Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Trimble and another v. *Goldberg, from the Supreme Court of the Transvaal; delivered the* 16*th July* 1906.

Present at the Hearing:

THE EARL OF HALSBURY.
LORD MACNAGHTEN.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from an Order of the Supreme Court of the Transvaal reversing the Judgment of the Witwatersrand High Court at Johannesburg. That Court had dismissed with costs an action for account brought by the Respondent Goldberg against the Appellants Trimble and Bennett, who were associated with him in a certain partnership adventure.

The trial of the action took place before Smith J. On all questions of disputed fact and on all questions of law but one the learned Judges of the Supreme Court agreed with the trial Judge. On one point they differed from him. Founding their opinion on an equity he had failed to appreciate or discover, they entered Judgment for the Respondent declaring him entitled to share with the Appellants in the profits of a purchase which they had made secretly and meant to keep to themselves. Considering the purchased property, though not within the scope of the partnership adventure,

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yet connected with it indirectly, and thinking the purchase injurious to the common interest, they held on general principles that the Appellants were liable to account to their partner for any profit derived from the transaction; and they regarded the veil of secrecy as a damning proof of guilt and an aggravation of the wrong of which, in their view, Goldberg was entitled to complain.

Goldberg was a land speculator. Trimble was an auctioneer: he had been Acting Chief Detective of the whole of the Transvaal before the war. Bennett was a merchant in Durban in a good financial position. The partnership agreement between Goldberg, Trimble, and Bennett was dated the 10th of February 1902. The object of the joint adventure was the purchase and re-sale of certain properties belonging to a gentleman named Hollard. They consisted of 5,500 shares in a company called the Sigma Syndicate, besides stands or plots of land laid off for building and other real estate in Johannesburg and elsewhere in South Africa.

There was nothing special in the partnership agreement of the 10th of February 1902. Profits and losses were to be shared equally. No partner was to sell or dispose of his interest without the consent in writing of his partners. All dealings with the property of the partnership were to be transacted by and through Trimble, to whom the other partners were to give powers of attorney.

The Sigma Syndicate, whose full title was the Sigma Building Syndicate, Limited, had been formed in 1896 under the laws of the South African Republic with limited liability. Its capital was 25,000*l.* divided into 25,000 shares of 1*l.* each all fully paid up. The Board of Directors was to consist of at least four and at most six members of the Company. The management of the Company's affairs was

committed to the Board " with the most extended " powers and without limit or reserve." The powers of the Board specially enumerated included " any purchase, sale, or exchange of " immovable properties."

The Syndicate was formed for the purpose of making profit by purchasing and re-selling a number of stands on Marshall Square and Government Square in Johannesburg.

In the early part of 1902 Hollard, a wealthy man and a Director of the Sigma Syndicate, was about to leave South Africa and anxious to dispose of everything he had there before quitting the country. He put all his properties on the market for sale through Goldberg. Goldberg was furnished with a prospectus or proposal containing a schedule of the various lots showing the aggregate price of the lots and the value placed on each. The total was 94,566*l*. The Sigma shares were put at 30,000*l*. The prospectus was accompanied by an elaborate report prepared by a Mr. Dumat, an attorney in Johannesburg. Goldberg's original intention seems to have been to form a syndicate for the purpose of purchasing the property, charging the syndicate 9,500*l*. as commission for his services. The gentlemen who were to compose the syndicate wanted further time. After carefully considering Dumat's report and expressing no little disappointment and dissatisfaction with it, Goldberg advised Hollard not to grant an extension of time to the Syndicate and proposed to accept Hollard's offer and buy on his own account. Bennett and Trimble joined him in the adventure. The one would not come in without the other. And so the Syndicate disappeared, and the partnership agreement of the 10th of February 1902 was arranged. To meet Hollard's requirements a remittance of 12,500*l*. was telegraphed in advance, and

Trimble was despatched to Johannesburg to complete the business.

Armed with powers of attorney from his two partners, Trimble went to Johannesburg, saw Hollard there, and settled the terms of the purchase off-hand. The purchase deed was executed by Hollard and by Trimble on behalf of himself and his partners on the 14th of February 1902. The purchase price as proposed was 94,566*l.* The sum of 12,500*l.*, which had been sent forward, was taken as part payment; the balance was secured by mortgage bonds over the several properties comprised in the purchase.

After this matter was settled, Trimble went one day with Hollard to see the stands belonging to the Sigma Syndicate. When they came to Government Square Trimble asked Hollard if the Syndicate would sell the stands there *en bloc.* Hollard said "yes," adding that he thought the Board would sell for 120,000*l.* Trimble asked about conditions and Hollard referred him to Davis, the secretary, who would, he said, lay the matter before the Board. It seems that the Syndicate had tried without much success to sell their stands. They had put them up for sale by auction but had only managed to sell one stand on Marshall Square. The Board, holding as they did 23,000 shares out of 25,000, decided in the presence of all the shareholders to take 100,000*l.* for their stands on Government Square, and negotiations were going on with the Government or the Private Secretary to His Excellency on that footing. Trimble, of course, was not made aware of this fact, and after some negotiation with Davis he was content to take an option to buy for 110,000*l.* Trimble at once communicated with Bennett, and told him that he thought from some secret information he had gained, which it seems would not bear the light, that

money was to be made out of the deal. He asked Bennett to join with him in the speculation, intimating that he was prepared to give even a larger price. Bennett consented to join, and agreed to finance the enterprise. The directors of the Syndicate were only too glad to accept Trimble's offer, and thus he secured the stands on Government Square for himself and Bennett at the price of 110,000*l*.

Goldberg was not told anything about this purchase at the time. He did not hear of it until the end of 1902 or some time in 1903. Meeting Trimble one day in the street he said, according to Trimble's uncontradicted evidence, corroborated by an accountant called Winship, who was present, " Don't you think you might have " let me have ' a show in ? ' " Later on, however, he took a more exalted view of his rights, and in June 1904 he brought this action, alleging, in the first place, that the partnership had given Trimble a mandate to buy the stands on joint account—an allegation which both Courts held not proved. He also contended that, on general principles applicable to all cases of partnership, he was entitled to share with his partners in the benefit of their purchase. On this ground the Court of Appeal gave effect to his claim.

It seems to their Lordships that the Judgment of the Court of Appeal is not well founded. The purchase was not within the scope of the partnership. The subject of the purchase was not part of the business of the partnership, or an undertaking in rivalry with the partnership, or indeed connected with it in any proper sense. Nor was the information on which it seems Trimble acted acquired by reason of his position as partner, or even by reason of his connection with the Sigma Syndicate. The way in which the information was acquired may have been much to Trimble's discredit, as the Court of Appeal has

pointed out; but Goldberg is not in a position to complain of that. He at least is not averse to sharing the profit to which it seems to have conduced.

Now if the purchase from Hollard had been completed so far as to make the partnership the absolute and unencumbered owner of the 5,500 shares in the Sigma Syndicate, and if those shares had been divided between the three partners and registered in their separate names, any one of the three would have had as good a right to buy any property of the Syndicate which the directors might think fit to offer for sale as any other shareholder in the Syndicate or any member of the general public.

The Court of Appeal 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 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. Through it the directors of the Sigma Syndicate were enabled to obtain for their property 10,000*l.* more than they would have obtained if they had sold to the Government at their own price. And the partnership, as a shareholder in the Syndicate, was proportionately the gainer.

The Court of Appeal seems to have been much impressed by the secrecy of the trans-

action. No doubt it would have been better if Goldberg had been told at the time that Trimble and Bennett were making this purchase. In a case in the House of Lords, which will be mentioned presently, in which the circumstances were somewhat analogous, Lord Blackburn observed, "I generally think it is advisable as a "matter of prudence, as well as on other "grounds, to let everything be above board." That is a very proper sentiment worthy, perhaps, of a more unhesitating acceptance. But still there was no legal obligation on Trimble or Bennett to tell Goldberg what they were doing unless he had a right to take part in the speculation if he chose to do so. Their excuse for silence, if it be an excuse, was that they considered Goldberg an undesirable partner and not financially strong.

The learned Judges of the Court of Appeal also seem to lay some stress on a provision in the articles of association of the Sigma Syndicate which states that "Each share gives, according "to the issued shares, a right to a proportionate "share in the ownership of the Company's assets "and in the distribution of profits." But there is nothing special in that provision. It is no more than an accurate description of the position of every shareholder in every trading company limited by shares.

Then there was an argument which it is very difficult to follow. It was said that the moment Trimble determined to buy these stands, he put himself in a position in which his interest and his duty conflicted. It was his interest to buy as cheaply as he could. It was his duty to sell the Sigma shares as dearly as possible. The value of the shares depended on the value of the stands, and so it was his duty to enhance the value of the stands by every legitimate means in his power. He ought not to have thought of buying them for less than the utmost price

he felt he might have been forced or tempted to give. He knew he was buying cheaply; he told Bennett so. The fallacy of this line of argument lies in assuming that Trimble had anything to do with selling the stands, or any right to meddle with the conduct of the sale. That was in the hands of the Directors. They were dealing at arm's length with him. It seems extravagant to suppose that he would have advanced the interests of the partnership by retiring from the field and declining to enter into a competition which actually had the effect of raising the price of the stands and so improving the value of the Sigma shares.

No authority was cited in support of the conclusion at which the Court of Appeal arrived. But there are several cases in which arguments similar to those which prevailed with that Court have been urged and urged unsuccessfully. Perhaps the most instructive cases are *Dean* v. *MacDowell*, 8 Ch. D. 345, and *Cassels* v. *Stewart*, 6 A. C. 64. The two cases have much in common, and it will be sufficient to refer to the latter.

In *Cassels* v. *Stewart*, which was an appeal from two concurrent Judgments in Scotland, three gentlemen, Reid, Cassels, and Stewart were partners in an undertaking called the Glasgow Iron Company. The contract of co-partnership contained an article forbidding any partner to assign his interest, or give any person or persons a right to interfere with the business, and declaring further that any such assignation should be of no effect as regards the Company. There was also a clause declaring that, on the retirement of a partner, the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. Reid sold all his interest to Stewart. Reid's

name, however, remained on the books, and he signed all deeds relating to the business until his death, which occurred seven years after the sale. Cassels was not till then informed of the arrangement. When he found it out he claimed to participate in the purchase on the ground (1) that a mandate had been given to Stewart to buy Reid's interest for the partnership; (2) that under the terms of the partnership agreement the purchase could only be legally made with his consent; and (3) that Stewart had secretly acquired a benefit for himself within the scope of the partnership business. It was held that the alleged mandate was not proved. But it was argued by Sir F. Herschell, then Solicitor-General, and the Lord Advocate that, putting aside the alleged mandate, "the agreement was "entered into under such circumstances as "entitled the Appellant to participate in it," "the acquisition of the shares of outgoing "partners . . . was one of the objects of "the Company." "Apart from the express "terms of the contract the secret agreement by "which the Respondent acquired for himself "alone a benefit falling within the scope of the "partnership business was a breach of the good "faith of the partnership, and when such a benefit "was acquired each partner had a right to demand "that it should be communicated to each of "them equally"—"on general principles it was "inequitable, having regard to the fiduciary "relations due to each other, that such an agree-"ment should be made behind the back of "another partner." Without calling on the Respondent, the House, consisting of Lord Selborne, L.C., and Lords Penzance, Blackburn, and Watson, dismissed the Appeal.

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*. 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.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, the Order of Smith J. restored, and the Appeal from that Order dismissed with costs.

The Respondent will pay the costs of the Appeal.