalent to knowledge, we have here the very case contemplated by these words. Where there is nothing but knowledge of an unregistered interest, it is not a fraud to buy. Such knowledge may be an element in the building up of a case of fraud, but it does not "of itself" constitute fraud. It is not necessary, or perhaps possible, to define fraud. Fraud is a fact to be proved; and it has not been proved here. It was consistent with honesty that Diplock should purchase, leaving it to the registered proprietor to settle with the syndicate as

to the alleged agreement, perhaps to buy out the interest of the syndicate; or Diplock may have meant to carry out the agreement if it was binding on him, and receive the rent. The Act is designed to facilitate dealings with land; and it seems to mean that a man may purchase land safely from the registered proprietor, closing his mind to the mere fact of any unregistered interest. It was on this ground, I think, that the late *A. H. Simpson* J. decided the case of *Oertel* v. *Hordern* (1). Although the purchaser, Hordern, knew of the unregistered interest of Oertel and that Oertel was in possession and carrying on a business on the land, and although Hordern had been warned by Oertel of his interest, the learned Judge found that there was no fraud proved on the part of Hordern, as Hordern might, on the facts, have purchased without any intention of wrong to Oertel. This is far from saying that if Hordern intended to wrong Oertel, or to help the vendors to wrong him, Oertel would have failed in his action (*Assets Co.* v. *Mere Roihi* (2)).

But it ought to be understood that this decision rests on the provisions of this New South Wales Act, and that the decision, if it rested on the provisions of the corresponding Act in most of the other States, would be different. Under sec. 42 of this Act the registered proprietor holds the land subject to certain specific encumbrances or interests, but not, as elsewhere, to "the interest of any tenant of the land." During all the dealings between Bennett and Diplock, the members of the syndicate were tenants of the land, in possession of it through their sub-agent Johnson, who conducted a picture show on the land; but the New South Wales Act allows a purchaser to ignore the unregistered interest even of actual occupiers. Whether this state of the law is desirable or not, it is for the Legislature to consider. So far, I agree with the conclusions of the learned Judge, who believed Wicks's evidence, and evidently found plenty of ground for suspicion, but no proof.

But although no relief can be given against the executor of Diplock, it does not follow that no relief can be given against Bennett. Bennett was at the time a member of the partnership, and bought the freehold secretly, and at the time procured the surrender of the lease granted to Moore by the South Australian Brewing Co.

(1) (1902) 2 S.R. (N.S.W.) (Eq.), 37. (2) (1905) A.C., at p. 210.

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Moore had sub-let to the partnership, and by the double transaction Bennett put himself in a position to turn his partners out of the picture show, which they had erected at much expense, unless they submitted to his exorbitant demands for rent. In my opinion, there are sufficient allegations in the statement of claim, and sufficient facts proved in the evidence, to justify an order directing Bennett to account to the partnership for the profits which he made by the transaction, on the principle of *Keech* v. *Sandford* (1) and its allied cases.

This aspect of the case was not put by plaintiffs' counsel to *Harvey* J. Even the prayer in the statement of claim is unsatisfactory. It is true that there is a prayer, in the alternative (par. 4), for a declaration that Bennett purchased the land as trustee for the plaintiffs and himself, and this declaration seems to have been sought merely as a basis for a declaration that Diplock "*now*" holds the land as trustee for Bennett and the plaintiffs. But under the prayer for "such further or other relief as the nature of the case may require," it is, in my opinion, the duty of the Court to grant such relief against Bennett as the position justifies *secundum allegata et probata*.

The statement of claim is very lengthy; but there may be extracted from it the allegations that Bennett purchased gradually all the interest of Johnson, one of the partners in the partnership; that, knowing of the agreement of Moore to lease the land to the partnership for twelve years from 1914, he purchased the fee simple of the land and procured the surrender of Moore's lease from the brewing company; that this double transaction was kept secret by Bennett from his co-partners; that when the plaintiffs (his co-partners) learned of it they offered to pay to Bennett their proportionate shares of the purchase-money if he would treat them as co-proprietors; that he refused; that Bennett and Johnson got the brewing company to sell by falsely representing to the brewing company that he was buying the land on behalf of the partnership; and that Bennett and Johnson wrongfully conspired to get the land into Bennett's name, and to get Moore's lease surrendered in order to deprive the plaintiffs of their rights under the lease from Moore. So far as to the

(1) 2 Wh. & Tud. L.C., 7th ed., 693.

allegations in the pleading. Then it is proved that Wicks was the first to approach the Broken Hill manager for the brewing company, Bryant, with an inquiry whether the company would sell the fee simple; that Bryant asked Wicks was it not for the syndicate, and Wicks said yes; that Bryant favoured the idea, and talked of the price, insisting on Moore's concurrence; that Wicks told Johnson and Cameron (Bennett's agent) of this conversation with Bryant; that the company, through Bryant, consented to sell to Johnson, who was one of the partners at the time, and actually carrying on the picture show as sub-lessee from the partners, and that it was by Johnson's direction the transfer was made to Bennett who (as Johnson said) was finding the money. The company did not sell or mean to sell to Bennett at all—either independently of the partnership or otherwise. Then, when Bennett had secured the fee simple and got rid of Moore's lease, and when the time was ripe, on 30th April 1918, he sent a letter to the plaintiffs notifying them that he would require £12 per week from the other three partners, instead of the £2 which they had been paying. It appears also that, on receiving this notice, the plaintiffs spoke to Bennett and to Cameron, his agent, of the unfairness of the transaction, and offered to pay their proportionate shares of the purchase-money if Bennett would make them co-proprietors. All these statements are emphasized by the fact that Bennett and Johnson were actually present in Court at the trial, and that they did not appear in the witness-box to deny or qualify the evidence given by the plaintiffs as to their conduct—conduct which was, at the least, clearly inconsistent with that *uberrima fides* which the law requires as between partners.

Under these circumstances, I am of opinion that on the pleadings and on the proofs as they stand the plaintiffs are entitled to have Bennett treated as a constructive trustee for the partnership of the fee simple estate purchased by him from the brewing company, and now, as the fee simple estate has been sold to a stranger, that the plaintiffs are entitled to share in their due proportions as partners in the net profits made by Bennett. This is in pursuance of the equitable principle laid down in *Keech* v. *Sandford* (1)—a principle which has often been applied as between partners (see *Clegg* v.

(1) 2 Wh. & Tud. L.C., 7th ed., 693.

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Fishwick (1)). Whenever a person clothed with a fiduciary position gains some personal advantage by availing himself of the position, a constructive trust is raised, and the advantage must be held for the benefit of the cestui que trust. In *Clegg* v. *Fishwick*, the old lease was the foundation of the new lease; in this case, the lease from the brewing company to Moore, with the agreement for sub-lease to the partnership, and the sub-agreement for the sub-lease to Johnson, were the foundation of the sale by the company to Johnson. This equitable principle is applied to a partner or any other in a fiduciary position purchasing the freehold of land of which the members of the partnership are tenants (*Phillips* v. *Phillips* (2); *Postlethwaite* v. *Lewthwaite* (3)). In an earlier case, *Hardman* v. *Johnson* (4), *Grant* M.R. said that the point was novel, but he was strongly inclined to apply the principle appropriate to the renewal of leases by a person in a fiduciary position to the case of a purchase of a reversion; and he said (5): "It would be dangerous to allow the trustee of a term to resort to the owner of a reversion to become a purchaser for his own benefit; for by that means he would debar his cestuy que trust of the fair chance of renewal, getting into his own hands the power to grant a renewal or not at his option." In *Randall* v. *Russell* (6) the Master of the Rolls said that the plaintiffs must show what right or interest of theirs the defendant acquired or defeated by making the purchase. In the present case the defeating of the co-partners' interest is obvious; for Johnson, and through him Bennett, defeated the right of the partnership to occupy or let the buildings which it had created at so much expense—defeated it by procuring from Moore a surrender of his over-lease, and by buying the freehold. This brought the right of the partnership under the sub-lease to an end, a sub-lease which had several years to run; the partnership was put thenceforth at the mercy of Bennett, and Bennett then began to demand £12 per week from his three partners for the land for which under the sub-lease the partnership had been paying £2 per week.

It should be steadily borne in mind also that the company meant

(1) (1849) 1 Mac. & G., 294.
(2) (1885) 29 Ch. D., 673.
(3) (1862) 2 John. & H., 237.
(4) (1817) 3 Mer., 347.
(5) (1817) 3 Mer., at p. 352.
(6) (1817) 3 Mer., 190.

to sell to Johnson, not to Bennett, and to Johnson for the benefit of the partnership; and that the company knew, from its manager's conversation with the plaintiff Wicks, that Johnson was one of the partners. The manager for the company was called for the plaintiffs, and says that the company decided to accept the offer of Johnson for £700; that instructions were given to the company's solicitors to prepare a transfer to Johnson; that, on Cameron assuring him that Johnson would like the transfer to be in Bennett's name as Bennett was finding the money, the transfer was made out to Bennett. The transfer to Bennett states expressly that it is made "at the direction and with the consent of John Erridge Johnson," and Johnson testified his consent by signing the transfer. So far as the evidence goes, it is clear that the company did not want to defeat the rights of Johnson and his co-partners, but to carry out their wishes as purchasers. If the transfer had been made to Johnson, he was still at the time a partner, and he would have been a constructive trustee for the partnership.

For these reasons, I am of opinion that although the plaintiffs fail as against Diplock or his executrix, there should be a declaration that Bennett was constructively a trustee of the land for the partnership, and that he should now account for the profits made by the dealing: and the appropriate inquiry should follow as to the profits. Such a declaration would not only render strict justice, but would, in addition, affect materially the costs of the action. The case of *Nocton* v. *Ashburton* (1) shows that even if a plaintiff has failed to establish actual fraud, in the usual sense, as presented in the pleadings and in argument, he is not precluded, even in the final Court of appeal, from claiming relief on the footing of breach of duty arising from fiduciary relationship, if the *allegata et probata* establish such a case. There is no amendment necessary in the allegations of the statement of claim; no one has suggested what amendment should be made. The appeal is from the *whole* decree dismissing the suit, and one ground as stated is "that upon the facts found the plaintiffs were entitled to the relief prayed"; and this includes the prayer for "such further or other relief as the nature of the case may require." But this Court is not confined in its powers on appeal to the specific

(1) (1914) A.C., 932.

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grounds stated in the notice of appeal—it has power on an appeal to "give such judgment as ought to have been given in the first instance" (*Judiciary Act*, sec. 37). In my opinion, it was the duty of the primary Judge, on finding (as he did) the fraudulent conduct of Bennett, to give such relief to the plaintiffs as the nature of the case required—on the allegations and the proofs—whether the plaintiffs had mistaken the true remedy or not. As stated by Lord *Erskine*, "the rule is, that, if the bill contains charges, putting facts in issue, that are material, the plaintiff is entitled to the relief which those facts will sustain, under the general prayer" (*Hiern* v. *Mill* (1)). In *Brookes* v. *Boucher* (2) there was no relief sought against one of the defendants except under the general prayer, yet the Master of the Rolls gave such relief as against that defendant as the allegations and proofs justified. In the case of *Hill* v. *Great Northern Railway Co.* (3) *Turner* L.J. said that "in cases in which plaintiffs are not entitled to the relief specifically prayed, and the relief to which they are entitled is consistent with the facts stated in the bill, the prayer for general relief is called in aid to give the plaintiffs the relief to which they are really entitled." It is not too much to say that it is for a plaintiff to state and to prove the facts which constitute his grievance, and it is for the Court, having found that there is that grievance, to find the appropriate remedy and to give it. This principle is at the very root of the administration of justice. Probably the learned Judge was affected in his mind by the futile amendment proposed by the plaintiffs at the trial—an amendment intended to fix Bennett with some liability for his fraudulent conduct in the event of the claim as to the sale to Diplock failing. The amendment proposed was based on a mistake as to the practice of Courts of equity in suits between partners; but it shows at least that the pleader dimly apprehended the disloyalty of Bennett's conduct, and felt that some relief should be granted against Bennett. Moreover, the plaintiffs did ask in fact in prayer 4 that Bennett should be declared a trustee for the partnership; though merely as incidental to relief against Diplock.

It seems to me, in short, that the whole of this long and expensive

(1) (1806) 13 Ves., 114, at p. 119. (2) (1863) 3 N.R., 279.
(3) (1854) 5 D. M. & G., 66, at p. 71.

litigation is due to the disloyal conduct of Bennett towards his partners, and that it is a grievous wrong to the plaintiffs to saddle them with the main costs of this action and appeal, and with the burden of bringing a new suit to prove over again facts which have been already proved as well as alleged. As the position stands, I think that Bennett should pay all the costs of the action and appeal, except so far as they are due to the attack on Diplock, and that Johnson, as having aided Bennett, should get no costs. Bennett has himself to blame if, by failing to go into the witness-box, himself and his witnesses, so as to clear himself of the dishonourable conduct alleged by the plaintiffs, he has been misunderstood throughout. But, having regard to the fact that counsel for the plaintiffs did not put the right aspect of the case before the learned Judge, and that thereby Bennett may have been misled into declining to give evidence, I think that, if Bennett wish it, he should be allowed to have this secondary aspect of the case retried, at the risk of costs.

Decree of Harvey J. varied by inserting a declaration that the dismissal of the suit is to be without prejudice to any proceedings which the plaintiffs may take against the defendants Bennett and Johnson or either of them on any ground not covered by the decision that the sale by Bennett to Diplock was not a mere colourable transaction. Appellants to pay costs of the appeal.

Solicitor for the appellants, *W. P. Blackmore*, Broken Hill, by *Thomas Green.*

Solicitors for the respondents, *A. J. McLachlan & Co.*; *Minter, Simpson & Co.*

B. L.