HOUSE OF LORDS.

Friday, June 29.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, James of Hereford, Robertson, and Atkinson.)

NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS AND OTHERS *v.* SMITHIES.

(On Appeal from the Court of Appeal in England.)

Process — Recovery of Documents — Tendency to Incriminate.

The Court will not refuse to grant an order for the discovery of documents against a party to an action merely on the ground that such discovery may incriminate the party and render him liable to a criminal charge.

Smithies, a master plasterer carrying on business in Birmingham, brought an action against the National Association of Operative Plasterers and the trustees thereof for damages for conspiracy, the conspiracy alleged being that they unlawfully and maliciously and with intent to injure him conspired together and with others to induce, persuade, influence, and coerce certain workmen, and in fact indeed persuaded, influenced, and coerced such workmen not to fulfil their contracts with him, and not to enter into further contracts with him or to engage in his service. The defences stated were, *inter alia*, that the acts complained of were lawful and done for the purpose of persuading Smithies to adhere to an agreement to which he was a party as a member of the Master Plasterers Association.

Smithies issued a summons for directions, asking for discovery of documents.

Master Archibald ordered discovery against the defendants, and Bucknill, J., confirmed the Master's order.

The defendants appealed, and the Court of Appeal (Collins, M.R., and Romer, L.J.) adhered.

The defendants appealed to the House of Lords.

Lord Chancellor (Loreburn)—This is an appeal from a decision of the Court of Appeal, which affirmed a decision of Bucknill, J., at chambers, and also a decision of the Master. The effect of the order appealed against is that the defendants were required to state on affidavit "what documents are or have been in their possession or power relating to the matter in question in this action." The appeal was really rested on two grounds—the first, only faintly relied upon, that assuming that the Court had power to make the order in question, yet it ought not to have made it as a matter of discretion. That was a very difficult ground of appeal to sustain, because nothing but an extremely exceptional case would warrant this House in interfering with the exercise of discretion by three successive tribunals in a matter which rested on discretion. It is sufficient to say that I do not think that we can interfere in any way upon that ground. The second ground, which was really the important and main ground of the argument, was that in a case of this kind, which involved a charge of conspiracy, no order for an affidavit of documents could be made. That would be a very far-reaching proposition. I have listened with attention to the able statement of the cases by Mr Evans, but he has not satisfied me that that ever was the law or the practice in Chancery, and certainly it would come as a great surprise to a great many of those who have practised in the courts of common law. I think that the right law on the subject is laid down in the case of *Spokes* v. *Grosvenor Hotel Company*, 76 L.T.R. 677, (1897) 2 Q.B. 124, which followed an earlier case of *Fisher* v. *Owen*, 38 L.T.R. 577, 8 Ch. Div. 645. In my opinion these two cases are conclusive, and the judgment appealed from is right, and the appeal ought to be dismissed with costs.

Lord Macnaghten—I am of the same opinion. I do not think that there is the slightest ground for this appeal. I think that the law is laid down and the practice of the Court of Chancery is perfectly correctly described in the judgments of James and Cotton, L.JJ., in the case of *Allhusen* v. *Labouchere*, 39 L.T. Rep. 207, 3 Q.B. Div. 654. Cotton, L.J., there said—"It always has been the practice of the Court of Chancery, and that practice is now under the Act of 1873, sec. 25, sub-section 11, universal, that it is no objection to an interrogatory, and no ground for taking the interrogatory off the file, if relevant, that the answer might tend to incriminate the party to whom it is exhibited. He may say, if he thinks fit, 'I refuse to answer on the ground that the answer may tend to incriminate me,' but then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way he is not bound to answer the interrogatory." Now in this particular case there is no interrogatory which could possibly tend to incriminate the defendants. They are merely asked if they have any documents relevant to the matters in question, and the defence is that they are entitled to say—"We have a bundle of documents, we will not tell you what they are, but we think that some of them may possibly tend to incriminate us."

Lord James of Hereford—I desire to add very shortly that I concur entirely in the result arrived at by my noble and learned friends. The argument at the bar, if acted upon, would really carry the decisions of the Court almost to the point of absurdity. The argument was that in every action which presented in its nature the capability of having two aspects, one of which would be criminal, no order for discovery could be obtained. Thus, taking the instance given, in an action for libel where discovery was sought it would be sufficient for the person against whom the discovery was sought to appear and simply make answer and say, "This is an action in which a criminal

aspect may present itself, and therefore I am entitled not to answer or make discovery." Now, why in an action like this there should be an entirely new objection to discovery without good cause for it I really do not know. No doubt in the instances given the reason why courts of equity would not relieve in actions of forfeiture and penalties was not made very clear at the bar, but I should suppose it to be this, that the courts of equity were so averse to actions of that nature being brought at all that they would not assist them, and therefore they did not allow discovery to be obtained. But in the action with which we are dealing here of course no such natural objection can possibly be found. If this argument were acted upon the immunity from discovery would go infinitely further, as was pointed out in the course of the argument, than the immunity which is accorded to a witness. If a witness says, "I decline to answer this question because it would tend to incriminate me," he does not escape by so saying unless he can satisfy the Court that there is reasonable ground for the objection being made. Here all that the defendants are asked to do is to make a statement, and they may say, "This will tend to incriminate us if we give an answer." If they make that statement the Court will have to deal with the answer so given. But the argument goes much further than that, and relies upon the nature of the action itself as giving immunity from making an answer. In addition to the very strong reason which prevails in this matter for the determination that the appeal should be dismissed, I entirely agree with what the Lord Chancellor has said, that this case is concluded by authority. The case of *Spokes* v. *Grovesnor Hotel Company* (*ubi sup.*) really determined the question which we have now to decide, and I think that there is no reason whatever for overruling that decision.

LORD ROBERTSON and LORD ATKINSON concurred.

Appeal dismissed.

Counsel for the Appellants—S. T. Evans, K.C.—Clement—Edwards. Agents—Pattinson & Brewer, Solicitors.

Counsel for the Respondent—M. Lush, K.C.—M'Cardie. Agents—Ward, Bowie, & Company, Solicitors.

PRIVY COUNCIL.

Monday, July 16.

(Present—The Right Hons. the Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills.)

TRIMBLE AND ANOTHER *v.* GOLDBERG.

(ON APPEAL FROM THE SUPREME COURT OF THE TRANSVAAL.)

Partnership—Purchase by One Member of Partnership—Right of Others to Participate in Profits—Subject of Purchase not Connected with Partnership.

Two persons who, along with a third person, were partners in a certain adventure, purchased certain property outwith the scope and object of the partnership adventure, the subject of the purchase not being part of the business of the partnership nor an undertaking in rivalry with the partnership or connected with it in any proper sense, nor was the information on which the purchase was made derived from the position which the purchasers occupied as members of the partnership.

Held that the third partner was not entitled to share in the profits of the transaction.

Cassels v. *Stewart*, 1881, 6 A.C. 64, 8 R. (H.L.) 1, *followed*.

Appeal from a judgment of the Supreme Court of the Transvaal, consisting of ROSE-INNES, C.J., MASON and CURLEWIS, JJ., who had reversed a judgment of the High Court (SMITH, J.).

The facts appear from their Lordships' judgment, which after consideration was 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 which 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, 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