SCHUMACHER and STRAUMANN - - *Appellants.*

v.

JEMAL and GALLIZIA - - - - - *Respondents.*

1st December 1924.

Action for damages for fraudulent misrepresentation in sale of a launch—Matter antecedent to and dehors *a written contract inadmissible in absence of fraud—Simplex commendatio—Purchase of launch "in the condition as she stands"—Article sold "with all faults."*

The facts of this case are sufficiently set out in the judgment.

Appeal from a judgment of Purcell, C.J., in the Supreme Court of the Colony of Sierra Leone.

Wright for the Appellants cites:—

Powell on Evidence, 9th Ed., pp. 180-181.
Benjamin on Sale, 4th Ed., pp. 617-618.
Kain *v.* Old, 2 B. and C., p. 627.
Pickering *v.* Dawson, 4 Taunton, p. 779.
Carr on Fraud and Mistake, 3rd Ed., pp. 47-49.
Halsbury, Vol. 20, p. 670.
Smith *v.* Chadwick, 20 Ch. D., p. 81.
Smith *v.* Chadwick, 9 A.C., p. 190.
Redgrave *v.* Hurd, 20 Ch. D., p. 1.
Cullen *v.* Knowles (1898), 2 Q.B., p. 380.
Odgers on Pleading, pp. 174-175.
Pilley *v.* Robinson, 20 Q.B. D., p. 155.
In *re* Matthews (1905), 2 Ch., p. 460.
Kendall *v.* Hamilton, 4 A.C., p. 504.
Rules of Supreme Court, Order 16, rules 11 and 12.

Thompson for the Respondent cites:—

Order 30, rule 1.
Order 16, rule 13.
Sheehan *v.* Great Eastern Railway, 16 Ch. D., p. 59.
White Book, 1915 Ed., p. 213.
Abouloff *v.* Oppenheimer, 30 W.R., p. 430.
Colonial Securities Trust Co. *v.* Massey, 65 L.J., Q.B., p. 1001.

Drummond *v.* Van Ingen, 12 A.C., p. 284.
Powell on Evidence, 6th Ed., p. 472.
Dobel *v.* Stevens, 3 B. and C., p. 623.
Schneider *v.* Heath, 3 Campbell, p. 506.
Baglehole *v.* Walters, 3 Campbell, p. 154.
Halsbury, Laws of England, Vol. 20, p. 729.
Ward *v.* Hobbs, 48 L.J., C.P., p. 281.

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 Plaintiffs to Defendants dated 28th July, 1920 (exhibit " C "), but that the letter of the day following from Defendants to Plaintiffs (exhibit " D ") (to both of which I must again refer shortly) was " merely part of a scheme by which 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:—

" Jemal & Co.,
" Sierra Leone.
" Freetown, 28th July, 1920.

" Messrs. Schumacher & Straumann,
" City.

" Dear Sirs,

" 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 ' Switzer-
" ' land ' and the ' New Imperial ' Motor cycle, value £310,
" whilst the remaining balance of £165 will be paid to you
" before the the 10th of August, 1920.

" Yours faithfully,
" W. JEMAL & CO."

and the second thus:—

" Schumacher & Straumann,
" Sierra Leone.
" Freetown, 29th July, 1920.

" Messrs. W. Jemal & Co.,
" Freetown.

" Dear Sirs,

" 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 Motor boat
" ' Switzerland ' and the ' New Imperial ' Motor-cycle
" which have been purchased by you from us sometime ago
" at the price of £310, the remaining balance of £165, to
" be paid on or about the 10th of August, 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 (2 Barnewall and Cresswell, p. 627), where we find the law very exactly stated by Abbott, C.J., at page 634 (see English Reports, Vol. 107, at page 519) in the following passage:— "But if the contract be in the end reduced into writing, nothing "which is not found in the writing can be considered as 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, C.J., in Pickering *v.* Dawson (reported in English Reports, Vol. 128, at page 540). A passage very much in point to be found in that judgment is as follows:—"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 head note to that case puts the law very clearly and tersely, as I have no doubt it stands, as follows:—

> "If a representation be made before a sale, of the "quality of a thing sold with full opportunity for a person "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 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 defect 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 and Hurd 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 reply 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 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 reported in 40 L.T.R. That case went to the House of Lords and, during the course of his judgment, Lord O'Hagan said " the 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 burden 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 judgment delivered in the same case (Ward *v.* Hobbs), because they express my feelings in regard to the present case. The passage reads as follows: —

> " 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 posi- " tively noxious and the other man does not know to be so, " even though he expressly negatives warranty and says the " purchaser must take his bargain with all faults is an action- " able 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 . . . . ."

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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, Acting C.J.

I agree.

BUTLER LLOYD, J.

I agree.