their priest, and I hold that the ecclesiastical authorities are entitled to demand a certain standard in matters of faith and conduct before they will allow persons to participate in the religious exercises which they perform.

Finally it has been said in this court that the appointment of Alhaji Saidu was a breach of trust as he was appointed by the sole surviving trustee alone. Of this we have no evidence, although his appointment in 1921 suggests the probability that there were not nine trustees then surviving. On this I hold that the respondents, not having put this appointment in issue in the court below and having in their defence referred to him as "the duly appointed priest," are debarred from raising that point now.

For these reasons I hold that the judgment of the learned Chief Justice should be set aside.

I hold that this court should grant an injunction to restrain the respondents from either doing any of the acts set forth in the statement of claim or from inciting any other person or persons to do all or any of them.

The court will order the appointment of new trustees for the purpose of carrying out the provisions of the trust deed and in that behalf will give the necessary directions with liberty to apply, the respondents to pay the costs of claim and counterclaim both in this court and in the court below.

SAWREY-COOKSON, J. and BUTLER-LLOYD, J. concurred.

Order accordingly.

SCHUMACHER AND STRAUMANN v. JEMAL AND GALLIZIA

Full Court (McDonnell, Ag. C.J., Sawrey-Cookson and Butler-Lloyd, JJ.): December 1st, 1924

[1] **Contract — misrepresentation — meaning of representation — simplex commendatio cannot amount to actionable misrepresentation:** A *simplex commendatio*, that is a seller's praise of his goods in general terms cannot amount to an actionable representation (page 111, lines 1–3).

[2] **Contract — misrepresentation — representations outside contract — in absence of fraud, oral representations of quality not embodied in written contract not binding — applies despite seller's knowledge of defects if**

buyer could inspect goods: When a written contract does not embody the seller's oral representations of the quality of his goods, he is not bound by them in the absence of fraud; this applies even when the seller knew of defects which he did not disclose if the prospective buyer had every opportunity to inspect the goods (page 108, lines 37—40; page 109, line 41—page 110, line 24; page 110, lines 33—34).

absence of fraud, express oral warranty of quality not binding if not embodied in written contract — applies despite seller's knowledge of defects if buyer could inspect goods: See [2] above.

[4] Sale of Goods — risk — purchaser's risk — sale expressly at purchaser's risk puts burden on him of discovering all defects — vendor liable only if actively conceals known defects: An express stipulation that the quality of goods sold is at the purchaser's risk transfers the burden of examining the goods for both latent and apparent defects to the purchaser and relieves the vendor of liability unless he actively conceals the truth about known defects (page 111, lines 17—23).

The plaintiffs/respondents brought an action against the defendants/appellants in the Supreme Court for damages for fraudulent misrepresentation.

The appellants sold a steam launch to the respondents. Before the sale they told the respondents that it was a very good launch, but also gave them the opportunity to judge for themselves on a trial run.

The terms of the agreement were contained in two letters, one written by the respondents and the other by the appellants. Neither made any reference to the representations of quality made by the appellants, whose letter stated that the respondents were buying the launch "in the condition as she stands," subject to a trial trip, after which it would be at the purchasers' risk.

The respondents later discovered that the launch was almost worthless and brought the present proceedings against the appellants contending that they were entitled to damages for fraudulent misrepresentation since the appellants, knowing that the launch was defective, had told them that it was in good condition. The Supreme Court (Purcell, C.J.) gave judgment for the respondents.

On appeal, the appellant contended that they were not bound by their representations since they were not embodied in the written agreement and that since they had not actively concealed

any defects and had allowed the respondents to examine the launch, the respondents were not entitled to damages.

The appeal was allowed.

Cases referred to:

(1) *Kain v. Old* (1824), 2 B. & C. 627; 107 E.R. 517, *dicta* of Abbott, C.J. applied.

(2) *Pickering v. Dowson* (1813), 4 Taunt. 779; 128 E.R. 537, applied.

(3) *Redgrave v. Hurd* (1881), 20 Ch. D. 1; 45 L.T. 485, considered.

(4) *Ward v. Hobbs* (1878), 4 App. Cas. 13; 40 L.T. 73, *dicta* of Lord O'Hagan applied.

C.E. Wright for the appellants;
Thompson for the respondents.

SAWREY-COOKSON, J.:

This is an appeal by the defendants from a judgment of the learned Chief Justice by which they were found to have made certain false and fraudulent verbal representations to the plaintiffs for the purpose of inducing them to agree, and which did in fact induce them to purchase a worthless steam launch. The learned Chief Justice further found that the agreement was concluded by a certain letter from the plaintiffs to the defendants dated July 28th, 1920, but that the letter of the day following from the defendants to the plaintiffs (to both of which I must again refer shortly) was "merely part of a scheme by which the plaintiffs were defrauded," *i.e.*, as I understand this particular finding of the learned Chief Justice — that this letter formed no part of the writing to which the agreement was (as Mr. Wright submitted) eventually reduced. I have purposely lost no time in referring to these two letters as much of Mr. Wright's argument was directed to them and, if Mr. Wright is correct in the view he maintains, it will not be necessary to consider the defendants' two remaining grounds of appeal. I understand the effect of Mr. Wright's argument on this point to be as follows: The two letters in question must be regarded as the intention of the parties to the sale and purchase of the launch to reduce the terms of their agreement into writing. That if this be conceded, it is clearly and well established law that we can only look to what is contained in those letters and shall not for any purpose, unless fraud is proved, go outside them. Let me now turn to those two letters and see what is said in them. The first reads as follows:

"Referring to our verbal conversation of this morning we beg to confirm herewith the purchase of your steam launch No. 488 at the price of £475 (four hundred and seventy-five pounds).

We are returning to you the motor boat 'Switzerland' and the 'New Imperial' motor cycle, value £310, whilst the remaining balance of £165 will be paid to you before August 10th, 1920.

Yours faithfully,
W. Jemal & Co."

and the second thus:

We beg to acknowledge receipt of your letter of 28th instant confirming the purchase of our steam launch No. 488, at the price of £475, in the condition as she stands, and we will put steam up this afternoon to prove to you the satisfactory run of the launch. After this trial trip the launch is entirely in your hands and risks.

We accept the offer to return to us the motor boat 'Switzerland' and the 'New Imperial' motor-cycle which have been purchased by you from us some time ago at the price of £310, the remaining balance of £165 to be paid on or about August 10th, 1920.

Yours faithfully,
F. Schumacher & A. Straumann."

Can there be any other conclusion than that they do, when read together, very clearly, though briefly, set out the terms by which the parties had agreed to be bound?

The plaintiffs confirmed their agreement to purchase a specified steam launch for a certain sum to be paid in a certain manner, and the defendants proceeded to amplify these terms by writing on the following day that it was to be clearly understood that the plaintiffs were buying the launch as she stood, but subject to a trial trip after which all further responsibility for the condition of the launch would lie with the plaintiffs. I can read nothing more nor less into those two letters.

I have now to consider whether the law is as Mr. Wright has argued that it is. A case which seems to me largely to decide the matter in Mr. Wright's favour, is that of *Kain* v. *Old* (1), where we find the law very exactly stated by Abbott, C.J. in the following passage (2 B. & C. at 634; 107 E.R. at 519): "But if the contract be in the end reduced into writing, nothing which is not found in

the writing can be considered as a part of the contract," and the learned Chief Justice proceeds to say in effect that a buyer cannot show a matter antecedent to and *dehors* the writing unless he can also show that the seller by some fraud prevented him from discovering a fault which the seller knew to exist, and approves of what was laid down by Gibbs, J., in *Pickering* v. *Dowson* (2). A passage very much in point to be found in that judgment is as follows (4 Taunt. at 786; 128 E.R. at 540):

> "I hold, that if a man brings me a horse, and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations; and whatever terms are not contained in the contract, do not bind the seller, and must be struck out of the case."

The headnote to that case puts the law very clearly and tersely, as I have no doubt it stands, as follows (4 Taunt. 779; 128 E.R. at 537):

> "If a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which the representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation. . ."

and these very significant words are appended, *viz.*: "Whether the vendor knew of the defects, — Or not."

I listened with great interest to Mr. Thompson in order to discover whether that clear expression of the law could be shaken, but unless *Redgrave* v. *Hurd* (3) is to the contrary nothing was said which impressed me. And I think with Mr. Wright that that case does not go so far as to be authority such as to overrule the two cases just referred to. I agree that if looked into carefully it goes no further than this, *viz.*, that a buyer who has examined the article cannot rely on misrepresentation.

Mr. Thompson endeavoured to show that there had been fraud on the defendants' part such as would void the sale altogether, and that it consisted in the instructions given by the defendants to certain of their workmen that if the plaintiffs came and looked at the launch they were to say it was a very good launch, but I do not think that these instructions amounted to any more than what the defendants might have represented, and I have no doubt did

represent to the plaintiffs. But even so, such representations would not amount to more than the *simplex commendatio* which falls far short of what the law requires in the matter of fraud. I can find no satisfactory evidence of the kind of active concealment which would be necessary in such a case as this. But even if there were such evidence I should still have great difficulty in explaining away the words "in the condition as she stands" to which I have already referred. Those words appear to me to mean exactly what "with all faults" meant in such a case as *Ward* v. *Hobbs* (4). That case went to the House of Lords and, during the course of his speech, Lord O'Hagan said (4 App. Cas. at 27; 40 L.T. at 76):

> "[T]he legal result [of those words] is stated very plainly by Lord *Ellenborough* in the case of *Baglehole* v. *Walters*. . . the authority of which has never, so far as I know, been called in question";

and then he quotes Lord Ellenborough thus:

> "'Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent.'"

Indeed when once satisfied that one of the terms of the agreement in this case as reduced to writing was the equivalent of the expression "with all faults," there would have been little necessity for adding further to this judgment.

I will conclude with a part of Lord Selborne's speech delivered in the same case (*Ward* v. *Hobbs*), because they express my feelings in regard to the present case. The passage reads as follows (4 App. Cas. at 29; 40 L.T. at 77):

> "The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know of no authority for the proposition that such is the law. . . ."

Such, therefore, being in my opinion the clear law on the points considered, no other ground of appeal need arise for decision, and for these reasons alone the appeal, though I have come to the conclusion with a certain amount of regret, must be allowed with costs.

McDONNELL, Ag. C.J. and BUTLER-LLOYD, J. concurred.

Appeal allowed.

SHORUNKEH-SAWYERR v. BISSETT

Full Court (McDonnell, Ag. C.J., Sawrey-Cookson and Butler-Lloyd, JJ.): December 1st, 1924

[1] **Civil Procedure — judgments and orders — order on summons for directions is not judgment within terms of O.XXXIX, r.3:** An order made on a summons for directions should be given the date of the day on which it is made, in accordance with O.XLIX, r.11 of the Supreme Court Rules, 1924; it is not a "judgment" within the terms of O.XXXIX, r.3, which does not therefore apply (page 113, lines 16—20).

[2] **Civil Procedure — summons for directions — order on summons for directions — to be given date of day on which it is made — Supreme Court Rules, 1924, O.XLIX, r.11 applicable not O.XXXIX, r.3:** See [1] above.

The appellant appealed against an order made in the Supreme Court.

Purcell, C.J. made the order in chambers on a summons for directions and it was given the date of the day on which it was pronounced.

The appellant appealed, contending that under O.XXXIX, r.3 of of Supreme Court Rules, 1924 it should have been dated as of the day on which the requisite documents were left with the proper officer.

In reply the respondent contended that the order was not a "judgment" within the terms of O.XXXIX, r.3 and had been correctly dated in accordance with O.XLIX, r.11.

The appeal was dismissed.

Legislation construed:

Supreme Court Rules, 1924, O.XXXIX, r.3:

"[T]he entry of judgment shall be dated as of the day on which the