Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of The Federal Supply and Cold Storage Company of South Africa, Limited v. (1) Adolph Angehrn; (2) Albert Piel, from the Supreme Court of the Transvaal; delivered the 15th July, 1910.

Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

LORD SHAW.

SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

In this case two Appeals (consolidated by Order of the 2nd of November 1909) were taken from two Judgments of the Supreme Court of the Transvaal, both delivered on the 26th day of August 1908, by one of which a sum of £2,551 7s. was awarded to the Respondent Angehrn, mainly as damages for illegal dismissal, and by the other of which a sum of £2,690 10s. was awarded to the Respondent Piel mainly in respect of a similar cause of action. Both the actions were tried before Mr. Justice Curlewis on the 24th of April 1908 and following

days. Most, if, indeed, not all, of the evidence applied to both cases, and, by a most proper arrangement between the parties, was treated as having been taken in both actions, saving, of course, all just exceptions. At the suggestion of the Court, it was, by consent, arranged, that after the close of the evidence, the case should be removed into the Supreme Court for argument and decision. In pursuance of this arrangement the case was argued in the latter Court, composed of Justices Wessels and Bristowe and the Trial Judge, on the 20th of May 1908, and the following days. The evidence of the most important witness for the Appellant Company, Mr. Edward Nelson, their Managing Director, was taken on commission, so that there was no opportunity of obtaining his evidence upon those points arising at the trial which were not, or could not have been anticipated at the time he was examined.

The Appellant Company is an English Company having its head office in London, and carrying on a very extensive business in South Africa as wholesale and retail butchers and importers of frozen meat. They have branches in Johannesburg, in the Transvaal, at Durban and Cape Town, and, during the period with which these Appeals are conversant, their transactions in the Transvaal alone amounted to some thousands per week. Their Bankers in South Africa were from August 1904 The National Bank of South Africa, and in London, from the formation of the Company to the present time, Messrs. Hill and Sons.

The London Board of Directors consisted of Edward Nelson already mentioned, T. C. Nelson, his brother, M. Bergl and W. Reid, and from the 25th of October 1905 the Respondent Angehrn. Of this Board one Nind was Secretary.

The two Respondents prior to the year 1903 carried on, in South Africa, under the name of Angehrn and Piel, the business of wholesale and retail butchers. The Appellant Company (in the proceedings referred to as " the Company ") shortly after its formation on the 23rd of December 1902 purchased from this firm, amongst other properties, their butcher's business, and by an agreement dated the 25th of April 1903, made between the Company and the Respondents, the latter were appointed joint Managers for the Company in the Transvaal as and from the 1st of January 1903 for a period of three years, at the handsome salaries of £1,200 per annum respectively. Notwithstanding this agreement, however, the Respondents continued to use in business the name of their former firm, and to keep in that name an account at the above-mentioned African Bank. By two further agreements, both dated the 25th of October 1905, made between the Company and the Respondents, Angehrn was appointed Managing Director of the Company's business in the whole of South Africa, and Piel their sole Manager in the Transvaal for a like period of three years. In the fiduciary position which the Respondents severally occupied under both these agreements considerable powers were conferred upon, and were exercised by them; great trust and confidence were necessarily reposed in them, and *uberrima fides* should have been observed by them in their dealings with their principals. Each of these agreements contained clauses binding the Respondents to devote their whole time, skill, knowledge and ability to the carrying on of the business, to promote its interests by all means in their power, and during the time of their employment and for four years afterwards not to be con-

nected directly or indirectly with any business similar to that of the Appellants, within a radius of three miles from any place where the Appellants had, or proposed to open a business.

The Respondents were on the 21st of November 1907 summarily dismissed from their positions. The burden of proving a justification for that dismissal rests, no doubt, upon the Company. They endeavoured to discharge it, firstly, by proving that in respect to a transaction, herein-after designated for convenience, "the Shepherd Deal," the Respondents had broken their contract, violated their duty, and betrayed their trust, as agents of the Company, by purchasing, in the month of December 1904, jointly with a rival Company called the Rand Company, 650 head of cattle from one Shepherd at the price of £11 5s. per head, one half the ownership of which they, themselves, had secretly acquired from Shepherd at the price of £10 per head, thereby making, or arranging to make for themselves a secret profit of £1 5s. per head on half the cattle sold to their employers; and secondly, by proving that, in respect of a large overdraft with which the Company were by their Bankers in South Africa accommodated, and for the payment of which the Respondents were, with one Verster, the Company's Manager at Capetown, joint guarantors, the Respondents had, in the months of January and September 1907, secretly, and to the injury of the Company in their business, procured the Bank to insist on an immediate reduction of this overdraft, and had in addition, in reference to their action in this respect, been guilty of falsehood, hypocrisy and deceit, showing thereby that they were unfit persons to discharge the duties of the positions they held.

This second charge was in effect not denied at the trial. The Respondents, however, sought to extenuate their guilt by showing that their primary object in procuring the reduction of the overdraft was to protect themselves, not to injure their employers; but it was not contended, and could not be contended successfully, that injury and inconvenience to the Company in their business was not the natural result of the reduction in the overdraft so effected, and must be taken to have been in the contemplation of the Respondents as the natural consequence of their own acts, and therefore must be taken to have been intended by them. The fact that their paramount object was the protection of their own interests, while it might be an answer to the charge of conspiring to injure the Company set forth in the pleadings, could not justify or excuse their falsehood, or show that they were persons whom the Company were bound to continue in the positions of trust and confidence they had occupied. They were, however, at the end of the case, permitted to plead by way of replication their answer to the case of the Company proved in evidence at the trial, as distinguished from the defence set forth in their pleadings. The replication was in the following terms:—

> "5. Alternatively in answer to the alternative allegation contained in paragraph 6 (*a*) of the Plea, the Plaintiff says that if he in breach of his duty did induce the Defendant Company's Bankers to reduce the said overdraft (which is denied) the Defendant Company had full knowledge from January, 1907, onwards of the said reduction and of the Plaintiff's action in connection therewith, and condoned the same."

The Appellants did not at the trial apply to have the case adjourned to enable them to meet by evidence the issue raised by this added repli-

cation. That is unfortunate, and it is impossible to be certain, that grave injustice may not be done to the Company's Managing Director, Mr. E. Nelson, in deciding on this new issue without giving him an opportunity of dealing with it, the more especially as it was on his alleged treatment of the Respondents that the condonation relied upon rested; but the Appellants, having failed to apply for an adjournment, must be held bound by the course of the trial.

The meaning of this replication, its validity in law, and the sufficiency of the evidence given to support it, are the questions for their Lordships' decision on the second branch of the case.

In reference to the first branch of the case, the Shepherd Deal, some time was apparently devoted at the trial to the discussion of the question whether the charge of gaining, or attempting to gain a secret profit in the way described, even if true, could now be relied upon, inasmuch as it occurred while the Respondents were employed under the Agreement of 1903 and before their promotion, as if the moral character and nature of a man could be divided into segments, all continuity between them severed, and each segment completely insulated from the other by an agreement in writing. This point was not relied upon by Mr. Simon on behalf of the Respondents. There is nothing in it. An agent who takes a secret commission does a dishonest act, and that act shows he is unfit for a position of trust and confidence. It is the revelation of character which justifies dismissal; and the important point is the date of the discovery of the misdoing, which may itself be long kept secret. It was, however, not disputed that, if the Shepherd Deal was, in truth, of a character such as the Appellants alleged,

it would, subject to the above-mentioned point, justify the Respondents' dismissal. Their reply to the Appellants' Case on this point was, as their Lordships understood, to the effect that the apparent character of the transaction was not its real character—that while on its face it looked as if they aimed at private gain, and were seeking to make a secret profit for themselves, yet, in truth and fact, they were actuated by zeal for their employers' interest, were seeking to make a profit for those very employers, the secrecy and artifice being resorted to merely in order to hide that fact from the rival company, their co-purchaser. But the burden of proving to be honest what admittedly on its face, looked dishonest rested upon the Respondents themselves, not upon the Appellants. Once the Appellants had proved a *prima facie* case of misconduct on the part of the Respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood *prima facie* justified, the burden of proof was shifted, and it lay upon the Respondents, as it does upon all agents in a fiduciary position who deal with their principals, to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the *prima facie* case against them must prevail, and their guilt, justifying dismissal, must be taken to be established. With all respect to the learned Judges of the Supreme Court, they seem to their Lordships to have failed to keep steadily before their minds this shifting of the burden of proof, and to have erred in consequence. They seem to have thought that the Respondents were entitled to the benefit of any doubt, as to the convincing nature of the explanation and justification of their own action.

That this was their view will appear from the observations made by Mr. Justice Wessels during the argument reported at page 1056 of the Record, as well as from a passage from the judgment of Mr. Justice Bristowe reported at page 1075 thereof. The first runs thus:—

> "Stripped of all these unnecessary things does it not come to this, that the circumstances of the case lead one to be extremely suspicious? When you deal with the *pros* and *cons* of the case, it is impossible to say that it is not a very suspicious transaction but it is not absolutely clear. There is a doubt about it, and being a matter of fraud, the Court must give Angehrn and Piel the benefit of that doubt."

The second runs as follows:—

> "Nor is there anything impossible in the explanation which the Plaintiffs give of the form of the transaction, namely, that it was desired to conceal from the Imperial Company the fact that the Federal Company were co-vendors with Shepherd. It is true that Angehrn's explanation of why he refrained from mentioning the profit to be derived from the Piel agreement in his official letter, namely, that there was a typist in the office whom he suspected of being a spy of the Imperial Company, is unconvincing. But even taking this into account I hesitate to say that it is sufficiently proved that the agreement with Piel was not intended for the benefit of the Company, or that the Plaintiffs intended to make a secret profit."

But this is to reverse the burden of proof. If the evidence given on behalf of the Appellants established *prima facie* that the Respondents had bought expressly on behalf of their principals cattle at a certain price, of which cattle they themselves had secretly acquired half the ownership at a lesser price, thereby apparently making a secret profit for themselves, then it was the business of the Respondents to prove satisfactorily the affirmative proposition that

the secret purchase was made, and the secret profit intended to be gained solely for the benefit of their principals. It was not the business of the Appellants under such circumstances, as seems to have been supposed, to prove the negative of these propositions. The conclusion at which the learned Judges of the Supreme Court appear, from the above quoted passages, to have arrived amounts apparently to this, that the Respondents have not proved satisfactorily the affirmative propositions above-mentioned. If so, their Lordships concur with them. It is, they think, the conclusion most favourable to the Respondents at which, having regard to the evidence, it is possible to arrive; but it is a conclusion fatal to the Respondents' case, if their taking of a secret profit from their employers had been *prima facie* established. So that the question for decision on this branch of the Case resolves itself into this: Did the Appellants establish at the trial a *prima facie* case that the Respondents had in breach of their express contract, or implied contract, to discharge the duties of their respective positions honestly and diligently, make, or attempt to make, in the way described, a secret profit for themselves out of the transactions carried on by them on behalf of their employers? Or, as it is frequently described, did they commit, or attempt to commit, a fraud upon their principals?

Now the Appellants gave in evidence two agreements, each bearing date the 7th of December, 1904; one (herein-after referred to, by way of distinction, as the " secret agreement ") made between the Respondent Piel and one Shepherd, by which after reciting that Shepherd was the owner of 650 head of cattle then grazing at Kameel River for which he had paid £10 per head, £6,500 in all, and that Piel had agreed

with Shepherd to pay half the price of the cattle upon getting one half the ownership thereof, and acknowledging the receipt of £500 in respect of halt such price, it was provided that Shepherd and Piel should become co-owners of the cattle on the payment by the latter to the former of £2,750 in addition to the £500 already received, making £3,250 in all. By the second of these agreements (hereinafter styled, for the sake of distinction, " the open agreement ") Colonel Wools Sampson, purporting to act as agent of the Rand Company, and the Respondents, purporting to act as agents for the Appellants, purchased in equal shares from this same Shepherd, as owner, these very same cattle at the price of £11 5s. per head, an advance of 25 shillings per head. The terms of payment were half the sum of £3,656 5s. immediately in cash, and the balance by two instalments, of £2,000 on the 31st of December 1904, and of £1,656 5s. on the 10th of January 1905. In pursuance of this agreement each of the joint purchasers gave to Shepherd a cheque for £1,828 2s. 6d. The cheque given by the Respondents was drawn on their own banking account, and was signed, in the name of the firm, Angehrn and Piel. These cheques were cashed by Shepherd.

The Appellants further gave in evidence the following documents, (1) a list drawn up in the Respondents' office at Johannesburg and forwarded by them to the office of the Company at Capetown, their head office in South Africa, of the payments made by the Respondents on behalf of the Company in the month of December, 1904, in which the following two items appear:—

31 December. Angehrn and Piel. Repayment of Loan,
£1,828 2s. 6d. on account purchase oxen.
Interest 27 days 8 per cent.—£10 16s. 4d.

It was the practice of the Respondents to charge interest at this rate on advances made by them on behalf of their principals, and this entry, save as to the date set opposite it, would correctly enough record the particulars of the open transaction; (2) a letter in German in the handwriting of Angehrn addressed to Piel, of which the following is a translation:—

> "Dear Mr. Piel,
>
> "We have bought the oxen at £11 5s. apiece, and paid half this amount.
>
> "Shepherd received two cheques, one of the Imperial Cold Storage, amounting to £1,828 2s. 6d., and one of the Federal for the same amount.
>
> "The Federal having sent money to Cape Town to-day, I gave Shepherd a cheque of A. and P.
>
> "I enclose a cheque for £2,750, being the balance of the amount which you owe Shepherd. I also enclose the receipt which Shepherd has to sign when you hand him over the cheque, and when you get the papers of the Government which prove that the oxen are his. You must also get a cheque from him of £1,828 2s. 6d. in your name, which you should bring over here yourself to pay it into the bank, or you can get the cash from the Bank at Pretoria, in which Mr. Shepherd can assist you. Then bring the money to Johannesburg. Therefore, you must bring £1,828 2s. 6d., which is the half of what he has altogether received from the Federal and Imperial Companies here; and as you are a partner you have to get one half.
>
> "He quite agrees, and has done his business very well.
>
> "Anything further to-morrow morning at five o'clock over the telephone.
>
> "Yours,
>
> "(Signed) A. ANGEHRN."

The cheque for £2,750 mentioned in this letter was drawn by Angehrn but was never given to Shepherd. Piel discharged his debt to Shepherd under the secret agreement in a different way. He gave to Shepherd on the 19th

of December 1904 a cheque drawn in the name of the firm on their private account in favour of Shepherd for the sum of £906 5s., that being the difference between the sum of £1,828 2s. 6d., already received by the latter under the open agreement, and the sum of £2,750 remaining unpaid under the secret agreement, less a small deduction of £15 12s. 6d. made by Shepherd in respect of 35 of the cattle purchased by him at less than £10 a head. This cheque was proved to have been paid. The third document was an extract from the Private Ledger of the Respondents in which the payment of these three sums of £500, £1,828 2s. 6d., and £906 5s.—is duly entered under the respective dates of the 1st December, 7th December, and 19th December 1904, no interest whatever being charged in respect of the sums of £500 or £906, as should have been done if they were really advances made by them on behalf of the Company. The fourth document, in German, proved to be written in Piel's handwriting, was found in the Company's safe at Johannesburg. Its translation was to the effect following:—

	£	s.
650 oxen	6,500	
My half	3,250	
Paid off	500	
Balance	2,750	
Cheque paid	2,750	
650 oxen sold at £11 5s.	7,312	10
Half paid up...	3,656	5
650 oxen cost me	6,500	
Sold £11 5s.	7,312	10

The fifth document was a letter dated the 27th of December 1904 from Angehrn to one Johnson, the Secretary of the Company in South Africa, in which no mention whatever is made

of the secret deal. It contained, however, the following passage:—

> "Our half of £3,656 5s. has already been paid by Angehrn and Piel in order not to interfere with the remittances at the beginning of the month, but of course this will have to be paid to Angehrn and Piel before 31st December."

To square the matter the repayment of this sum is entered in the list of payments as made on the suggested date, the 31st of December; but the statement contained in the letter as to only one half of the sum of £3,656 5s. (£1,828 2s. 6d.) having been paid is, if the secret agreement was entered into for the benefit of the Company, an absolute falsehood; since, if the Respondents' story be true, the two sums of £500 and £906 5s., making together £1,406 5s., had, in addition, been paid on account of the Company and for its benefit. The explanation given by Angehrn for having made no mention in this letter of the secret deal was, according to Mr. Justice Bristowe, that he feared the typist in his office might disclose the contents of the letter, and that the secret would in consequence reach the ears of the officials of the Rand Company. It is not surprising that that learned Judge should have found this explanation "unconvincing." In face of the fact that Angehrn need not have trusted his disloyal typist at all; but have written himself confidentially direct to Johnson if he wished to disclose how zealously he and Piel were labouring, by tortuous methods indeed, yet unselfishly, to gain for this great Company a paltry profit of between £300 and £400. It is the poorest excuse for suppression that could be conceived. Mr. Simon, on behalf of the Respondents, sug-

gested some other explanations of this reticence. As might have been expected, they were all ingenious, but they have this defect in common, they are different from that given by Angehrn himself, who ought to know the true reason for his action better than his Counsel. It has been urged that the Respondents are men of substance, and that it would be strange that they should, for this small sum, act in the manner charged against them; but it is almost equally strange that they should resort to the subterfuges they did resort to, in order to gain such a sum for their employers, and still more strange that, having done this, they should be silent as to their achievements, and be contented apparently, as it were, to do good to their employers by stealth.

Thus matters stood on the 31st of December 1904. It appears to their Lordships that, on these documents alone, coupled with the payments proved to have been made under them, a strong *prima facie* case was made out against the Respondents of the committal by them of a fraud upon their principals of the kind described. But the case by no means rests there. The anticipated profits were never realised! Only three hundred and thirty head of cattle were delivered by Shepherd to the purchasers. He had bought 650 head from the military authorities, but, failing to pay for all of them, the contract was cancelled by these authorities in respect of 253 head. On the 23rd or 24th of January 1905 Shepherd absconded. Two telegrams, dated the 24th and 25th of January, respectively, were sent by Piel, who was then at Pretoria, to Angehrn, who was then at Capetown, dealing with Shepherd's pecuniary affairs. They run as follows:—

"From Piel, Pretoria, to Angehrn,
c/o Federalize, Cape Town.
24/1/05.

"We have jointly received 330 for which Shepherd has settled except £20 Balance of 253 we can take for £2,550 cash which means we have overpaid £1,432, will see Shepherd's solicitor who drew up agreement and see if he cannot demand balance of cattle Shepherd left last Friday for Port Elizabeth where his wife lies ill."

"From Piel, Pretoria, to Angehrn,
c/o Federalize, Cape Town.
25/1/05.

"Received wire from Mrs. Shepherd reading Shepherd on way to Pretoria, stop. Will take balance of cattle for last jointly."

This purchase was effected for the sum of £2,530, which, with £20 remaining due by Shepherd to the military authorities, amounted to £2,550 in all, but these cattle, like the others, were sold to the two Companies at £11 5s. a head, making in all £2,902 10s. (of which £28 2s. 6d. was to cover expenses), half of which sum (£1,451 5s.) was paid by each Company, in other words, was paid by Angehrn and Piel as agents of the Company to themselves as vendors to the Company. No entry is to be found in any of the books of the Company up to March 1905 giving any clue to the existence of the secret agreement. Such entries are only to be found in the Private Ledger of the Respondents. The only reference to this last transaction appears in the list of the payments made in the month of January 1905 under date the 31st of that month.

It runs thus: "Angehrn and Piel Bal. 583 oxen (Shepherd's) £1,451 5s. joint purchase Imperial C. S."

Shepherd fled to Capetown *en route* for England. From a lengthy correspondence between

Angehrn and Verster given in evidence by the Appellants, it is plain that Angehrn desired that the criminal law should be put in motion against Shepherd, not so much for the purpose of punishing him for any crime he may have committed, as to force him to pay what he owed them. Angehrn consulted Verster, who swears that he (Angehrn) told him the secret agreement was a private transaction, not an affair of the Company's. Angehrn denied this; but Verster's story is corroborated by this fact that Johnson, when enquiries were made from him by the London Board as to the matter, acting on information supplied by Verster, wrote to the Board that it was a private transaction—a gratuitous and purposeless invention on Johnson's or Verster's part if Angehrn's story be true. The Police at the Cape however seem to have been more precipitate than Angehrn desired. Shepherd was arrested on the charge of obtaining the sum of £1,378 2s. 6d. by fraud from the Respondents.

Angehrn was examined as a witness. It was then seen that the secret agreement must result in a loss, not a profit, and then for the first time an item connected with it appears in the Ledger of the Company. It is under the date of the 6th of March 1905—" Cash advanced by A. and P. £1,406 5s.," the amount of the two sums of £500 and £906 5s. by which their debt under the secret agreement was in part discharged; but, significantly enough, no interest is charged in respect of these sums.

In their Lordships' opinion, the case thus proved against the Respondents, if not overwhelming in character, was at least one which called imperatively for a clear, full and conclusive answer. That answer, they think, has not been given. The Judges of the Supreme

Court, as is evident from the above quoted passages, did not think so either. On the contrary, the case of the Respondents is, in their Lordships' view, inconsistent with the documents and with the usual course of dealing followed between the Respondents and their principals. It rests almost entirely on the Respondents' own evidence. Their explanation of their conduct is, their Lordships think, unsatisfactory and unconvincing, and they are moreover of opinion that the fact cannot be lost sight of that in the other branch of the case the Respondents have, by their own letters, been shown to be men capable of resorting to falsehood, hypocrisy and deception where it suited their purpose to resort to them. In their Lordships' opinion, therefore, the Appellants have, on this branch of their case, justified their action in dismissing the Respondents from their service, and the Appeal should in consequence be allowed. As, however, the questions arising on the reply of condonation have been fully argued, and as that reply is based upon principles novel in character and far-reaching, if not mischievous, in their application, it is necessary to deal with it briefly. The word " condonation," though used in some of the authorities cited by most distinguished judges, is not quite happily chosen. In the cases of *Phillip* v. *Foxhall*, L.R. 7 Q.B. 680, and *Boston Deep Sea Fishing and Ice Company* v. *Ansell*, L.R. 39 Ch. D. 339, so much relied upon by the Respondents the word is used as applicable to a case where a master, with full knowledge of a servant's misconduct continues to retain him in his, the master's, service. It is likened to the case of a man who, knowing he has a legal right to do either of two things determines or elects to do one of them in preference to the other, and also likened to

the case of a man who, knowing that a forfeiture has been worked, and that he has a legal right to take advantage of it, deliberately abandons that right, that is, waives the forfeiture. In these cases, however, to which "condonation" is compared, the burden of proving that the election had been made or the forfeiture waived would rest upon him who relied upon the one or the other. And so it is with condonation. The Master must be fully aware that the servant has by his misconduct forfeited the right to be continued in his master's service, which is the correlative of the master's right to dismiss him before he can be held to have waived that forfeiture. These authorities, however, lend no support to the theory that it is competent for a guilty servant to say to his master—"I admit I have misconducted myself in such a way as to justify my dismissal from your service. I admit that when accused to you on suspicion or little more than suspicion of this misconduct, I lied lustily to you, denied the accusation, and vehemently protested my innocence, and that by that lying and deception I led you to believe I was innocent and induced you to continue me in your service. But you were too credulous, you ought not to have believed me without inquiry into the facts of which you had notice. Had you made that inquiry you would have discovered how gross my misconduct was, and because you abstained from making it you must be deemed to have knowledge of everything to the discovery of which the inquiry would have led, must be taken to have condoned the offence, which in fact you never believed I had committed, and now, though you have discovered my wrongdoing, you are bound to continue me in your service."

Notice or knowledge of a servant's mis-

conduct cannot be imputed to a master in this fashion. If the master accepts the servant's denial of guilt, and honestly comes to the conclusion that the servant is innocent, then whatever the master's credulity, the case does not come within these authorities, since no man can condone a wrong which he does not believe was committed upon him.

Until Edward Nelson landed in South Africa on the 22nd of October, less than a month before the dismissal of the Respondents, nothing in the shape of proof of the Respondents' misconduct touching the reduction of the overdrafts, as distinguished from suspicion, had come to his knowledge, or to the knowledge of the London members of the Board or their Secretary, other than the copy of the telegram sent by Piel to Angehrn on the 15th of January preceding. It ran thus:—" Everything allright. Strong wire has been sent to reduce immediately to £15,000. Will never be allowed to go above that amount." No doubt that document looks suspicious. There is a jubilant note in it which accords ill with the sympathy and pity expressed in the letter of the same date written, with infinite hypocrisy and duplicity, by Angehrn to E. Nelson; but in itself the telegram is ambiguous. Angehrn had in writing and by word of mouth in South Africa and before the Board in London protested his innocence in reference to the reduction in January. E. Nelson swears that despite this copy telegram, he and the Board believed Angehrn. It was not unnatural that they should have believed him; he was their brother director and had not then been discovered to be the consummate liar and trickster he has since been shown to be. There is no finding of fact that this statement of Edward Nelson is untrue. He left for South

Africa immediately upon the September reduction being reported to the London Board. The misconduct of the Respondents, if condoned at all, must therefore have been condoned by what took place in South Africa between the 22nd of October and the 20th of November, when the Respondents were dismissed. It may be assumed that on Edward Nelson's landing in South Africa, Johnson communicated to him any suspicion he entertained in reference to the conduct of the Respondents in relation to the overdrafts; but it is not pretended that either of the Respondents had up to the 21st of November ever confessed to him or to any person connected with him that they had had any share in the reduction of the overdrafts. Nor was it proved that Henderson, the Bank Manager at Pretoria, or Cruikshank, the Bank Manager at Capetown, or any other official of the Bank, ever disclosed to him or to any person acting for him that it was the guarantors or some of them who put the Bank in motion. The only disclosure made to Edward Nelson of anything which it is alleged amounted to proof of the misconduct of the Respondents in this respect was made, if at all, by Verster. Mr. Justice Bristowe, at page 1083 of the Record, is reported to have treated a passage in Verster's evidence as a full disclosure of the conduct of the Respondents and himself in relation to the reduction of the overdrafts. The passage will be found at page 219 of the Record. It is very doubtful whether Verster in it refers to the transactions of January and September or to the latter alone. He was being cross-examined in reference to a statement contained in one of Johnson's letters to the effect that Verster was trying " to run with the hare and hunt with the hounds," and was asked the question, " Had

you ever indicated to Mr. Nelson that you were in any plot or intrigue against Angehrn and Piel?" To this he replied by asking the question, "When?" Counsel answered, "At this time," and Verster replied, "Yes. After his arrival. I told him on his arrival what transpired." The matter was not further inquired into. Verster was examined on commission before the issue of Condonation was raised. Edward Nelson, as is plain from the passage in his evidence at page 103, line five, of the Record, was never asked a single question touching this alleged communication of Verster's to him. With all respect to the learned Judge, it would appear to their Lordships to be most unsafe, as well as most unjust to the Appellants, under these circumstances, to attempt to draw from this passage in Verster's evidence, the inference which he appears to have drawn, namely, "that (in his own words) it must be taken that Edward Nelson had before him as full information on all material points as we [the Judges] have before us now" [the date of the hearing on appeal]: Yet it is by this evidence, plus the ambiguous telegram, that the Respondents claim to have discharged the burden of proof which rested upon them and to have established that Edward Nelson was fully aware of the Respondents' misdeeds before he offered, as he undoubtedly did offer, to transfer Angehrn to the post of Manager at Johannesburg and to transfer Piel to that of Manager at Pretoria.

This offer is in reality and truth the sole act done by E. Nelson in South Africa upon which the alleged condonation rests. It is, no doubt true, that one of Edward Nelson's letters from South Africa to his brother contains the passage following:—" We have sufficient proof that

Johnson's telegram is correct with reference to the reduction of the overdraft." He does not say what the proof was; does not allude to Verster, which is strange if Verster, as Mr. Justice Bristowe assumes, had made a full disclosure. The attention of either of the brothers Nelson was never directed to this letter in cross-examination. No opportunity was given to either of them to explain to what it referred. It is clear, however, from Edward Nelson's letter to his brother, dated the 29th of October, that he, Edward, had only deferred the discussion with Angehrn on the " overdraft matter " until he had ascertained from Hughes, the Managing Director of the Imperial Company, the latter's views on the subject of the amalgamation of the two Companies. Edward Nelson did not meet Hughes for some days. The negotiation with a view to amalgamation broke down on the 3rd of November. A few days after Angehrn left Capetown for the Transvaal and E. Nelson and Nind left it for Natal. Nelson did not again see Angehrn till they met in Pretoria on the eve of the dismissal when the telegraph book was discovered and the guilt of the Respondents established too plainly to be any longer denied. In the interval, no negotiations of any kind, direct or indirect, had taken place between them. It is clear from the correspondence between the brothers Nelson, which is in evidence, that Edward Nelson had not any intention of abandoning inquiry into the " overdraft matter," at least if amalgamation of the Companies did not take place, possibly if it did take place. Neither he nor any person acting on behalf of the Company appears to have ever expressed the intention to continue the Respondents in the Companies' employ, irrespective of the result of that investigation, or,

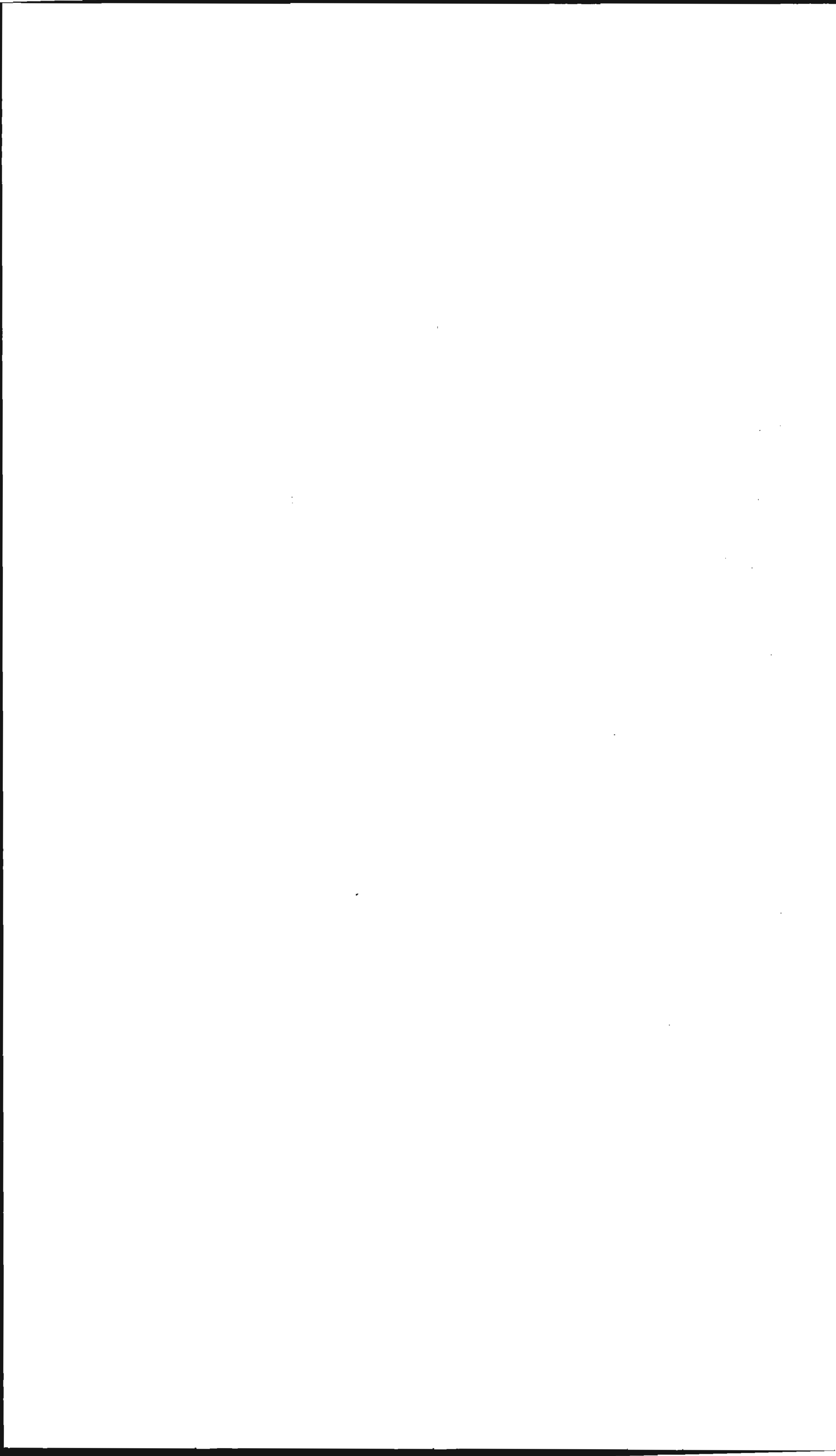
save the offer above-mentioned, ever did anything to lead the Respondents to believe that the inquiry would not be followed up or its result acted upon. The offer itself was not definitely accepted by Angehrn, nothing was done upon it, and unless Verster fully disclosed the secret operations of the Respondents, which their Lordships think cannot be safely assumed, it must have been made before E. Nelson had, as far as appears in the evidence, obtained such proofs of the guilt of the Respondents as it would have been safe for him to have acted upon. He seems, indeed, after his arrival in South Africa to have, in the difficult position in which he was placed, transacted this business with the ordinary prudence and caution of a responsible business man, gathering information where he could, but waiting till he was sure of his ground before he took decisive action—that it amounts to, and fairly considered, nothing more.

There was no undue delay. On the contrary, he dismissed the Respondents peremptorily within 48 hours of the discovery of the piece of evidence which alone made such action reasonably safe. Their Lordships are therefore of opinion that on this branch of the case, as well as upon the other, the Respondents have failed to discharge the burden of proof which rested upon them, that is, they have failed to prove by satisfactory evidence that knowledge of the Respondents' misconduct in this matter was brought home to Nelson or Nind before they reached Pretoria on the 19th of November, or that even if it had been brought home to them the Appellants or their agents have done anything which would amount to a waiver of their right to act upon this knowledge, or which would disentitle them to act upon it. The

Appeals, their Lordships think, should therefore be allowed, and the decision of the Supreme Court in both cases reversed and judgment entered for the Appellants in both the original Actions, and also in each Action on the counter-claim for the sum of £1,053 15s. with interest at 6 per cent. from the 6th of March 1905 until payment thereof, and for the costs of the Actions in the Supreme Court.

The Respondent Angehrn must repay to the Appellants the sum of £2,428 with interest at 6 per cent. from the date at which the damages awarded to him were paid into Court until payment thereof, together with the amount paid to him by the Appellants in respect of costs, and the Respondent Piel must repay to the Appellants the sum of £2,750 with interest from the same date at 6 per cent. until payment thereof, together with the sum paid to him by the Appellants in respect of costs.

Their Lordships will humbly advise His Majesty accordingly. The Respondents must pay the costs of these Consolidated Appeals.



In the Privy Council.

THE FEDERAL SUPPLY AND COLD STORAGE COMPANY OF SOUTH AFRICA, LIMITED

v.

(1) ADOLPH ANGEHRN;

(2) ALBERT PIEL.

LONDON:
Printed for His Majesty's Stationery Office
By LOVE & MALCOMSON, Ltd., Dane Street,
High Holborn, W.C.
1910.