[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;
DEFENDANT,

AND

MacDONALD AND ANOTHER . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 16, 17, 19, 20, 24.

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

Master and servant—Servant under contract to devote his whole time to master's service—Servant entering service of another person—Duties towards other person inconsistent with service of master—Knowledge and consent of master—Right of master to remuneration received by servant from other person.

A., a manufacturer of refrigerating machinery at Adelaide, having other establishments elsewhere, employed B. at a yearly salary as his manager at Adelaide. B. agreed to devote his whole time and ability to his duties. One of those duties was to promote syndicates or companies which should purchase refrigerating machinery from A. B. promoted an ice skating rink company in Melbourne, and, with A.'s knowledge and consent, was appointed consulting engineer of the company. As such consulting engineer he was called upon by the company to draw plans and specifications of refrigerating machinery, prepare the conditions of the contract for its supply and erection and superintend its erection on their behalf. A. tendered for the supply of the machinery in accordance with the plans and specifications prepared by B., his tender was accepted, and the machinery was erected under the superintendence of B. B. received from the company as remuneration for his services to the company as consulting engineer 2,000 paid up shares in the company.

Held, that A. was not entitled to claim the shares from B.

Judgment of *Madden* C.J. reversed.

APPEAL from the Supreme Court of Victoria (*Madden* C.J.).

Charles Arthur MacDonald brought an action in the Supreme Court against Henry Newman Reid and the Melbourne Ice Skating and Refrigerating Co. Ltd., alleging, shortly, that Reid, while he was in the employment of MacDonald, without the latter's knowledge or authority, and with the intention of benefiting himself, entered into a contract whereby he became entitled to receive 2,000 fully paid up shares in the defendant company, the scrip for 1,500 of which had already been handed to Reid. MacDonald claimed (*inter alia*) a declaration that the 2,000 shares were his property, or were acquired by Reid as his trustee or agent, and an order that Reid should forthwith deliver to him the scrip for the 1,500 shares, and do any acts necessary to enable him to obtain the other 500 shares.

The facts and evidence so far as material to this report are set out in the judgments hereunder.

Madden C.J., before whom the action was heard, gave judgment for the plaintiff with costs.

From this judgment the defendant Reid now appealed to the High Court.

The defendant company by arrangement between the parties took no part at the hearing or on the appeal, being treated merely as a stakeholder.

Mitchell K.C. (with him *McArthur* and *Schutt*), for the appellant. The evidence shows that the appellant took the position of consulting engineer to the defendant company with the knowledge and consent of MacDonald. It was a position in which the duty of the appellant was opposed to the interests of MacDonald. That being so, the case does not fall into the class of cases in which a master is entitled to recover money paid to his servant. If a master allows his servant, who is bound to devote all his time to his master's employment, to do work for another person, the master cannot recover the remuneration paid to the servant for that outside work: *Wallace* v. *De Young* (1). That is so although the master did not know when he gave his consent that the servant was to get any remuneration, or thought it was to be much less than in fact it was.

(1) 38 Am. Rep., 108.

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[ISAACS J.—If the work done for the other person is outside the scope of the agency between the master and his servant, the master is only entitled to claim damages because the servant did not give his whole time to his master's business. He referred to *Dean* v. *MacDowell* (1); *Trimble* v. *Goldberg* (2).

HIGGINS J. referred to *Bowstead on Agency*, 3rd ed., p. 139.]

If MacDonald did not actually consent to the appellant taking the position of consulting engineer, he caused the appellant to believe that he did consent, and induced him to act on that belief, and he cannot now be allowed to say that he did not consent: *Pickard* v. *Sears* (3).

[Counsel also referred to *Great Western Insurance Co.* v. *Cunliffe* (4).]

Duffy K.C. and *Davis*, for the respondent MacDonald. The appellant gained the shares through his character or position of servant of MacDonald or incidentally to the execution of his duty as such servant, and therefore MacDonald is entitled to them. It is not necessary that they should have been gained in the course of his employment: *Story on Agency*, sec. 207; *Lewin on Trusts*, 11th ed., p. 303; *Thompson* v. *Havelock* (5); *Diplock* v. *Blackburn* (6); *Tarkwa Main Reef Limited* v. *Merton* (7); *North American Land and Timber Co. Ltd.* v. *Watkins* (8).

[ISAACS J. referred to *Morison* v. *Thompson* (9).

HIGGINS J. referred to *Parker* v. *McKenna* (10).]

The foundation of this action is purely equitable, appellant being a constructive trustee. The position which the appellant took as consulting engineer was not inconsistent with his being MacDonald's agent. MacDonald did not know the appellant had taken it until afterwards. A man may be the general agent of one and particular agent of another person at the same time: *Encyclopædia of Laws of England*, vol. VIII., p. 255.

[GRIFFITH C.J. referred to *Aas* v. *Benham* (11).

ISAACS J. referred to *Smith* v. *Lay* (12).]

(1) 8 Ch. D., 345.
(2) (1906) A.C., 494.
(3) 6 A. & E., 469.
(4) L.R. 9 Ch., 525.
(5) 1 Camp., 527.
(6) 3 Camp., 43.
(7) 19 T.L.R., 367.
(8) (1904) 1 Ch., 242; (1904) 2 Ch., 233.
(9) L.R. 9 Q.B., 480.
(10) L.R. 10 Ch., 96, at p. 118.
(11) (1891) 2 Ch., 244.
(12) 3 Kay & J., 105.

There was not necessarily anything illegal in the appellant being at the same time MacDonald's servant and consulting engineer of the company. The appellant must negative every hypothesis on which the contract could be legal: *Clarke* v. *Pitcher* (1); *Hutchinson* v. *Scott* (2); *Waugh* v. *Morris* (3); *Thwaites* v. *Coulthwaite* (4).

Mitchell K.C. in reply. A man cannot act as agent for two parties to a transaction without the knowledge of both: *Story on Agency*, sec. 31; *Farnsworth* v. *Hemmer* (5).

[ISAACS J. referred to *Rice* v. *Wood* (6).]

Whatever may have been the position with regard to promoting the defendant company, it was entirely without the scope of MacDonald's business that the appellant should act as consulting engineer of that company and superintend the supply of machinery by MacDonald.

[The following authorities also were referred to during argument:—*Carter* v. *Palmer* (7); *Lindley on Partnership*, 6th ed., p. 322; *Russell* v. *Austwick* (8); *Clegg* v. *Clegg* (9); *Shallcross* v. *Oldham* (10); *Lord Norreys* v. *Hodgson* (11); *Baring* v. *Stanton* (12); *Scott* v. *Brown, Doering, McNab & Co.* (13): *Gedye* v. *Royal Exchange Assurance Corporation* (14); *Sharp* v. *Taylor* (15); *Beeston* v. *Beeston* (16); *Bridger* v. *Savage* (17); *Lister & Co.* v. *Stubbs* (18); *Tenant* v. *Elliott* (19); *Farmer* v. *Russell* (20); *Thomson* v. *Thomson* (21); *Sykes* v. *Beadon* (22).]

Sept. 27.

GRIFFITH C.J. This is an action brought by the plaintiff, the respondent, claiming the benefit of a secret profit which he alleges to have been made by the appellant, the defendant, while in his service and engaged in his business, and obtained by reason

(1) 9 V.L.R. (L.), 128; 5 A.L.T., 17.
(2) 3 C.L.R., 359.
(3) L.R. 8 Q.B., 202.
(4) (1896) 1 Ch., 496, at p. 499.
(5) 1 Allen (Mass.), 494.
(6) 113 Mass. Rep., 133.
(7) 8 Cl. & Fin., 657.
(8) 1 Sim., 52.
(9) 3 Gif., 322.
(10) 2 John & H., 609.
(11) 13 T.L.R., 421.
(12) 3 Ch. D., 502.
(13) (1892) 2 Q.B., 724.
(14) (1900) 2 Q.B., 214, at p. 220.
(15) 2 Ph., 801, at p. 818.
(16) 1 Ex. D., 13.
(17) 15 Q.B.D., 363.
(18) 45 Ch. D., 1.
(19) 1 B. & P., 3.
(20) 1 B. & P., 296.
(21) 7 Ves., 470.
(22) 11 Ch. D., 170.

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of his employment. There is no doubt about the law applicable to such a case. It is stated as clearly as anywhere, I think, by *Bowen* L.J. in the case of the *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1), in the passage quoted by the learned Chief Justice of Victoria from whose decision this appeal is brought. I will read the passage:—"Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it."

The element of secrecy is twice referred to by the Lord Justice in that passage. He also refers to the fact that the profit arises out of the business which the agent was employed to transact. It is necessary therefore in every case to inquire whether the profit arises out of the business which the agent or servant is employed to transact for the master or principal. The plaintiff's case is put in this way in his statement of claim. He says that he was a manufacturer of ice refrigerating and cold storage machinery and plant, carrying on business in Sydney in his own name, and in Adelaide as the Adelaide Ice and Cold Storage Company, and that the defendant Reid was an engineer experienced in connection with ice refrigerating and cold storage machinery and plant. Then he alleges that he, the plaintiff, engaged the defendant to be the general manager of his Adelaide business. The agreement was in writing and I will refer to it presently. The plaintiff says that throughout the engagement part of the duty of the defendant as the plaintiff's employé was to use his ability and influence in the formation of syndicates or companies for ice

(1) 39 Ch. D., 339, at p. 363.

refrigerating and cold storage purposes, and to assist the plaintiff in procuring that such syndicates or companies when formed should purchase the requisite machinery and plant from the plaintiff, and also, if necessary or expedient in order to facilitate any such purpose, to prepare and supply plans and specifications for, and to supervise the erection of, such machinery and plant. That is the plaintiff's statement of what the defendant was to do for the him as his servant. Then he says, par. 10, that, during the term of his employment, the defendant in pursuance of his duty promoted or assisted in forming the defendant company, which was a company for ice refrigerating and cold storage purposes, and that, as part of the negotiations for such promotion or formation, and in order to facilitate the purchase by the company of its machinery and plant from the plaintiff, the defendant agreed with some persons acting as a syndicate for the formation of the defendant company, or with some trustee or trustees for such company, to prepare and supply to the company plans and specifications for such machinery and plant and to supervise the erection thereof. All this is alleged to have been done by the defendant as part of his duty to the plaintiff. The statement of claim goes on to say (par. 11) that the defendant did this work for the company as agreed and that, without the plaintiff's knowledge or authority, the defendant, whilst engaged in and about the matters referred to in paragraphs 10 and 11, acquired a benefit on his own behalf, that benefit being 2,000 fully paid up shares in the defendant company. At the trial the learned Chief Justice was of opinion that the case turned upon the actual express terms of an extension of the defendant's original agreement of service, which extension was made verbally. The version of the conversations given by the plaintiff differed from that given by the defendant, and the learned Chief Justice thought that given by the plaintiff was the correct one, and he thought that upon that view of the facts the case was brought within the recognized rule as above quoted. In my opinion, there is no substantial conflict between the versions given by the plaintiff and defendant as to any material fact. This case may be determined, I think, upon uncontroverted facts appearing from the correspondence and a long course of action.

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I will refer only to uncontroverted facts in the reasons on which I found my conclusions, my judgment.

The defendant was originally engaged under a contract under seal, dated 3rd March 1903, which took effect for a term of three years from 28th July 1902. By paragraph 5 of the contract the defendant undertook zealously, faithfully, and skilfully to devote his whole time and ability to the efficient carrying out of his duties as general manager for the plaintiff for the term of three years, during the first year at Adelaide, during the second and third years in such State or States in Australia as the plaintiff might in writing desire or direct "to the end and intent that the interest and businesses of . . . (the plaintiff) shall by . . . (the defendant) be in every respect not only well and truly conserved and fostered but in every legitimate manner be further improved and extended to the utmost of the ability and influence of the defendant." The defendant accordingly entered into the service of the plaintiff at Adelaide, where he superintended his refrigerating and cold storage machinery business, and, in the discharge of his duties, he endeavoured to promote the plaintiff's interest in every way he could. He assisted in getting up various businesses carried on by other persons who became good customers of the plaintiff and bought machinery from him. Amongst other things were mentioned a rabbit-freezing plant, an egg-freezing plant, and it was contemplated to establish an ice skating rink in Adelaide. As a good deal of reliance was placed upon that episode both by the learned Chief Justice in the Supreme Court and by learned counsel, I will say a few words about it.

It occurred to the defendant that it would be a good thing, for the purpose of finding an outlet for the plaintiff's works, to establish an ice skating rink. He found a building not very far from the plaintiff's works, of which it was possible to get a lease at a low rent, which was said to be eminently suitable for the purposes of a skating rink, and to which the necessary machinery could be conveyed from the plaintiff's works without setting up separate works at the rink itself. But, in order to carry out the scheme, it was necessary to get an option of a lease of the premises from the owners, and it was necessary to acquire

easements for the passage of pipes conveying the ammonia and other materials for refrigerating from the plaintiff's works. The defendant, with the knowledge and approval of the plaintiff, proceeded to acquire this option and these easements. He acquired them in his own name, but with the moneys of the plaintiff, to which the plaintiff made no objection. The defendant invited the plaintiff to join in a company if he got one up, and the plaintiff at one time was willing to take shares in a company to the extent of the profit, whatever it might be, that he would derive from supplying the necessary plant and machinery, but that company was not formed. This option and these easements were placed by the plaintiff at the defendant's disposal for a single purpose—in one sense for the plaintiff's own benefit, and in another sense for that of any syndicate or company that would take up the enterprise, but the plaintiff did not care who the beneficiaries might be. They were given to the defendant to make use of for the plaintiff's benefit, not by giving them back to the plaintiff, but by giving them away to someone else who would make such a use of them that the plaintiff would indirectly gain. After various efforts the defendant succeeded in getting up a syndicate or partnership of four persons, but in order to do so he had to become one of the partners and share the liabilities and undertake to manage the enterprise. It appears, indeed, that the defendant was the only person in Adelaide capable of managing such an enterprise. That syndicate was formed, and an elaborate contract was made between the plaintiff and the syndicate. There was no secrecy. The defendant informed the plaintiff that he was one of the syndicate, and a contract was made by one of the plaintiff's agents in Australia, under which the syndicate were to pay the plaintiff a considerable rent. When the plaintiff, who was at that time away from Australia, came back, he heard all about it, but made no objection and made no claim whatever to the share of the defendant in that skating rink. On the contrary, he sued him and his co-adventurers for rent, and for money payable for the supply of the refrigerating plant. It was suggested that this transaction showed that any benefit that the defendant might obtain from getting up a syndicate or company was to enure to the benefit of the plaintiff, and that those were the terms on

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which the defendant was employed. In my opinion, the episode has hardly any weight in the matter, but, if it proves anything, it proves that the course of dealing between the plaintiff and the defendant was such that the defendant might reasonably understand that he was at liberty to enter into such an enterprise for his own benefit, and that the plaintiff would not claim anything in respect of it. But I think the episode is of little, if any, importance.

I now come to the period of the conversation on which the learned Chief Justice relied. In April 1905 the plaintiff went to Adelaide. The defendant's term of service was then drawing to an end, and would expire in July. It was not contemplated on either side that the engagement should be renewed; the defendant was naturally looking out for some other employment, and he told the plaintiff what he was contemplating. He told him that he contemplated going to Melbourne and endeavouring to establish an ice skating rink there of which he hoped to be the manager. This idea of the defendant was extremely acceptable to the plaintiff. He encouraged him in it, and after some conversation it was arranged between them—I am stating facts not in controversy—that the defendant should continue in the plaintiff's service as manager of his Adelaide works for a period which was indefinite, but which it was expected would last until the Melbourne skating rink was established, if it should be established, which would be about the beginning of the following winter—May or June 1906; that during that time the defendant should continue to supervise the plaintiff's works in Adelaide and should also go to Melbourne and do his best to establish this ice skating rink enterprise, which, it was hoped, would be a good customer to the plaintiff, and in which the plaintiff was willing himself to take a considerable interest.

Further, it was anticipated that the defendant would become the manager of this new skating rink. So that this was a transaction to operate partly for the benefit of the plaintiff, as the seller of the machinery, and as being an investor in the skating rink venture, and partly for the benefit of the defendant, who was trying to provide for himself a future situation into which he would enter upon the termination of his employment by the

plaintiff. These are undisputed facts, and upon these facts it is at least extremely doubtful whether it can be said the promotion of that business in Melbourne was a business which the defendant was employed by the plaintiff to transact, or which he was to transact for the plaintiff. It is extremely doubtful, but I will assume that in promoting the company in Melbourne the defendant was transacting the business of the plaintiff, and not his own, although he would get the greater advantage from the business if it were successful. But, if that were so, still that employment would terminate with the formation of the company. In the management of the company he could not be the servant of the plaintiff. So that, if there was any service relevant to the present case, it was service to terminate on the formation of the company.

This arrangement having been made, the defendant came to Melbourne and tried to get up the company. This was done with the full approval of the plaintiff, which he expressed in writing by a letter written from Sydney on 2nd May 1905 as follows:—

"Dear Sir,

I herewith hand you approximate price of a plant suitable for a skating rink such as that now proposed to be erected by you. The price quoted is my standard for cash, but in this case I would be willing to take one-third of the amount in paid-up shares (provided you are the managing director of the company) in this project, and two-thirds cash in one and three months from the date of starting. I am so convinced of the success of this enterprise under your management that I would like to be in it to the extent named, in fact would prefer stock to cash, because I am convinced that the business will pay excellently, and I have had a good opportunity of observing the great success that has attended these enterprises when managed by men as capable as yourself; the success of the enterprise depends more upon the management than upon the skating rink in other respects. I must now congratulate you on the success of your Adelaide enterprise, and have no hesitation in stating that the ice surface there maintained is the best that I have ever seen, and my connection with this branch of refrigeration dates back to 1893 when I erected the first ice skating rink in the United States.

Wishing you most unqualified success,

I remain, yours truly."

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Various explanations were offered by the plaintiff of what he meant in writing that letter. It is sufficient to read the letter. It shows, if it shows anything, that the plaintiff approved of the defendant's enterprise, wished him every success, and even insisted that he should be the managing director of the company as a condition of his taking shares in it. It also shows clearly that the plaintiff understood that the defendant would be acting as much for his own benefit as, if not more than, for the plaintiff's in the transaction. Furnished with this letter, which probably was written in order that the defendant might arm himself with it in getting up the company, the defendant proceeded to Melbourne and negotiated with various persons. The result was that during June he got together a number of persons sufficient to form a company. By the end of June he obtained promises to take up 20,000 shares, and he also obtained an option in his own name for suitable premises. I pass over one or two things that happened in June, and go on to 31st July, at which time the final result of the defendant's negotiations had been ascertained. On that day it was practically known who the directors would be, and on that day the defendant wrote this letter:—

"Adelaide, 31st July, 1905.

"The Melbourne Ice Skating and Refrigerating Company.

"The Directors, The Melbourne Ice Skating & Refrigerating Coy.

"Gentlemen,—In consideration of your allotting me two thousand (2,000) fully paid up shares in the above company, I agree to supply plans and specifications of the machinery capable of supplying refrigeration over an ice rink of about 14,000 square feet surface, such plant to be alternatively used for cold storage. I also agree for the above mentioned consideration to personally supervise the erection of such machinery as may be ordered by the directors without further remuneration other than travelling expenses.

Yours faithfully,

H. Newman Reid."

I pause to remark that an ice skating rink was a new venture in Melbourne, and it was essential to its success that the machinery should be supervised, and that the affairs of the company should

be managed, by a competent person, and the defendant appears to have been the only competent person available in Australia. This was the bargain he made, and it is the bargain upon which the plaintiff now rests his case. The defendant made no secrecy of this transaction. On 26th June a gentleman in Sydney, Mr. Minter, who held a general power of attorney from the plaintiff, who had agreed to take shares in this proposed company, sent a power of attorney authorizing the defendant to represent the plaintiff at a proposed meeting of the shareholders of the company. On the 29th June the defendant returned the power of attorney to Mr. Minter saying :—" I do not desire to use the power of attorney and in fact could not sign any contract on Mr. MacDonald's behalf for the simple reason that should the scheme come off I will be the consulting engineer for the company, and it will, in all probability, devolve upon me to approve of the conditions of any contracts made. I would have had no difficulty in having the scheme adopted at Tuesday's meeting but for the fact that I have been endeavouring to make Mr. MacDonald's offer for the plant one of the contracts to be taken up by the company, and it is only natural that many of those who have promised to go in, and who know nothing about the value of such plants, wish to be sure that they are accepting a contract which is not loaded."

That was a communication to the only person in Australia representing the plaintiff with whom the defendant could communicate. On 7th July he had written to the plaintiff himself, who was then in America, giving an account of the success of his efforts in the formation of a company. He said he had got promises of altogether 20,000 shares, and gave a list of well-known names in Melbourne to show the plaintiff how successful the venture was likely to be. He pointed out the difficulties there would be in the way, how a counter scheme had been got up, and that representatives of various competing machinery makers had "tried to make out that the price of the plant was loaded to cover your promised third in shares," showing that the letter given by the plaintiff to the defendant has been used for the purpose for which it was obviously given. He goes on :—"They did this so successfully that the scheme nearly fell through. However Mr. Northcote, Mr. John Cooke and Mr. Underwood are all in favor of having your plant,

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and I have been forced into the position of having to agree to allow them to go through the form of calling for tenders for the supply of plant, but I am to be consulting engineer to the company and am to draw out the specifications upon which tenders will be called, and will also have to supervise the erection and fitting up of the plant." Then he gives other statements showing that he had the interest of the plaintiff very much at heart, and finally he mentions some gentlemen and says that "with the before-mentioned gentlemen and myself, this will complete the directorate." So that he informs the plaintiff that he is going to be the consulting engineer, and that he is to be a director. That letter was received by the plaintiff before 24th August in America. He affects to have been rather shocked when he saw it, because the defendant had put himself into a difficult position, for his interests would be adverse to the plaintiff, and that was hardly consistent with receiving a salary from the plaintiff in respect to being manager of his Adelaide works. He affects to have been somewhat shocked, but he did not say anything about it. He was quite content to take any benefit he could get out of it.

On 24th August notice was given of the statutory meeting of shareholders (required under the Victorian *Companies Act* to be held shortly after the formation of the Company) and the meeting was held on 27th September. Amongst other matters laid before that meeting was a statement of all contracts made which the company was taking over, and the notice of the meeting set out the nature of the contract made with the defendant as follows:—"Mr. H. Newman Reid's contract with the company is as follows:—In consideration of 2,000 fully paid up shares Mr. Reid agrees to supply plans and specifications of the necessary refrigeration machinery, and agrees for the above-mentioned consideration to personally supervise the erection of such machinery as may be ordered by the directors without further remuneration other than travelling expenses, and is dated 31st July 1905."

The plaintiff's representative attended the meeting at which that contract was brought to the notice of shareholders, and, I presume, was adopted. The plaintiff's personal absence in America at that time seems to me to be absolutely immaterial. In October tenders were called for the refrigerating machinery

of the company. The plaintiff's Sydney office, Sydney works, or Sydney branch, intended to tender for the machinery, but it was quite uncertain whether they would get the contract. The representative of the plaintiff in Melbourne wrote to the defendant on 9th October and said that he knew that tenders were called for and asking whether he need attend personally with the plaintiff's tender, and continued, "Mr. Cooke" (the Sydney manager) "further adds that we must be represented and cannot of course expect Mr. Reid in his position to advocate or represent any machine." That shows that both the plaintiff's Sydney manager and the plaintiff's Melbourne representative knew the defendant's position, and know that he must take up a position adverse to the plaintiff. Mr. Reid replied to that on 10th October, saying:— "I quite agree with what Mr. Cooke says that Mr. MacDonald should be represented thereat, as I shall, of course, be representing the company."

These facts are absolutely uncontradicted, and it appears to me that only one inference can be drawn from them, and that is that, whatever the original verbal agreement in April might have been, the defendant was in fact detached from the plaintiff's service so far as necessary to enable him to enter into the company's service for the purpose of supervising and watching their interest in the performance of any contract, for the supply of any machinery whether bought from the plaintiff or from anybody else. In case the plaintiff was the supplier of the machinery the defendant was detached from his service for the purpose of entering into the service of the company in a matter in which he could not, without actual fraud, be in the plaintiff's service at the same time. That appears to me to be not only the only possible inference to draw from these facts, but I think it is overwhelming evidence of the real understanding of the parties when the defendant left Adelaide to go to Melbourne after the interview in April 1905.

Upon these facts it appears to me to be proved that the shares in question were to be acquired by the defendant as remuneration for services rendered to the company, and not for services rendered to the plaintiff, and at a time when he was detached

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from the plaintiff's service so far as necessary to enable him to enter into the company's service for that purpose.

Tenders were accordingly sent in in October. The plaintiff's tender might or might not have been accepted. If the plaintiff's tender had not been accepted, it is not pretended that the defendant in the supervision of the contract would have been acting as the plaintiff's representative. But the plaintiff's tender was accepted, and a stringent contract was drawn up to which the plaintiff was a party. He says he was not here himself, but that, for various reasons, seems to me to be irrelevant. That contract between the plaintiff and the company, is "to be carried out to the entire satisfaction of the company's engineer or anyone the directors may appoint to supervise the same, and he shall have authority to inspect same during erection and order immediate removal of any defective materials which must be replaced free of extra cost and the contractor shall not be entitled to receive any payment on account until such defective or objectionable materials and / or works pointed out by the engineer are removed." The general conditions provide that the work is to be carried out for the Melbourne Ice Skating and Refrigerating Co. under the direction of Reid and in conformity with the specifications, of which condition 6 provides that:—"No works beyond those included in the contract will be allowed or paid for, without an order in writing from the engineer, who shall be the sole judge during the progress of the works in all matters or questions arising out of this contract so far as relates to the quality of materials or workmanship, the rate of progress, amount of progress, payments (if any) or the general management of the works." There are the usual stringent conditions that a final certificate is to be given, and that before the final certificate is given the engineer may call upon the contractor to remove any work if not satisfactory.

That was the contract actually drawn up by the plaintiff's agents with the company, stipulating that Reid was to act as their representative adversely to the plaintiff. No doubt, it was a position of some delicacy on the part of Reid. It was, perhaps, a foolish position for him to put himself in, but it is consistent with honesty only on one hypothesis, and that is, that he was

effectively detached from the plaintiff's service so far as related to that matter. Any other hypothesis renders the transaction dishonest.

Now, after this, the plaintiff came back to Australia in December, and he then knew all about the transaction. At that time the defendant had not begun the supervision. The work he was to do to earn these 2,000 shares had hardly been begun, if begun at all. The plaintiff and the defendant continued apparently to be on good terms. The plaintiff kept on regularly paying the defendant's salary from month to month, and was anxious not to lose his services, as there were matters in Adelaide for which he relied on his judgment, and they finally parted very good friends. But, when the defendant got the shares and had done the work, the plaintiff then said "those shares belong to me." This, then, is the case put forward by the plaintiff—that, while the defendant was being paid by the defendant company to protect their interests against the plaintiff, he, the defendant, was really acting within the scope of his authority as agent for the plaintiff in absolute breach of the duty which he owed to the company; that he was in fact, while in the defendant company's service, really under a treacherous agreement to serve the plaintiff and not the company. In my opinion no man can be heard to make an allegation of that kind the foundation for an action in a Court of law. As I have pointed out, the evidence shows that the fact is not so, but that is the foundation of the plaintiff's case, and no plaintiff should be allowed to set up such a case in a Court of law. It is within the maxim *allegans suam turpitudinem non est audiendus*. The confusion in this case seems to have arisen when the learned Judge fell into the fallacy of interpreting the words "by reason of" or "by means of" in the various forms in which the rule is laid down, as meaning merely "subsequent to," or "following on in point of time." In none of the cases are the words used in that limited sense. I will conclude in the words of Lord *Macnaghten* in delivering the judgment of the Privy Council in the case of *Trimble* v. *Goldberg* (1):—"In their Lordships' opinion the order under appeal cannot be supported on authority or on any recognized doctrine of equity," to which I will add the words "or of common honesty."

(1) (1906) A.C., 494, at p. 503.

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BARTON J. It seems to me that the plaintiff is in a dilemma. If we put the complexion on the documents that he says we ought, he is out of Court, because the case becomes one in which he cannot be heard to complain. If, on the other hand, we read the documents in their ordinary sense, his plight is as bad, for then they show how distinct the transaction in which the defendant acquired these shares is from the fiduciary relationship which existed between the plaintiff and defendant in respect of the agency of the latter for the former. I do not propose to enter into a long analysis as His Honor the Chief Justice has done. I propose to confine myself to the documents. I shall make some reference to the documents in this case relating particularly to the transaction which resulted in the formation of the Melbourne company and the allotment to the defendant of the 2,000 shares therein. First, however, I should mention that it is instructive and significant that in respect to the Adelaide transaction, which resulted in the establishment of a skating rink in the Cyclorama, the action of the defendant in practically forming a syndicate for the establishment of that rink at the Cyclorama, and in respect to which he was bringing in no capital, but was to receive a share of the profits—action which preceded the transaction about which complaint is made in the present suit—seems from first to last never to have been made the subject of dispute. As to the Melbourne transaction, the agreement between the parties was under seal and bore date the 3rd March 1903, and it was to last for three years from the 28th July 1902. By it the defendant was to be the general manager at such places as thereinafter mentioned from the 28th July 1902 for three years. There is a proviso for the continuance for a year beyond the three. He was to be paid £500 for the first year, £600 for the second, and £750 for the third. There is here a covenant on the part of the defendant, now the appellant, that he will zealously, faithfully and skilfully devote his whole time and ability to the efficient carrying out of his duties as general manager for the plaintiff for the term of three years, and so on. He was apparently already in the service of the plaintiff at the time that agreement was made, and he so continued. There was considerable correspondence on subjects relating to the employment. My next refer-

ence is to the documents of the 2nd May 1905, that is to say, the letter from MacDonald to Reid with two estimates of the cost of plant enclosed. In that letter the plaintiff says:—[His Honor read the letter, which is set out in the judgment of *Griffith* C.J., and continued]. That letter provokes comment because from end to end the plaintiff does not seem to hint at any objection to the defendant engaging in Adelaide in any such enterprise as he afterwards engaged in in Melbourne. Nor does it foreshadow or give a hint of any objection or claim against the defendant on account of his taking part in any such transaction. If read in the terms of our ordinary language, it is a letter which of itself is inconsistent with the plaintiff's attitude in this case. If it is read otherwise, then it can only be read, as many other of the documents would have to be, as part of a plan by which others were to be hoodwinked for the mutual advantage of the plaintiff and the defendant.

On the 15th May 1905 the plaintiff wrote to the appellant a letter in which he says:—"Your project for a similar rink in Melbourne is a good one, and the location which you have selected is strictly first class. I do not think that you are under any obligations to turn over the option for the land to Mr. Burgess unless it be used for a skating rink; the option is yours, not Burgess's, and I would not turn it over to him unless he carries out the purpose which you had in view when getting that option. It appears to me that there is good value in the property, and there is no reason why it should be given to an outsider, unless by so doing we help ourselves, and that in this case means the sale of machinery for an ice skating rink." Now we get some information as to what the plaintiff meant by "help ourselves." He meant the sale of machinery for an ice skating rink. There was no hint there of any objection to any interest being acquired by the defendant, or to any participation in any profits arising out of that transaction, probably because at that time the plaintiff had fixed in his mind the distinction which afterwards seemed to have been given effect to, that is, the distinction between the kind of business for which he was employing the defendant and the kind of business as to which the defendant was afterwards in relationship with other people.

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Then on the 26th June in the same year there is a letter from the plaintiff's solicitors to the defendant again showing that the only anxiety of the plaintiff on his own behalf was in reference to the supply of machinery for cold storage, or for skating rinks or the like, and the amount of profit he could make out of that kind of transaction. In this letter Mr. Minter says to the defendant, speaking of the quoting of a price for machinery :—"I think that you had better be careful to quote a price that will in your opinion at any rate, cover all questions as to costs and requisite profit, at the same time intimating that you think you will be able to somewhat reduce the prices on going more closely into figures than you have been able to do." Whatever the suggestion in that letter may be, it cannot help the plaintiff in one way or the other, because, in the one aspect, it is simply a letter which shows that the object of the plaintiff, so far as this syndicate is concerned, was to make a profit on the sale of the plant and machinery, and it does contain, no doubt, some suggestion which may mean that even when the defendant was in a fiduciary relation with other people, he should quote an excessive price for something which was to be the source of the plaintiff's profit. There I leave it.

On the 29th June the defendant wrote to the same firm of solicitors and said :—[His Honor read that part of the letter which is set out in the judgment of *Griffith* C.J., and continued]. That seems to be, so far as the defendant himself is concerned, perfectly above board, and it points out that the relationship into which he intends to enter with the company, whatever its incidents may be, would be one in which he would have an interest adverse to that of the plaintiff in respect of his office as a consulting engineer for that company, probably by way of specifications, inspection of machinery, approval of it, and so on.

Then we come to the letter of the 7th July 1905, which the defendant addressed to the plaintiff in Chicago. The plaintiff received that letter some time in August, because in another letter the defendant, after discussing the question of machinery with the plaintiff, asks him by return of post to write very fully on the question of power plant for the Melbourne rink, and to give any hints which would be of use in quoting for

tender. In reply there is written a letter which we find embodied in a letter of the 29th September 1905 from the defendant to Cooke the plaintiff's manager in Sydney. A comparison leaves no doubt whatever on the mind that the plaintiff writing the letter there quoted to Mr. Reid is answering the letter of the 7th July. That letter of the 7th July contains a list of the intending shareholders in the Melbourne enterprise so far as the matter had gone, and in it the defendant said:—"I am to be consulting engineer to the company and am to draw out the specifications upon which tenders will be called, and will also have to supervise the erection and fitting up of the plant. I am assured by the members of the committee that every preference will be given to your tender." It is clear upon that letter that the plaintiff is again warned that the defendant is to be the consulting engineer for the company, and is to draw out the specifications on which tenders are to be called, and will also have to supervise the erection and fitting up of the plant. That is work which was not comprehended in the agency which the defendant held for the plaintiff at that time, but is perfectly distinct work. There the plaintiff is distinctly put upon his guard, and has an opportunity given him to object if he wishes to object, because he is told a second time that the defendant is to be the consulting engineer of this company. The matter of the consulting engineer to the company formed in Melbourne was so distinct from the fiduciary relationship that existed between the plaintiff and defendant that there was no necessity for any secrecy about it, and it did not matter whether any arrangement, made by the defendant for his own profit, with regard to that matter was kept from the plaintiff or not.

The next letter is of 31st July in the same year, and is from the defendant to the directors of the Melbourne company, called the Melbourne Ice Skating and Refrigerating Company. In it the defendant made a proposal, or at any rate, reduced to writing the arrangement, whichever it be, which is the subject of complaint in this case. [His Honor read the letter which is set out in the judgment of *Griffith* C.J. and continued]. A letter which at any rate goes to show this, that if it represents—and we have no reason to say it does not show—the nature of the trans-

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action, the business which is born of that transaction is not a necessary part, nor is it within the scope, of the general managership of the plaintiff's business, especially the business in Adelaide, which is the subject of the relation of master and servant between them. Then I find a letter from the plaintiff's representative, Anderson, to the defendant, on the 9th October 1905, and he says this in it, speaking of the Melbourne ice skating rink transaction: —"Mr. Cooke further adds that we must be represented"—that is, represented on the delivery of tenders—"and cannot of course expect Mr. Reid in his position to advocate or represent any machine." Mr. Reid in writing to Mr. Anderson in answer to that letter on the following day says:—"Tenders close at 11 o'clock, but it has been practically arranged that no announcement will then be made of the result but they will be referred to myself for consideration and report." The fact that the tenders would have to be referred to him for consideration and report shows that he was not acting in any sense in an interest which would be classed as within the fiduciary relationship between him and the plaintiff. The letter goes on:—"I quite agree with what Mr. Cooke says that Mr. MacDonald should be represented thereat, as I shall, of course, be representing the company." That is to say, he would not be representing Mr. MacDonald but the company of which he was to be the consulting engineer.

Then comes an important document, viz., the contract between MacDonald and the company itself. That is the contract after the acceptance of the tender for the supply and erection of the machinery for the skating rink, which throughout seems to have been—at any rate till some time in August last year—the sole concern of the plaintiff. The contract is to be carried out to the entire satisfaction of the company's engineer or any one the directors may appoint for the purpose. The erection is to be under the direction of H. Newman Reid. The material is to be supplied and the work to be executed in a workmanlike manner to the entire satisfaction of the engineer. I need not make any further reference to this contract. It teems with references to the supervision and the effective supervision of the engineer in the interest of the Melbourne Ice Skating and Refrigerating Co. as

an adverse interest to that of the plaintiff in the very transaction in respect of which the plaintiff now claims the benefit.

It was my intention to refer to some more documents in the case especially to elucidate the nature of the Melbourne transaction by reference to what had previously taken place in Adelaide, but, taken in connection with what His Honor the Chief Justice has already said before me, the documents I have quoted from now will show pretty clearly what was the nature of the transaction upon which this claim is founded. In the first place as to the agreement between the parties, there is in it a covenant that the defendant shall, upon the faithful carrying out by the plaintiff of his part of the agreement, "zealously, faithfully and skilfully devote his whole time and ability to the efficient carrying out of his duties as general manager," for the plaintiff for the term of three years. It is said that, because of the existence of that clause, the defendant was bound to bring into account any profits he might make in any part of the time during the currency of those three years in any business he might undertake. Upon that point I refer to the case of *Dean* v. *MacDowell* (1). I read from the headnote.

There "the plaintiffs and defendant, being partners as salt merchants and brokers, mutually covenanted by the partnership articles to diligently employ themselves in the partnership business, and 'not to engage, directly or indirectly, in any business except upon the account and for the benefit of the partnership.' After the expiration of the partnership by effluxion of time, the plaintiffs discovered that during the partnership the defendant had been engaged in another business as a salt manufacturer in which he had made profits. A bill filed by the plaintiffs to compel the defendant to account to the partnership for such profits was dismissed without costs; and an action by the plaintiffs claiming that the defendant's interest in the other business formed part of the partnership assets was dismissed with costs." It was pointed out in the judgments of the Court that whatever remedy the plaintiffs had was not by way of an action for an account of the profits made by the defendant, but that their proper remedy was an action for damages for breach of the covenant. The covenant in

(1) 8 Ch. D., 345.

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that case was the same as in this. *James* L.J. said (1):— "But here, what has been done is this: The defendant has not entered into any business in any way analogous to or connected with the business of the firm, except in a very trifling manner. The business of the firm was to deal as merchants and brokers, selling on commission the produce of salt works. The business which the defendant has entered into was that of manufacturing the salt, which was to be the subject-matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made—if by his joining in the partnership for the manufacture he had diverted the goods from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty, but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a shareholder in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damage done to the original firm by reason of his having become a shareholder or partner in the works which produced the thing in which the firm traded. Under these circumstances, it seems to me that we cannot say his profit from the new business was a benefit arising out of his partnership with the plaintiffs. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. His relation to the partnership in this respect was the same as an ordinary covenantor to a covenantee in respect of any other covenant which is broken. It was a covenant by a partner with a co-partner, a covenant that he would not do something which might result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between the parties. That being so, it seems to me that the Master of the Rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant, which in truth did not result, and could not have resulted, in the slightest loss to the

(1) 8 Ch. D., 345, at p. 351.

partnership, unless it could have been shown that it led to the covenantor neglecting the business of the partnership, and devoting himself to the other business, and diverting his time and attention from the business to which it was his duty to attend. That would have been a matter for an action for damages if it could have been alleged or shown here." As to the classification of cases of this nature there is a very clear passage in the judgment of *Thesiger* L.J. (1), which is as follows :—" Several cases were cited by Mr. *Chitty*, and the principles which are to be collected from those cases seem to resolve themselves into three, which have been correctly stated by Mr. Justice *Lindley* in his book on Partnership. The first of those principles is that a partner" (and I may place an agent in the same position as a partner because undoubtedly the same principles apply) " shall not derive any exclusive advantage by the employment of the partnership property. That principle has been illustrated in two cases which have been cited. The first is the case of *Burton* v. *Wookey* (2), where mineral ore was obtained by one of the partners by means of the sale of partnership goods. The second of those cases is the case of *Gardner* v. *M'Cutcheon* (3), where, two persons being part owners of a ship which was being employed in trading for the common benefit of the part owners, one of these part owners used that ship for the purpose of a private trading of his own, and it was held that the other part owner was entitled to follow the profits thereby made. The second principle which is to be collected from the cases is, that a partner is not to derive any exclusive advantage by engaging in transactions in rivalry with the firm. That principle is illustrated by the case of *Somerville* v. *Mackay* (4), if that case is to be treated as a decision at all upon the point. There, the partnership being mainly founded for the purpose of supplying goods in *Russia* to a firm of *Anderson & Co.*, the defendant himself had during the period of the partnership been supplying goods of the same character to that same firm. Another case to the same effect was the case of *Lock* v. *Lynam* (5), decided

(1) 8 Ch. D., 345, at p. 355.
(2) 6 Madd., 367.
(3) 4 Beav., 534.
(4) 16 Ves., 382.
(5) 4 Ir. Ch. Rep., 188.

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by the Irish Lord Chancellor, in which, the partnership being for the purpose of supplying meat to the Government, one of the partners had been engaged with other persons in the supply of meat to that same Government. The third principle which is to be collected from the cases is, that a partner is not allowed in transacting the partnership affairs to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on. That has been illustrated by those cases to which Mr. *Chitty* referred of a partner obtaining behind the back of another partner a renewed lease of the premises upon which the partnership business is carried on, and in which it has been held that on the dissolution of the partnership the partnership is entitled to that renewed lease as part of the assets of the firm. Similar to these cases is that of *Russell* v. *Austwick* (1), which was a case of a partnership where two persons having joined in business as carriers under a contract with the *Mint* to carry bullion between London and Falmouth, one of the partners, by virtue of his position as contractor, obtained a further contract in his own name for carrying silver for the *Mint* by another route. Now, it seems to me that those principles do not in any way apply here. First, there has not been any advantage obtained by the employment of partnership property. Secondly, it is not disputed that the transactions with the other firm were transactions which were in no way in rivalry with the partnership to which the plaintiffs belonged; and, thirdly, it cannot, as it appears to me, be reasonably argued that the contract of partnership with *Ashton & Sons* was obtained by virtue of, or was in any way a consequence from, the partnership which existed between the plaintiffs and the defendant. If we were in the present case to extend the principles beyond those which have been established by previous cases, there is no reason why the plaintiffs should not have sought to have recovered the profits of any business in which the defendant might have engaged, although that business might have been entirely unconnected with the subject-matter of the business of the partnership." Now there is not a word in that last passage that does not apply

(1) 1 Sim., 52.

here, nor has there been a case since that of *Dean* v. *MacDowell* (1), that I have seen, which in the least throws any doubt upon the principles laid down by *Thesiger* L.J.

That case was explained and followed in the case of *Aas* v. *Benham* (2), where *Kay* L.J. said:—"The case seems to me to be covered by that which determined that the profits of a different business, though in the same article—salt—to which the business of the firm related could not be claimed by co-partners, even where the partner who had embarked in such business infringed in doing so a provision in the articles by which he was bound to give his whole time and attention to the concern of the partnership, and not to engage in any other business."

That line of cases is followed by *Trimble* v. *Goldberg* (3), to which the learned Chief Justice has referred. There, as appears from the headnote, "the respondent and the two appellants, under a partnership arrangement in 1902, bought with a view to re-sale the properties of H., consisting of stands or plots of land laid off for building, and of shares in a company entitled to other stands in the same locality. The appellants, apart from the respondent, purchased the company's other stands and made profits. In a suit by the respondent for an account thereof the Court below held that, though the stands so purchased were not within the scope of the partnership of 1902, they were connected with it indirectly; that the purchase thereof by the appellants was secret and injurious to the common interest,"—which is very much the same argument as was used by the appellant here—"and that the respondent was entitled to share in the benefit thereof. *Held*, reversing this decree, that it could not be supported on authority or on any recognized equity." Lord *Macnaghten* in delivering the judgment of the Judicial Committee said (4):—"The Court of Appeal" (the Supreme Court of the Transvaal) "appears to have regarded the purchase in question, though not expressly prohibited by the partnership articles, as a breach of good faith and consequently as a violation of the fundamental condition of the partnership. Suppose it had been forbidden in express terms, what would have been the result? The other partner or partners

(1) 8 Ch. D., 345.
(2) (1891) 2 Ch., 244, at p. 261.
(3) (1906) A.C., 494.
(4) (1906) A.C., 494, at p. 500.

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discovering the breach of contract might have claimed immediate dissolution, or even damages, on proof of actual loss to the partnership. But a claim to share in the profits of the forbidden purchase would not have been warranted by principle or precedent. And here there was no loss to the partnership; only a disappointment to the partner left out in the cold. The purchase apparently was an advantage to the partnership." He further says (1):—"It seems to their Lordships that the decision of the Supreme Court of the Transvaal in the present case cannot stand with the decision in *Cassels* v. *Stewart* (2). There was at least as close a connection between the partnership and the partner's purchase in that case as there is in this. In their Lordships' opinion the order under appeal cannot be supported on authority or on any recognized doctrine of equity."

Very different from that class of cases is such a case as *Clegg* v. *Clegg* (3). Such a case has no application here. The Vice-Chancellor in delivering judgment said (4):—"Therefore, in disposing of this question, I am without the assistance of any authority whatever. It seems to me that, in the absence of authority, I am bound to decide it upon the principle that what is done by the tenant of two persons who have a joint interest in property, with a view to the benefit of both, although done on the property of one, does not leave in that one any exclusive right to the use of it for his own benefit, so as not to entitle the person who bore his share of the burden to his share of the benefit of the use of the work thus constructed, to whatever purpose of advantage it may be used." That is not a principle upon which such a case as the present is to be decided.

I am of opinion that the transaction which resulted in the defendant's appointment as consulting engineer to this company, and his receipt of the 2,000 shares, was not a transaction in respect of which he could ever be called upon to account to his employer, Mr. MacDonald. That transaction was so severable and distinct in its essence from the scope of the agreement of hire by which he was bound to the plaintiff, that, while he might have been accountable in an action for breach of covenant in

(1) (1906) A.C., 494, at p. 503.
(2) 6 App. Cas., 64.
(3) 3 Gif., 322.
(4) 3 Gif., 322, at p. 335.

respect of the clause in the agreement to which I have referred—which is not the question before us now—he certainly was not, within the principles which regulate the fiduciary relation of master and servant or principal and agent, to be called upon to account to his employer in respect of the receipt of these shares.

I have said that, in one aspect, the understanding in ordinary language of the documents which are the turning point of this case establishes a relationship of a fiduciary character, but not in respect of the transaction with the Melbourne Ice Skating and Refrigerating Company. That is a distinct transaction. There was, however, one way in which it could have been a transaction not distinct, and that was by accepting the plaintiff's interpretation of the writings, but that interpretation could not be made good and consistent without attributing to the parties an intention effectuated in the correspondence of entirely disguising the character of the transaction between them and holding it forward as a blind for the deception of others, and particularly the Melbourne Ice Skating and Refrigerating Co. I refuse to consider it in that light because I see no reason why the documents should not be understood in their ordinary sense. But it seems to me that, if the plaintiff's construction of the documents were accepted, he would simply be out of the frying pan into the fire, because he would find himself in conflict with the principle *ex turpi causâ non oritur actio.* I will make a reference to the case of *Gedge* v. *Royal Exchange Assurance Corporation* (1), in which case it was held that it made no difference that the taint in the transaction was not pleaded by the defendant. *Kennedy* J. said:—"This policy, then, being an illegal instrument—an assurance which, in the language of *Grove* J. in *Allkins* v. *Jupe* (2), is contrary to the direction of the Statute, and so unlawful in all its incidents that the law will not countenance any part of it—I cannot give judgment upon it in favour of the plaintiffs. Their counsel argued that the illegality was not pleaded by the defendants; in my opinion that makes no difference. '*Ex turpi causâ non oritur actio.* This old and well-known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No

(1) (1900) 2 Q.B., 214, at p. 220. (2) 2 C.P.D., 375.

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Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him': *per Lindley* L.J. in *Scott* v. *Brown, Doering, McNab & Co.* (1). 'If,' said Lord *Mansfield* in his judgment in *Holman* v. *Johnson* (2) (which *Lindley* L.J. refers to as an authority immediately after the passage I have just quoted), 'from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'" If then the construction, to which at one time plaintiff's counsel seemed to lean, were adopted, the plaintiff would be brought within the grasp of that principle, which would be fatal, but, if he rests in preference, as I suppose he does, on the ordinary interpretation of the documents, he is equally out of Court, because in respect of this transaction the fiduciary relation between the defendant and the plaintiff did not impose on the defendant an obligation to account to the plaintiff. I think therefore that this appeal ought to be allowed.

O'CONNOR J. read the following judgment. The two thousand shares in respect of which the plaintiff makes his claim are the remuneration fixed between the defendant and the directors of the Melbourne Ice Skating and Refrigerating Company in the agreement of the 31st July 1905. That document clearly and definitely sets out the services by which the remuneration is to be earned. The defendant is to supply plans and specifications of the machinery required and to personally supervise the erection of such machinery as may be ordered by the directors. The plaintiff's claim concerns those services and no other, and the question

(1) (1892) 2 Q.B., 724.

(2) Cowp., 341.

for determination is whether the defendant in performing those services must be regarded as an agent of the plaintiff earning a secret remuneration, and as trustee for the plaintiff in respect of the remuneration earned. There is no doubt about the general principle of law applicable. It is concisely stated in *Lewin on Trusts*, 11th ed., p. 196:—

"*A constructive trust* is raised by a Court of Equity, *wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee*; for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a *legal* title he may have, will be decreed in *equity* to hold for the benefit of his *cestui que trust*."

That doctrine, being based upon the general principle that no one who has a duty to perform shall place himself in a situation in which his interest conflicts with his duty, applies equally, as Lord *Hardwicke* L.C. points out in *Morret* v. *Paske* (1), to the relation of principal and agent. The commonest illustration of its application in the law of principal and agent is to the relation of partners *inter se*, many instances of which were cited in argument. The real difficulty in this, as in most cases, is in the application of the general principle to the facts of the case. From that point of view much assistance is to be derived from two of the cases cited, *Dean* v. *MacDowell* (2), and *Aas* v. *Benham* (3), which explains and follows it—both cases turning on the application of the principle to the transactions of partners. Lord *Lindley*, in his judgment in the latter case, deals with the principle in an aspect which arises here. He says:—"As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority

(1) 2 Atk., 52.
(2) 8 Ch.D., 345.
(3) (1891) 2 Ch., 244, at p. 255.

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which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business, nor does the language of Lord Justice *Cotton* in *Dean* v. *MacDowell* (1), warrant any such notion. By 'information which the partnership is entitled to' is meant information which can be used for the purposes of the partnership. It is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefit from information which he obtains as a partner would be manifestly absurd."

That passage explains the sense in which we must read the statement of the principle laid down by Lord Justice *Thesiger* in *Dean* v. *MacDowell* (2) in which he says:—"The third principle which is to be collected from these cases is, that a partner is not allowed in transacting the partnership affairs to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on."

No doubt the defendant required in the plaintiff's service the knowledge, experience, and skill, which gained for the defendant the position of constructing and supervising engineer to the Melbourne Rink Company, and, probably, but for his connection with the service, he would not have been brought into the business relationship with that company which resulted in his appointment. But the question, as Lord *Lindley* points out, is to what use has the knowledge, skill and business connection been put—has it been put to some use connected with the plaintiff's business, or with any duty which the defendant owed to the plaintiff in relation to that business? Fortunately the documents in evidence in this case put the answer to that question beyond doubt. The terms of the agreement of the 31st July 1905 to which I have referred plainly mark out the duties for which the remuneration was paid. Another document, the contract between the plaintiff and the Melbourne Rink Company, dated the 8th November 1905, for the supply and erection of the machinery, makes it plain to whom the defendant owes duty as executing and supervising engineer for the Rink Company. That document provides that

(1) 8 Ch. D., 345.

(2) 8 Ch. D., 345, at p. 356.

the contract is to be carried out to the entire satisfaction of the company's engineer, that is, the defendant. The plaintiff at the engineer's request is bound to remove and replace inferior work or material, and the engineer is made the sole judge in such matters and in all that concerns the management of the contract, and the contract is to be carried out by the plaintiff under his direction and supervision. Payments in respect of the contract can be made only on the certificate of the engineer, and final payment can be made only on the engineer's certificate that the contract has been performed to his satisfaction.

Respondent's counsel made a strenuous endeavour to prove that the defendant, in carrying out these duties, was in some sense the servant and agent of the plaintiff as well as of the company. But I am at a loss to understand how the defendant could carry out his service honestly in any other way than as the servant and agent of the Rink Company, owing to them, and to them only, the duty of having the contract carried out in their interest. There is only one way in which in the course of that employment the defendant could render the plaintiff services, that is by dishonesty to the company. I decline to listen to the suggestion that it was contemplated by either the plaintiff or the defendant that such a fraudulent use should be made of the defendant's opportunities. No party could be permitted in a Court of Justice to found his claim on such a ground, nor has there been throughout the case a hint of an imputation of any dishonesty in fact in the carrying out of the plaintiff's contract.

In my opinion, therefore, the documents in the case conclusively negative the claim that the duties, in the performance of which the defendant earned the remuneration in question, were in any sense carried out by the defendant as the plaintiff's servant or agent.

Turning now to the defendant's duties as manager of the plaintiff's Adelaide business, and assuming that they covered any transactions in which he might engage in Melbourne on the plaintiff's behalf, let us inquire whether there was or could be any connection between the defendant's duties in the course of his employment as the plaintiff's manager and his duties as the company's engineer. His duties as the plaintiff's manager are

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set forth generally in the agreement between them of the 3rd March 1903. The modification verbally arranged which extends the employment into 1905 was in the same terms. Giving the widest interpretation reasonably possible to the general words of clause 5 describing the defendant's duties, I am at a loss to see any ground upon which it can be successfully contended that the duties of erecting and supervising engineer for the Ice Rink Company in supervising on behalf of the company, the supply and erection of the rink machinery by the plaintiff, were part of the defendant's employment in the plaintiff's business, or were in any way connected with any duty which he owed to the plaintiff in connection with the business.

I am, therefore, of opinion that the documents in the case establish beyond doubt that the remuneration earned by the defendant under the contract of 31st July 1905 was not obtained by the defendant under such circumstances as to entitle the plaintiff now to claim that the former must be declared to hold it as his trustee. I have also come to the conclusion that on the facts in controversy the defendant's account is certainly in accordance with the documents and the probabilities. There was no secrecy in his conduct. The plaintiff's representatives in his absence from Adelaide were well aware of the position which the defendant was taking up, and the evidence satisfies me that the plaintiff himself after his return became aware of it in ample time to protest if he had thought fit.

I am satisfied that no protest was made by the plaintiff because the defendant's action all through had his concurrence.

Two documents which I shall read, both written while the plaintiff was in Australia, supply very strong evidence on this aspect of the case. The first is an application for the first certificate under the contract. It is a letter from Cooke, the plaintiff's Sydney representative, to the defendant, who is described as the General Manager of the Melbourne Ice Skating and Refrigerating Company Limited, and is dated the 4th June 1906:—

"Dear Sir.—Following my conversation with you on Saturday last, I now beg to make application for the first payment on 'Hercules' Refrigerating Machinery, Plant, &c., &c., as per contract dated 13th October last, which becomes due upon complete

erection of plant, and fulfilment of guarantees. I recognize that the test is not yet completed, but I know such was started last week, and as my annual balance takes place on the 30th instant, furthermore, as I have heavy engagements to take care of before that date, I shall be extremely obliged if you can arrange this payment at your next meeting, which I understand takes place on the 14th instant. In your position as consulting engineer to the company I recognize that it will be necessary for you to issue a certificate, when no doubt the company will make the payment. . . . Commending this to your kind attention, and trusting you will issue the necessary certificate,

I am, yours truly,

C. A. MacDonald, per T. Cooke."

The second document is the defendant's certificate of the 14th June 1906. It is in these terms:—

"Melbourne Ice Skating and Refrigerating Company, Limited.

Registered Office: No. 121 Queen Street,

Melbourne 14th June 1906.

The Chairman of Directors, Melbourne.

Dear Sir,—I hereby certify that Mr. C. A. MacDonald of Sydney, has completed the delivery and erection of plant as specified in his contract. The same has been running very satisfactorily, but the circumstances do not permit of my making a test of the plant to its fullest capacity. I have therefore arranged with Mr. MacDonald to issue this certificate on the clear understanding that the issue of it or any payment made thereunder shall not be considered as evidence of the plant having performed its guarantee or a waiver of his contract in any respect. The amount payable hereunder is £2,660 13s. 4d. being one-third of the contract price.

Yours faithfully,

(Sgd.) H. Newman Reid, Consulting Engineer."

It is impossible to say that such communications could take place between the parties if the plaintiff's version of these transactions is correct. For these reasons I am of opinion that the judgment in the plaintiff's favour cannot stand, and that the appeal must be allowed.

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ISAACS J. read the following judgment. In my opinion this appeal must succeed, and out of respect to the learned Chief Justice of Victoria I shall state my reasons.

The defendant received from the Melbourne Ice Skating and Refrigerating Company Limited 2,000 shares paid up to £1 per share, the consideration being services to be rendered by him to the company as its consulting engineer. The services set out in detail were to supply plans and specifications of the necessary refrigeration machinery and to personally supervise the erection of such machinery as might be ordered by the directors without further remuneration other than travelling expenses.

The plaintiff by this action claims these shares (less 250 since arranged for) as his, asserting the defendant to have received them as his trustee or agent, and invokes the equitable assistance of the Court to compel the defendant to transfer them to him.

For this he relies on the well established rule that no agent can be permitted to acquire any personal benefit in the course or by means of his agency. In other words, no agent can lawfully, either within or beyond the actual limits of authority conferred upon him, use, for his own personal advantage, the fiduciary position with which he has been entrusted for his principal's benefit.

The way in which the plaintiff attempts to make out his claim is this: He is a machinery merchant, and alleges that it was part of the defendant's duty as his manager, and also by reason of a special direction, to promote and float the company, to prepare plans and specifications and sell to it refrigerating machinery and plant and to supervise the erection of the machinery and plant when sold. He alleges further that the defendant in the discharge of his duty to the plaintiff did all those things, and secretly received the shares from the company by way of remuneration for the services rendered as the plaintiff's manager.

The keynote of the plaintiff's claim is that the services for which the shares were given and received were services which the defendant owed to the plaintiff, or, at all events, must be considered in law as rendered on his behalf, so that the remuneration also must be considered as his.

The work for which, upon the uncontradicted testimony, the

shares were received, was all done, as it was agreed to be done, subsequent to the organization and incorporation of the company, and was rendered to the company itself. It was such as in ordinary circumstances an engineer occupying the position of the defendant towards the company would perform in protection of the company's interests against every person in the situation of the plaintiff. The duty of drawing up the specifications and conditions connoted the best of the kind for the company and the most stringent against possible tenderers; his advice as to the acceptance of a tender had to be based on what was most advantageous to the company. The supervision of the work during the performance of the contract meant keeping the contractor, whoever he might be, strictly to the proper supply of work and materials, and certainly whatever discretion vested in the engineer ought not to have been exercised so as to favour the contractor. Many months before the work was begun the plaintiff personally and by his agents thoroughly knew the position which the defendant would necessarily occupy as between the contractor and the company. To regard the duties which the admitted situation cast upon the defendant as part of his ordinary functions as plaintiff's manager under his agreement with the plaintiff is inconceivable. No man's business can include absolute antagonism to his business interests; and it was the clear duty of the defendant as supervising engineer under his agreement with the company (some important clauses of which have not been copied in the transcript) to act as the company's representative and in adverse interest to the plaintiff. Any express or implied arrangement outside the regular agreement as manager, whereby the defendant was, in his office of supervising engineer of the company and in relation to the machinery contract, to consider himself the agent of the plaintiff would, if not fully communicated to the company, be dishonest, and would of itself disentitle the plaintiff to the relief claimed. It would be secretly combining with defendant that he should accept a fiduciary position with the company as against a person, who was really his principal, though posing as the opponent of his principal. The mere fact that in other matters the defendant was acting for the plaintiff could not amount to the necessary disclosure.

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The defendant did not act for the company without the fullest permission of the plaintiff. He placed his desires fully before his employer; he asked for permission to employ some of his time in the formation and creation of the company which would then be a possible and indeed a probable purchaser of the plaintiff's machinery. The permission was accorded and the company formed. The defendant openly informed the plaintiff that, owing to his intended employment by the company, he could not represent the plaintiff at the company's meetings, and the plaintiff acceded to this view, and acted throughout on the basis of the defendant being not his but the company's representative. The learned Chief Justice of Victoria has not, I think, given sufficient weight to the consideration that the defendant's services as consulting engineer of the company were so inherently antagonistic to the plaintiff, that they could not possibly be regarded as rendered on his behalf. He himself quite appreciated the position as appears in his evidence. The plaintiff says, speaking of the defendant:—"He was to prepare specifications and call for tenders. I did not approve of it. I thought it was a dual position." Further on he said:—"I did not think it was an honest position for Reid."

The incongruity of the position, and its unfairness to the company must lead a Court to find a meaning for the situation, if such be possible, that is more consistent with straight dealing as well as probabilities. It is a question of fact to a large extent—at least so far as relates to the actual arrangement between the plaintiff and the defendant. Both of them agree that he was permitted to do the work. There was no secrecy about that. Both admit that the defendant was bound to protect the company as against the plaintiff in relation to the contract, in its formation and in its performance. So far as the documentary evidence throws light upon the question, and sufficient reference to its contents has already been made by my learned colleagues, it distinctly supports the defendant. The defendant's view of his complete independence of the plaintiff as regards his work for the company as engineer, is understandable, consistent and honest. The plaintiff's view, on the contrary, is almost incomprehensible

from a business aspect, and is open to serious objections in point of morality.

As a question of fact, therefore, I arrive at the conclusion that both plaintiff and defendant thoroughly understood and acted on the basis that the defendant in his capacity of consulting engineer of the company was completely severed from all relations with the plaintiff, and that both of them felt the double relation was impossible, because the functions were incompatible.

A great part of the plaintiff's case rested on the contention that he was unaware the defendant was to receive any remuneration as consulting engineer. So the plaintiff swears. He says: —"I thought he was getting nothing as he did not tell me he was getting anything. He was bringing business to me in that matter, and if it were profitable he might well have come to me and asked for further consideration from me."

I confess this is a strange attitude for a man asking the assistance of a Court of Equity to recover a secret reward from a servant who deceived him. He admits he knew the defendant assumed a position of trust and confidence under the company, he asserts that if the business turned out profitable the defendant could have come to him and asked for a share of the profits. If that means anything, it means that the defendant in supervising the plaintiff's performance of the contract was placed between his duty to the company and his own personal interest, and that the less the company got for its money, the more the defendant might expect from the plaintiff. This is exactly what Lord *Ellenborough* so strongly reprehended in *Diplock* v. *Blackburn* (1), but the admission appears essential to the plaintiff's success on the facts, whatever its effect in law may be, because, unless he was ignorant that the defendant was to receive some remuneration from the company, his case fails; and to suppose the defendant was to undertake the skilled, responsible and laborious work of consulting engineer without expecting consideration of some sort and from some person puts an undue strain upon human credulity. The plaintiff's explanation that he thought the defendant was doing this extra work—he calls it "extra work"—to make up a previous loss of £5,000 in Adelaide is far

(1) 3 Camp., 43.

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from satisfying. And it is open to the further objection that it again assumes the defendant to be forgetting his duty towards the company in his anxiety to make reparation to the plaintiff, which he was under no obligation or promise to do.

The authorities referred to by Chief Justice *Madden* are, of course, unimpeachable. The facts, however, do not in my opinion bring the plaintiff's case within the principles of those authorities. If once it were established that the defendant was a trustee or agent for the plaintiff as regards the work he did in his capacity of consulting engineer, then, no doubt, the results referred to in the cases and text books cited would follow. But in *Morison* v. *Thompson* (1), *Cockburn* C.J., after reviewing the authorities up to that date, was careful in no fewer than three different portions of his judgment to emphasize the position that, in order to entitle the principal to the profits acquired by his servant or agent, they must have been made in the course of or in connection with his service or agency, or differently phrasing it, in the course of or in connection with his employment or service.

As already indicated, the facts here establish that the shares were not received in the course of or in connection with the defendant's service or agency for the plaintiff.

The plaintiff claims that through the instrumentality and in the name of the defendant he promoted the company, and did so for the purpose of gaining profit in selling to it his machinery. His own name did not appear as a promoter. The reason he gives is as follows :—" I desired defendant to do floating &c. of rink in his own name. My name had appeared in connection with a previous one and I did not wish to be thought a company promoter ; no other reason." These circumstances create the strongest possible reason for seeing that the consulting engineer, purporting to deal with the plaintiff at arms' length in relation to the plaintiff's ultimate object in creating the company, was not dependent upon him. The defendant certainly, and the plaintiff according to his own account, were promoters of the company, and were in the circumstances in a fiduciary relation to the company regarding this transaction. With reference to this aspect of the matter the case of *Aberdeen Railway Co.* v.

(1) L.R. 9 Q.B., 480.

Blakie Brothers (1) tells strongly against the plaintiff. I quote one passage from the speech of Lord *Cranworth* L.C. :—"A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Judged by this test, it is impossible to accept the plaintiff's contention that the defendant's acts in his capacity of the company's engineer were really done as the plaintiff's agent or by means of that agency; nor can any weight be given to the suggestion that the defendant accepted and entered upon a fiduciary duty towards the company, on the understanding with the plaintiff that his remuneration must be sought, if at all, from the plaintiff, and then only provided the result, which was largely dependent upon the defendant, were profitable to the plaintiff. The plaintiff admits the defendant occupied the fiduciary position, says that the defendant so occupied it with his full knowledge, confesses that he considered it dishonest, but took full advantage of it all through the contract to get his work passed by the defendant. Finally, he appeals to the high standards of fidelity established in Equity in order to obtain the Court's assistance to gather in the remaining benefits of his improper arrangement.

If his version of the facts be true, he is clearly disentitled to succeed; but I prefer to adopt the more reasonable, and certainly the less censurable view put forward by the defendant.

It was argued that no specific plea is raised objecting to the relief asked for, on the ground of turpitude. The Lord Chancellor in *Aberdeen Railway Co.* v. *Blakie Brothers* (2), in answer to a similiar objection, said:—"Suppose the contract to be *ob turpem causam*, is the Court, merely for defect of pleading, bound to execute it? If what the appellants urge is right, the contract here is bad on general principles."

(1) 1 Macq. H.L. Cas., 461, at p. 471. (2) 1 Macq. H.L. Cas., 461, at p. 465.

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Higgins J.

HIGGINS J. read the following judgment. I also am of opinion that this appeal should be allowed. My ground is that the defendant acted as paid consulting engineer for the company with the knowledge and consent of the plaintiff.

It is not necessary for me to refer to all the evidence of knowledge and consent which my learned colleagues have mentioned. But there is no doubt that by his letter, dated 7th July 1905, before the company was incorporated, and before even the letter containing the terms of the engagement was written (31st July 1905), the defendant wrote to the plaintiff stating that he was to be consulting engineer, and stating what his duties were to be. His letter contained statements which showed that this guardian of the shareholders' interests was prepared to go very far in the direction of favouring the plaintiff as tenderer; statements which must have arrested the attention of the plaintiff at once, and have shown him the impropriety of allowing—at all events without taking every precaution—the engagement to be carried out. But the plaintiff, although he replied to the letter from Chicago on 24th August, in no way repudiated the unfair advantage which the appointment of his own employé gave him, allowed the work to be done, and his tender to be accepted, his machinery erected and passed; and he did not make the slightest claim to the remuneration till the share certificates were out of the company's possession and in the hands of the defendant. It is true that the plaintiff was not told till December 1905 what the defendant's remuneration was to be. But knowledge of the amount of the remuneration is not material for the purposes of this case. The plaintiff must have known that an appointment as consulting engineer would involve remuneration; and he, by silence, gave consent to his servant acting under the appointment. His attorney under power in Sydney knew of the remuneration shortly after the distribution of the company's circulars of 24th August 1905.

I may say that there are strong indications in the evidence in this case that the shares may have been given to the defendant in fact because of his acting as promoter of the company, and that the remuneration took the form of payment for acting as consulting engineer in order to meet the exigencies of the Vic-

torian *Companies Act* 1896, and to prevent questions from shareholders *in posse* or *in esse*; and it is not pretended that the plaintiff was informed that his servant, the defendant, was getting payment for promotion. But the pleadings do not permit us to act upon any such theory as to the truth. In the statement of claim, par. 12, it is alleged that the 2,000 shares were given in consideration of the defendant's supplying the plans and supervising the erection of the machinery; and this allegation is admitted in par. 13 of the defence.

The defendant's letter of 7th July 1905, taken with the plaintiff's subsequent letters, cables, and conduct, is the principal evidence of the plaintiff's knowledge and consent; and he admits that he knew even of the 2,000 shares remuneration on 28th December 1905. He excuses himself for not acting immediately on the ground that his solicitor advised him that he would not jeopardise his rights by delay; that the shares would not be issued to Reid till the contract for machinery was complete; that Reid was a necessary witness in some Adelaide litigation; and it would be better to wait. The plaintiff's attorney under power told the plaintiff that the defendant "might trouble them in passing the machinery;" but he denies that this was said in connection with the shares. However, Reid and the others had to act on what the plaintiff said or did, not on his mental reserves; there is no doubt that Reid was induced by the plaintiff's silence to continue such services as he rendered to the company; and the plaintiff, having stood by and allowed Reid to carry out his engagement with the company, and having got the benefit of Reid's friendly offices with the company, cannot now turn round and deny that he consented to Reid's acting as he did for his own profit.

I am anxious, however, to make it clear that I do not at all concur with the argument of the defendant that, even if there were no knowledge and consent on the part of the plaintiff, Reid could not be made to account, as constructive trustee, for his profits derived from the company. I assume, for this purpose, that we are not to treat both plaintiff and defendant as concerned in a fraud—a scheme in fraud of the company—although there is much in the case that seems to me to support the

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comments of the Chief Justice just expressed. The argument of the appellant seems to me to proceed from a misapprehension of the equitable doctrine of constructive trust. In the case of a constructive trust, the Court compels a man to treat some profit which he has gained for himself, and not on behalf of any other person, as if it were a profit gained for his principals or his beneficiaries. A trustee renews a lease for his own benefit when he cannot get it for the estate; and he is compelled to give it up to the trust estate: *Keech* v. *Sandford* (1). An ex-agent, who has gained information about his principal's estate during his agency, and who, by means of that information, buys up charges on the estate after his agency has terminated, is compelled to surrender the profit to the estate: *Carter* v. *Palmer* (2); and this applies even though the purchase of the charge is not within the scope of the agent's duties. There is, certainly, a glaring inconsistency in Reid's double position. As a servant of MacDonald, his duty is to further MacDonald's business in connection with refrigerating machinery; while, as a servant of the company, his duty is to promote competition amongst tenderers, and to get the best machinery at the lowest price. But such inconsistency as this does not prevent the Court from declaring that to be trust property which was never meant to be trust property, and which does not become trust property until the Court's declaration. If it be once established that Reid was a servant of the plaintiff for the purpose of carrying on or assisting in the plaintiff's business, then any profit which he gains therein or thereby, beyond his salary and expenses, should belong to his employer. In this point, I thoroughly concur with the view stated by the Chief Justice of Victoria. Under the agreement of employment of 3rd March 1903, Reid's services were retained as general manager "*at such places as are hereinafter mentioned*" for three years, at a salary. Reid was to "devote his whole time and ability to the efficient carrying out of his duties as general manager," during the first year at Adelaide, and during the second and third years in such State or States within Australia as MacDonald might in writing direct, "to the end and intent that the interests and businesses" of MacDonald should be "in every respect

(1) II. Wh. & T.L.C., 7th ed., 693. (2) 8 Cl. & Fin., 657.

not only well and truly conserved and fostered but in every legitimate manner be further improved and extended to the utmost of the ability and influence" of Reid. There was in the agreement a promise that Reid should be employed at Melbourne or Sydney for one year at least during the second and third years of the term. I have no doubt that this agreement covered the starting of enterprises, even the floating of companies or syndicates, or what is called the creating of purchasers, for a commodity so special as refrigerating machinery; and this work was to be done for MacDonald. It is said that MacDonald did not in writing direct Reid to go to Melbourne for the purposes of the business. But, although the lack of a writing might prevent MacDonald from treating Reid as guilty of breach of the agreement if he refused to go to Melbourne, it does not prevent the equitable rules as to constructive trust from applying, when Reid goes to Melbourne at MacDonald's expense, in MacDonald's time, under MacDonald's encouragement, with Macdonald's letter of commendation, and makes arrangements whereby a new purchaser is created for MacDonald's machinery. The fiduciary relation continued notwithstanding that the parties did not precisely comply with the terms of the agreement. Reid had already taken a position as director in an insurance company, and had treated the commission and director's fees as the plaintiff's. He had also instituted a slaughtering business, a rabbit business, an egg business, a fish business, all on behalf of the plaintiff. He had asked the plaintiff's consent before he acted as adviser to the Portland Freezing Company. So, when he went to Melbourne as the salaried officer of the plaintiff, with his expenses paid out of the plaintiff's money, having in his possession the plaintiff's commendatory letter of the 2nd May 1905 for the purpose of influencing Melbourne business men to favour the skating rink venture, I am of opinion that, but for the plaintiff's knowledge and consent, Reid's position was fiduciary, as to the Melbourne transaction, and he would be bound to account for any profits made by the venture.

All the States of the Commonwealth were within the range of the plaintiff's potential activities, contemplated by the terms of the agreement of the 3rd March 1903; employment of the de-

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fendant in either Sydney or Melbourne was obligatory. These places were therefore *taboo* to the defendant so far as regards private profit in connection with the plaintiff's business, whether the plaintiff had given the defendant a direction in writing or not, and whether the profit should be derived during the term of the agreement, or subsequently to the agreement but by virtue thereof, as in *Carter* v. *Palmer* (1). This profit did, in my opinion, arise out of the business in which the defendant was employed by the plaintiff.

I have not dwelt on the conflict of evidence as to the conversations in April and May 1905, but I agree with the Chief Justice of Victoria that the burden of proof lay on Reid; and that burden was not discharged.

But for the purpose of dealing with such a case as this is, I rely almost wholly on the admitted facts and documents.

Appeal allowed. Judgment appealed from discharged. Judgment for defendant with costs. Respondent MacDonald to pay costs of the appeal.

Solicitors, for appellant, *Rigby & Fielding*, Melbourne.

Solicitors, for respondent MacDonald, *J. M. Smith & Emmerton*, Melbourne.

B. L.

(1) 8 Cl. & Fin., 657.