THE

LAW REPORTS.

Queen's Bench Division.

REPORTED BY

ARTHUR P. STONE AND EDMUND LUMLEY,

BARRISTERS-AT-LAW;

IN THE COURT FOR CROWN CASES RESERVED

BY

CYRIL DODD, BARRISTER-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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HYDRAULIC ENGINEERING COMPANY v. MCHAFFIE.

contract sued on was subsidiary, could not as such be recovered; that was because penalties are not the natural consequence of a breach. Here, however, the defendants knew that Justice might refuse to take the machinery if it should be delivered by the plaintiffs too late; the defendants therefore are liable for the consequences of their default.

Judgment affirmed.

Solicitors for plaintiffs: *Woollacott & Leonard.*
Solicitors for defendants: *Cheston & Sons.*

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May 27.

[IN THE COURT OF APPEAL.]

WADDELL *v.* BLOCKEY.

Damages, Measure of—Sale induced by Fraud—Loss occasioned by Cause happening after Sale.

L. ordered the defendant to buy for him rupee paper: the defendant sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what the defendant had sold to him, and ultimately re-sold it at a loss of 43,000*l.*:—

Held, that the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper and the price which he would have received, if he had resold it in the market forthwith after purchasing it.

ACTION to recover damages for a fraudulent misrepresentation.

The cause was tried before Huddleston, B., without a jury, and the following facts were proved:—In August, 1875, the defendant represented to Peter Lutscher that Indian 5½ per cent. rupee paper would probably be a profitable investment; and upon the faith of these representations Lutscher instructed the defendant to buy for him 100,000*l.* worth of rupee paper. The defendant suggested that as rupee paper paid 5½ per cent., Lutscher might borrow money at a lower rate of interest in order to pay for what he might buy. The defendant accordingly purported to buy for Lutscher 110,000*l.* worth of rupee paper, and forwarded to him contract notes in due form. Subsequently in the same month Lutscher authorized the defendant to buy rupee paper to the

extent of 200,000*l*. The defendant accordingly purported to buy for Lutscher rupee paper to that amount, and Lutscher accepted it. The purchases were completed by Lutscher in the belief, that they were bonâ fide made by the defendant on his behalf on the Stock Exchange. After the purchases rupee paper rapidly fell in value, and ultimately, in March, 1876, Lutscher sold what had been bought for him by the defendant at a loss of 43,000*l*. In April, 1876, Lutscher filed a petition for liquidation by arrangement, and the plaintiff was appointed trustee. In June, 1877, it was discovered that the representations of the defendant as to the rupee paper were untrue, and that the defendant had not bought rupee paper for Lutscher on the Stock Exchange, but had simply transferred to him certain rupee paper belonging to himself. The present action was then commenced by the plaintiff for the benefit of Lutscher's estate.

Huddleston, B., found as a fact that the defendant had been guilty of a fraudulent misrepresentation, in pretending that he had purchased the two amounts of rupee paper on Lutscher's account upon the Stock Exchange and was not transferring his own stock to Lutscher. His Lordship further found that Lutscher had paid for the rupee paper on the faith of the defendant's representation, and he held that the plaintiff was entitled to recover the difference between the price which Lutscher had actually paid, and the price at which he has actually sold it, and he ordered judgment to be entered for the plaintiff for 43,000*l*.

The defendant appealed against the judgment, and also applied for a new trial on the ground that the damages were excessive.

May 6. *R. E. Webster, Q.C.*, and *Warmington*, for the plaintiff. The damages are not excessive and were assessed upon a right principle. The insolvent was not bound to sell the rupee paper when the market began to fall: *Twycross* v. *Grant* (1); and the plaintiff may recover damages for the injury sustained by Lutscher, which was the direct and natural consequences of his acting on the faith of the defendant's representations: *Mullett* v. *Mason*. (2) When an agent is employed to buy, it is a fraud if he sells his own property to a principal, who is under the belief that he is dealing

(1) 2 C. P. D. 469. (2) Law Rep. 1 C. P. 559.

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with a third party: *Brookman* v. *Rothschild* (1); *Gillett* v. *Peppercorne* (2); *Kimber* v. *Barber* (3); and in the present case the defendant occupied a fiduciary position. Upon the discovery of the fraud, the person defrauded may annul the contract, and the damages awarded in this action truly represent the amount payable to the plaintiff if the contract were annulled.

Cohen, Q.C., and *C. H. Anderson*, for the defendant. The proper mode of measuring the damages is by ascertaining the difference between the price actually paid and the real value of the rupee paper: *Davidson* v. *Tulloch* (4); that decision is exactly in point for the present case, except as to the question of fiduciary position; and if a person holding a fiduciary relation commits a breach of duty, he ought not to incur a more extended liability than one who perpetrates a downright fraud.

Cur. adv. vult.

May 27. The following judgments were delivered:—

BRAMWELL, L.J. We all are agreed that this appeal must be allowed: the damages cannot remain at the amount at which they have been assessed. When a person has been defrauded in buying a chattel, and is in a condition to restore it, he is entitled upon discovering the fraud to receive back the price, provided he offers to return the chattel. It may be that if the plaintiff, who represents the insolvent buyer, could have tendered the rupee paper to the defendant, he might have recovered back the whole price. Reliance has been placed upon *Brookman* v. *Rothschild.* (1) I do not deem it necessary to consider the principle of that decision: I think it distinguishable from this case. I will merely say that the decision seems to me to have worked an injustice, and to have taken away money from those who were entitled to keep it. If there could have been a restitutio in integrum, possibly the plaintiff in this action might have recovered in full. The question, however, is reduced to this, what damages is the plaintiff entitled to? How much worse off is the estate which he represents owing to the bargain into which the insolvent entered? We may suppose

(1) 3 Sim. 153; on appeal, 5 Bli. (N.R.) 165.
(2) 3 Beav. 78.
(3) Law Rep. 8 Ch. 56.
(4) 3 Macq. 783, 790.

the insolvent to have been an intentional and willing buyer: in fact he bought the rupee paper, he accepted it, and used it, that is, sold it. Therefore the plaintiff cannot tender it to the defendant, and the question is one of damages. The right mode of dealing with the damages is to see, what it would have cost the insolvent to get out of the situation, that is, what is the price at which he could have sold the paper? Suppose that a horse has been sold with a fraudulent warranty, and suppose the horse is re-sold with knowledge of the defect which had been fraudulently concealed, the damages to be recovered would be the difference in the prices obtained at the two sales. Here the question is, what could the insolvent have obtained, if he had re-sold the rupee paper which he had been induced to purchase by the fraud of the defendant. It was for the insolvent to consider whether he would sell it or retain it. The retention of it was his own voluntary act. If he elected to remain owner after the rupee paper began to fall in price, his loss was not owing simply to his having purchased it, but to his having purchased it and retained it. When I say that his loss is to be estimated by the price which he might have obtained upon a re-sale, I mean that he is entitled to include the commissions which he would have to pay upon the sale and the re-sale; further, he would not have been bound to re-sell hastily and unadvisedly, but he ought to have time allowed to him to ascertain what his loss really was. Upon these principles the amount must be calculated at which the damages are to stand.

BAGGALLAY, L.J. I think that the damages have been assessed at too high a rate. It is difficult to lay down a general principle, for every case must to some extent depend upon its own circumstances. In this case the defendant, having more than 300,000*l.* in rupee paper, agreed to buy rupee paper for the insolvent, suggesting that the rupee paper would pay interest at 5½ per cent., and that the money to pay for it could be obtained at a lower rate. The insolvent had no idea when he ordered the defendant to buy for him, that the defendant would sell rupee paper belonging to himself. The paper was ultimately sold by Lutscher, who thereby incurred a loss of about 43,000*l.*, and he is represented by the plaintiff, who is his trustee in liquidation. There are several

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modes in which the damages might be assessed. First, they might be assessed upon the basis of the difference between the price which the insolvent paid for the rupee paper and the price for which he might have bought a similar amount in the market; but this would not entitle the plaintiff to damages unless Lutscher paid too high a price for it. Secondly, they might be assessed upon the basis of the loss which the insolvent actually sustained. This was the course adopted by Huddleston, B.; but I think this view cannot be sustained, for it seems plain that the loss to the plaintiff flowed not from the fraud of the defendant, but from the circumstance that the insolvent held the stock during a period of five months whilst the rupee paper continued to depreciate in value. A third view is that indicated by Bramwell, L.J., namely, that the plaintiff, as representing the insolvent's estate, is entitled to the difference between the price which Lutscher paid for it and the price at which Lutscher might have re-sold it. This view I am prepared to adopt, and I agree that the damages should be assessed upon this basis. I think, however, that in ascertaining this difference the price at which Lutscher might have re-sold must be taken to be the price at which he might have re-sold if he had sold upon the same day upon which he bought from the defendant. What occurred after that is not to be taken into account.

THESIGER, L.J. I agree in the conclusion that the damages have been assessed upon a wrong principle, are excessive, and must be reduced. The plaintiff complains that the insolvent has been induced by the fraudulent misrepresentation of the defendant to buy rupee paper belonging to the defendant, which he would not otherwise have bought; and the plaintiff asks to be recouped the loss sustained upon the re-sale of such rupee paper through its depreciation in the market consequent upon a fall in the value of silver. The mere statement of the plaintiff's case indicates the objection to which his demand is open. There is no natural or proximate connection between the wrong done and the damage suffered. In *Twycross* v. *Grant* (1) the thing purchased was worthless, owing to inherent defects existing at the time of

(1) 2 C. P. D. 469.

the purchase. The plaintiff became a shareholder in a company, which was a dying one, and the fact of his holding his shares until it was dead, was decided by this Court to be no reason for reducing the damages assessed by the jury below the full value paid for the shares. In the present case, on the contrary, the thing purchased had at the time of purchase no inherent defect. There was nothing in it which either necessarily or naturally, or even probably, would lead to any loss. It became deteriorated by reason solely of a cause which subsequently arose. Under such circumstances the general rule laid down by the Lord Chief Justice in the case cited (1) would be applicable: "If a man is induced by misrepresentation to buy an article, and while it is still in his possession it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration, which has arisen from some other supervening cause." It is said that in this case if the fraud had been discovered before the re-sale, the insolvent might have avoided the purchase and returned the rupee paper, claiming the full sum given for it; and it is argued that inasmuch as in that way practically the defendant would have been mulcted in the damage represented by the difference between the value of the thing at the time of its sale and the depreciated value at the period of its return, it ought to follow that even when a re-sale has taken place the plaintiff ought to be put in the same position as he would have been if it had not. I am, in the first place, not prepared to admit the premise upon which this reasoning rests, for it appears to me by no means plain that where the article, although existing in specie, has depreciated in value by reason of a cause supervening subsequently to the sale, the buyer upon discovering the fraud can avoid the sale to him. It may reasonably be argued that the depreciated article proposed to be returned is not the same as that purchased, the parties cannot be put in statu quo, and the condition therefore upon which an avoidance of a contract upon the ground of fraud depends cannot be performed. But assume this not to be so, still it does not follow that the buyer, who has by re-sale rendered the return of the article in specie

(1) 2 C. P. D. at p. 544.

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impossible, is entitled to have the seller and himself put practically in the same position as if it had been returned. *Davidson* v. *Tulloch* (1) appears to be authority for the proposition, that in such a case the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the article at the time of the purchase. But the present case is complicated by the circumstance of the defendant's fiduciary position in the matter of the purchase, and by the fact that the fraud did not touch the value of the article sold, but consisted of a fraudulent representation that it was sold by a third party and not by the defendant himself. It would seem, however, strange if under such circumstances a plaintiff who has got the article he bargained for, upon whom no fraud as regards its value has been practised, could, after the article has been depreciated and resold at a loss owing to a cause totally unconnected with the fraud, claim to recover all the loss which he has thereby sustained. I cannot see upon what principle such a claim could be based. *Brookman* v. *Rothschild* (2) was a case of a very special and peculiar character, and does not, in my opinion, govern the present. I think that the damages may fairly be ascertained in the manner proposed by Baggallay, L.J., for by that course being adopted, as I understand it, the plaintiff is saved the loss, if any, which really accrued to him by reason of the insolvent's buying the defendant's rupee paper instead of getting rupee paper in the market, and the defendant is precluded from reaping any profit he may have derived from his disposal of the rupee paper privately to the insolvent instead of throwing it, as regards such sale, as a whole upon the market.

Action referred to re-assess the damages.

Solicitor for plaintiff: *A. G. Ditton.*
Solicitors for defendant: *Flux & Co.*

(1) 3 Macq. 783, 798. (2) 3 Sim. 153; on appeal, 5 Bli. (N.R.) 165.