

MEREDITH, C.J.O.:— . . . The matters to which the appeal and cross-appeal relate may be referred to as: (1) the Yale business; (2) the Wuerth Haist & Co. business; (3) the oil mill property; (4) the defendant's claim for commission. . . .

The argument of counsel has failed to satisfy me that the conclusion of my brother Middleton as to the Yale business is erroneous.

It is, no doubt, clear law that a partner must account to his firm for the profits made by him in any business of the same nature as and competing with that of his firm, if he carries on any such business without the consent of his partners.

I share the doubt of my brother Middleton as to the Yale business being of the same nature as and competing with the partnership business; but, assuming it to have been, the evidence, in my opinion, establishes that it was carried on with the consent of John Livingston. . . .

In my opinion, the appeal fails and should be dismissed.

My brother Middleton dealt with the Wuerth Haist & Co.'s business in the same way as with the Yale business, under the mistaken belief that it was conceded that the same considerations were applicable to both of them. There was no evidence of any consent by John Livingston to his brother engaging in the Wuerth Haist & Co. business on his own account, and it was not even shewn that John knew or had any reason to think that James was interested in it.

I would, therefore, reverse the order of my brother Middleton as to that business, and allow the referee's report as to it to stand.

I agree with the conclusion of my brother Middleton as to the liability of the defendant with respect to the oil mill property, but I am not able to agree with his reasons for that conclusion. The view of my learned brother is, that the purchase of that property, though in form by Erbach, was in fact a purchase by the defendant, but that, the property having been afterwards, and before the transaction was attacked, transferred by Erbach to an incorporated company . . . at the same price as that for which it was sold to Erbach, there was no profit on the resale to be accounted for; that, nevertheless, the defendant would have been liable to account for the real value of the property, but that there was no liability on that basis because the Referee has found that it was sold for its full value, and that finding has not been appealed from.

My learned brother appears to have thought that the Referee