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are not needed, and the other because he has become permanently incapable. Whether the employé is permanently incapable or not, the Commissioners have power to dismiss him if he has broken the regulations &c., under sec. 87; but if they choose simply to remove a man who has been in the service before 1883, without formulating and proving a charge, they must pay him compensation. The Court is not required to burden itself with an inquiry into the mind of the Commissioners, and find out motives other than the motives expressed. The motive is nothing; the power exercised is everything.

Appeal dismissed with costs.

Solicitors, for appellant, *Hickford & Balmer*, Melbourne, for *Hamilton Clarke*, Benalla.

Solicitor, for respondents, *Guinness*, Crown Solicitor for Victoria.

B. L.

Appl *Gould* v *Vaggelas* 157 CLR 215

Appl *Munnings* v *Australian Government Solicitor* (1994) 118 ALR 385

Expl *Gould* v *Vaggelas* (1984) 56 ALR 31

Cons *Bank of South Australia Ltd* v *Ferguson* (1996) 66 SASR 120

Refd to *Voss Real Estate* v *Schreiner* (1998) 70 SASR 545

Appl *Green* v *Chenoweth* [1998] 2 QdR 372

[HIGH COURT OF AUSTRALIA.]

HOLMES AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

JONES AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

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SYDNEY, *Aug.* 19, 20, 21, 22.

Griffith C.J., O'Connor and Isaacs JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Action of deceit—Contract of sale induced by false representation—Fraudulent intention—Misdescription of property sold—Inspection by purchaser—Measure of damages—Evidence—Contradicting statements of adverse witness.

In an action to recover damages for fraudulent misrepresentation inducing a contract, the plaintiff must prove that the misrepresentation was fraudulent, that the contract actually entered into was in fact induced by the misrepresentation, and that he suffered actual loss by entering into the contract.

So, where the owners of a pastoral property, in offering it for sale, made false statements as to the numbers of the stock upon it, but the purchaser refused the offer, and afterwards, having been informed of the inaccuracy of the statements made in the original offer, negotiated for a sale upon a totally different basis as regards the stock, inspected the property and stock, and as a result of the inspection, decided to purchase, and entered into a contract of sale upon the new basis, he could not afterwards say that he relied upon the misrepresentations made by the vendors in the first instance.

The duty of a vendor, who has made false statements in offering his property for sale, to correct them and bring the correction to the knowledge of the purchaser before acceptance, may be fulfilled by giving notice of the actual facts to an agent of the purchaser with apparent authority to receive such information on his behalf.

The measure of damages in such an action is not the same as that in an action for breach of warranty, but is the difference between the price actually paid and the fair value of the property at the time of the purchase; and, therefore, it is not sufficient for the plaintiff merely to show that the property sold was not worth as much as it would have been worth if the representations had been true; he must show that it was worth less than he actually paid for it.

Broome v. *Speak*, (1903) 1 Ch., 586; and *Waddell* v. *Blockey*, 4 Q.B.D., 678, considered and applied.

The rule that, when a witness refuses in cross-examination to distinctly admit that he has previously made a statement inconsistent with his present testimony after the circumstances of the supposed statement have been properly brought to his notice, evidence may be called by the other party to contradict him, applies as well to the case of a witness called for the first time by the plaintiffs in reply as to one called at an earlier stage of the case.

Decision of the Supreme Court: *Jones* v. *Holmes*, (1907) 7 S.R. (N.S.W.), 17, reversed.

APPEAL from a decision of the Supreme Court of New South Wales refusing to grant a rule *nisi* for a new trial.

This was an action by the respondents against the appellants to recover damages for fraudulent misrepresentation inducing a contract, and for breach of warranty. At the trial the jury found a verdict for the plaintiffs for £2,802 10s.

The Supreme Court refused to grant a rule *nisi* for a new

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trial on the main grounds taken, and from that decision the present appeal was brought. A rule was granted on certain grounds not material to this appeal.

The facts and the material portions of the pleadings are fully stated in the judgments.

Pilcher K.C. and *Rolin*, for the appellants. There was no evidence of fraudulent intention on the part of the defendants in making the misrepresentation, and, even if there was such evidence, there was no evidence that the misrepresentation induced the contract that was actually made.

The false statements, if made at all, were made with a view to a contract upon certain terms, but the plaintiffs refused to entertain a contract on those terms. Afterwards a full disclosure was made by the defendants of the facts so far as they knew them, and the plaintiffs negotiated for a contract upon a new basis altogether, inspected the property, and, as a result of that inspection, decided to purchase. The terms of the contract actually completed rendered the misstatements originally made quite immaterial. It is not sufficient for the plaintiffs to say that they were induced by those misrepresentations to make the contract. They must show that it was reasonable for them to be so misled. Under the circumstances of this case no reasonable man could come to the conclusion that the misrepresentation induced the contract.

[GRIFFITH C.J.—Assuming that there was a fraudulent misrepresentation inducing the contract, the proper measure of damages does not seem to have been put to the jury. The plaintiffs are not entitled to be put into the position they would have been in if the contract had been performed in accordance with the representations, but only to be put into the position they would have been in if the contract had never been made.

ISAACS J.—If they made a profit out of the contract as a whole, they cannot recover damages unless there was a breach of warranty.]

No evidence was given that the whole property was worth less than was paid for it.

Evidence should have been admitted to contradict statements

made by the plaintiffs' witness in reply. It is immaterial at what stage of the case the evidence which it is sought to contradict is given.

Shand K.C. and *D. G. Ferguson*, for the respondents. This Court has only to consider whether there was any evidence of fraud to go to the jury. There was abundant evidence upon which the jury might find fraud. Where a person makes a representation which he knows to be false, *primâ facie* it is fraudulent, and, if made to a person negotiating about a contract with respect to the subject matter of the contract, the jury may fairly infer that it was made with intent to induce the contract. Here the defendants knew, or ought to have known, that the statements were false. Having once made false statements under circumstances likely to deceive the purchasers, the defendants were *primâ facie* liable for the consequences, unless they made a clear and distinct correction, and brought it home to the minds of the purchasers. They must show that their wrongful act did not cause the loss: *Arnison* v. *Smith* (1); *Pollock on Torts*, 5th ed., p. 286. There is no evidence of a clear correction in this case. This is not a case of *caveat emptor*. There was no opportunity for such an inspection as would have enabled the purchasers to test the truth of the statements made by the defendants. The size and nature of the property made a thorough inspection impossible under the circumstances. It is practically a case of misrepresentation as to a latent defect, which could not be discovered by a reasonable inspection.

As to the question of damages, the sum agreed upon between the parties was some evidence of actual value. The defendants said that the property with so many stock upon it was worth so much. If as a matter of fact there were not so many as they stated, the jury might fairly infer that the property and stock were worth so much less than the amount stated by the defendants. In this case the only possible measure of damages was practically the same as for breach of warranty. [They referred to *Page* v. *Parker* (2); *Williams on Vendor and Purchaser*, p. 729.] It is

(1) 41 Ch. D., 348.
(2) Sedgwick's Ruling Cases on Measure of Damages, p. 553.

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too late now for the defendants to take objection to the measure of damages adopted at the trial.

[GRIFFITH C.J.—We have in two cases decided that a failure to take an objection at the trial as to the measure of damages does not affect the right of a party to take the point on appeal.]

There was no objection in the Supreme Court at all.

[ISAACS J.—It is peculiarly the duty of the Judge to draw attention to the measure of damages. The stage at which the objection is taken can only affect the question of costs.]

The Court will not enter a verdict on this ground, because the matter might have been remedied if attention had been drawn to it at the trial.

[GRIFFITH C.J. referred to *Davidson* v. *Tullock* (1); and *Arkwright* v. *Newbold* (2).

ISAACS J. referred to *Broome* v. *Speak* (3); *Waddell* v. *Blockey* (4); *Mullett* v. *Mason* (5); *Marshall* v. *Hubbard* (6).]

The evidence tendered by the defendants in contradiction of the plaintiffs' witness in reply was not admissible at that stage. The Judge had a discretion. Moreover the defendants had not laid the proper foundation. The evidence tendered would not have been necessarily inconsistent with that given by the witness.

Pilcher K.C., in reply.

Cur. adv. vult.

August 22.

GRIFFITH C.J. The first count of the declaration in this case, with which alone we are concerned, is a count for deceit. It alleges that the defendants, the present appellants, with intent to induce the plaintiffs to purchase from the defendants a pastoral property with stock plant stores and effects for £15,000, represented to the plaintiffs that the number of cattle upon the stations was then about 2,942, and that the number of the bullocks born in 1903 or older was then about 1,337, whereas the numbers were much less, and that these statements were untrue to the knowledge of the defendants. The plaintiffs say that by these representations the

(1) 3 Macq. H.L. Cas., 783.
(2) 17 Ch. D., 301, at p. 312.
(3) (1903) 1 Ch., 586.
(4) 4 Q.B.D., 678.
(5) L.R. 1 C.P., 559.
(6) 117 U.S., 415.

defendants induced the plaintiffs to purchase the stations and stock, &c. Now, the actual contract for the sale of the stations by the defendants to the plaintiffs was dated 3rd January 1906, and the alleged representation was made, if it was made at all, in a letter from the defendants' agents to the plaintiffs of 20th November 1905. The complaint is that the plaintiffs were induced to enter into the contract of 3rd January 1906, by the representations alleged to have been made on 20th November 1906. The first observation to be made is that it is clear that, in order that the action may be maintained, the representation must have been continuing down to the time when the contract was entered into, and must have been believed by the plaintiffs at that time, so as to be at that time an inducement to enter into the contract.

The representation, as I have said, was made in a letter written by the defendants' agents. The subject matter of the contract was a pastoral property in Queensland called Bendeena. The plaintiffs had shortly before become the owners of an adjoining pastoral property which was to a certain extent dependent for water on the defendants' property, and the plaintiffs were on that account anxious to buy it. Some negotiations, the nature of which is not fully explained, had been going on between the parties before 20th November, and on that date the defendants' agents wrote to the plaintiffs a letter in which they said "acting as agents for the vendors," who were trustees of the estate (under a will) "we now place under offer for your inspection and answer as to approval or otherwise, on or before 20th December next," the station in question, "together with all improvements thereon and the following stock, the number and ages being only approximate, and not guaranteed, cattle, males about 1,000 bullocks 0's and older, 67 No. 1s, 30 No. 2s, 240 No. 3s, 167 No. 4s, 94 calves and 19 bulls, females" of certain numbers mentioned, "total cattle about 2,900. Horses about 200 head. Price, for the cattle, five pounds five shillings per head with all calves under six months old given in. For the horses, four pounds ten shillings per head. Also three thousand pounds as part compensation for the bore and freehold land, the leasehold land to be given in."

It appears that before this time the plaintiffs had written to a Mr. Campbell, from whom they had purchased the adjoining

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station, telling him that they were anxious to buy the defendants' Bendeena station, and they asked him to put himself in communication with one of the defendants who lived at Dubbo, in New South Wales, and endeavour to make a bargain for the purchase of the property. The instructions given to Mr. Campbell were contained in a letter of 4th November, written from Hobart. The plaintiffs suggested various devices to induce the vendors to accept a lower price, and the terms of the letter showed generally that the plaintiffs were anxious to buy. In pursuance of that letter Campbell visited one of the defendants, Mr. Sefton, at Dubbo, and had a conversation with him on the subject of the property. According to Sefton's evidence, he gave Campbell full information as to the stock then upon the property, but according to Campbell's evidence that was not done, or he did not recollect it. But there was, at any rate, a conversation about the cattle, and after it Campbell asked other persons to find out all about the cattle and to go to Sefton and ascertain the exact numbers. So much he admitted. That was all before the letter of 20th November, which is alleged to contain the misrepresentation. I pause here to remark again that the plaintiffs must show that the representation contained in that letter was understood by them to be continued up to the moment at which the contract was entered into in January. The letter of 20th November was in fact inaccurate. The number of cattle born in 1903 and earlier mentioned in the letter was actually 1,337. The total number mentioned was 2,912. There were not, however, at that time 1,337 cattle of those ages on the station. A good many had been sold before the letter was written. This letter, written by the defendants' agents, was therefore inaccurate. But there is no suggestion that the defendants' agents knew of any mistake in the numbers. There was no dishonesty whatever on their part. How the mistake arose is abundantly clear. It appears that the defendants, as trustees of the estate, were in the habit of getting quarterly returns showing the transactions on the property, and in the return for the quarter ending 30th June the figures showed the numbers of the cattle on the station at that date, but during the quarter ending 30th September many of these cattle had been sold, and a later return as of 30th

September gave correct information of the transactions up to that date. The instructions given to the agent, on which he wrote the letter, were given in September and founded on the June return. Even these, however, were not correct, because some of the cattle had been sold since the June return. The statements contained in the letter, therefore, were not accurate, and in one sense the defendants ought to have known that they were not true. But that does not prove that the representation was fraudulent, or that it would have been fraudulent, even if made by the defendants themselves, if they had honestly forgotten the last return and given information taken from the earlier return. It might be careless or improper to make such a misstatement, but it would not be conclusive evidence of fraud. Possibly a jury might draw the inference of fraud under those circumstances, but it is not necessary to express any opinion on the question. I will only say that I am not satisfied that that inference ought to be drawn under such circumstances as exist in this case. If the offer of 20th November had been accepted, there would, perhaps, have been a warranty by the defendants that there were then about 1,337 cattle—not that precise number but thereabouts—on the station, and, if it had turned out that the numbers fell very far short of that number, there would have been a breach of the warranty, but one from which the defendants, the vendors, could not have gained anything. The result of such a breach would have been that the purchasers might have refused to perform the contract on the ground that the property offered for delivery was substantially different from that which was sold. But it is difficult to see how a misrepresentation made in the form of a warranty can be evidence of a fraudulent intention to deceive the other party to the contract.

The plaintiffs did not accept the offer of 20th November. Having, as we may assume, the benefit of Campbell's report, they wrote on 2nd December from Hobart to the defendants' agents:—"Yours of 20th ult., giving offer of Bendeena and Yunnerman Stations duly received and after carefully considering same, in view of the long interval which must necessarily elapse before Mr. Easy has inspected and we receive his report, we have decided to make the proposals in the form of two options, as per enclosure."

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So that it appears incidentally that they had in the meantime instructed another gentleman, who was in fact the manager of the adjoining station, to make a full inspection of the property and report to them. While this was being done they wrote this letter and, without further reference to the defendants' previous offer, ask the defendants to make another offer in an alternative form, which they called two options, the first being the option of purchase of the land, with improvements, plant, &c., but without stock, for £5,000, the other the option of purchase of the land, &c., with stock for £16,230, "assuming the number of cattle 1 year and upwards to be 2,740 and horses 200, any number under or over to be allowed for at £4 10s. per head." A note was added showing how they made up the amount by reckoning 2,740 cattle of one year and over, calves given in, and 200 horses at £4 10s., making £13,230, and the land, £3,000. The number, 2,740, is the number of cattle mentioned in the letter of 20th November, deducting the animals described as calves. But it is to be noticed that in this proposal, when the plaintiffs ask the defendants in this letter to make a new offer, they do not describe the cattle as of the ages mentioned in that letter, but under a different description altogether, "one year and over," for which they say they are willing to pay at the rate of £4 10s., per head. In the meantime Easy went to inspect the station. He was there in December for two or three days. According to the uncontradicted evidence, which must be taken to be true, for Easy was afterwards called by the plaintiffs and was not asked any questions on the subject, he asked for the last returns. Those were the returns of 30th September. The witness Baker, manager of the station, said:—"He asked for the last returns. I had a copy of the September returns. He asked me to read out the numbers for him, which I did. I went through the paddocks with him." The plaintiffs received Easy's report on 14th December, and on 19th December telegraphed from Hobart to their agents in Sydney authorizing them to offer £15,000 for the property, stock and plant, on the terms "walk in and walk out." But in the meantime the defendants' agents had acknowledged the plaintiffs' letter of 2nd December, saying "We could not do any business in terms of your offer" (he had been to see his principals at Dubbo), "and the trustees

instructed us to make you a fresh offer, open to you until 20th December, as to what they are prepared to do." He then made three offers, first, to sell Bendeena station with plant &c. for £6,000; second, to sell at £4 10s. per head for all cattle and horses (say 2,829 of the former and 257 of the latter) to be mustered, and 400 unbranded calves and 40 foals given in, and £3,000 for the run; or third, a "walk in and walk out sale," the purchasers to pay for 2,600 cattle and 225 horses at £4 10s. and run at £3,000 with improvements, which amounted in all to £15,700. So that there were three offers, to sell the run alone, to sell it with stock at a specified price per head, or to sell the whole concern for a lump sum, on what is called a "walk in and walk out contract." I remark that the last is in substance a sale of a specific article with all faults.

The description of the cattle on the run in this letter is quite different from that in the letter of 20th November which contained the alleged fraudulent representation. The numbers are different, 2,829, "all cattle" without any reference to ages or descriptions, and the number of the horses is different. 400 unbranded calves are mentioned, as against 200 in the previous letter, and 40 foals. As a matter of fact the figures that I have just read exactly correspond with the figures in the September return read to the plaintiffs' agent on the station before this letter was written. Now, that was the last communication made by the defendants to the plaintiffs. It contained a perfectly true statement of the facts as known to the defendants, a statement of the facts communicated to the plaintiffs' agent who had been expressly sent to ascertain the truth. And it is said that, in face of that, the plaintiffs relied, not upon the statement made in this letter, not upon the information given to their agent, which corresponded with that statement and was also true, but upon a communication made nearly a month before as a basis for an intended contract which had entirely gone off. Having this knowledge, and Easy's reports, the plaintiffs did not accept either offer. But they offered for a specific property, inspected by Easy and reported upon by him, a lump sum of £15,000, "walk in and walk out." And in the contract drawn up on 2nd January one of the terms is in these words: "The sale is under the usual

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walk in and walk out conditions and no allowance or abatement shall be made or allowed for any deficiency in the area of the lands or the numbers of stock mentioned and no requisitions shall be made in respect of the said leases." It appears to me that on these uncontroverted facts the plaintiffs, on their own case, relied upon the report of Easy, and were induced to enter into the contract because, from what he had told them, they regarded £15,000 as a good price to pay for the whole concern. It is not open to the plaintiffs to say, under those circumstances, that they relied upon the innocent mistake made some time before as the basis of an intended contract which never came to anything. It appears to me to be common sense as well as law that, when a purchaser chooses to rely upon his own judgment or upon that of his agent, he cannot afterwards say that he relied upon a previous representation made by the vendor.

I am therefore of opinion that the case of fraud entirely failed, and that there was nothing to go to the jury. On the contrary I think it was proved, as far as is reasonably possible to prove a negative, that the plaintiffs did not rely upon the misrepresentation, even if there was a misrepresentation or fraudulent misstatement in the letter of 20th November. I have said nothing about the alleged false representation as to the number of bullocks being 2,900, because there is absolutely no evidence to support the allegation that any fraudulent representation was made on that point.

Another point was made as to the damages assessed. The case was treated at the trial as if the plaintiffs were entitled to the same damages for fraudulent misrepresentation as if the action had been for breach of warranty. In support of that view, two American cases were cited to us in which it was held that in an action for fraudulent misrepresentation the plaintiff is entitled to recover damages upon the same measure as in an action for breach of warranty. That, in my opinion, is not the law of England. Such a rule would lead to the most extraordinary results, and it would, in effect, do away with the benefit of the *Statute of Frauds* to a great extent. The true rule, as I understand it, was laid down by *Buckley* J. in the case referred

to by my learned brother *Isaacs*, *Broome* v. *Speak* (1), which was an action against directors of a company, claiming damages for fraudulent misrepresentation in a prospectus. The learned Judge there said:—"The result of this is that the plaintiff is entitled to damages as against all the defendants. The measure of damages is well fixed. It is the difference between the price which the plaintiff paid for the thing, and the fair value of the thing at the date at which he got it." That case went on to the Court of Appeal, and further to the House of Lords under the name *Shepheard* v. *Broome* (2), and was there affirmed. I will only refer to one other authority, *Waddell* v. *Blockey* (3). That was an action against an agent for fraudulently inducing his principal to buy a quantity of rupee paper by representing that it belonged to third persons. *Bramwell* L.J. said (4):—"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." And *Thesiger* L.J. (5), after referring to *Twycross* v. *Grant* (6) in which the same rule had been laid down, referred to *Davidson* v. *Tulloch* (7) as authority for the proposition that "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." That, I conceive, is the English rule of law, and any other rule would lead to the most extraordinary consequences. Suppose that a man was induced by fraudulent misrepresentation to give £10,000 for a property worth £20,000, on a representation that it was worth £30,000. If the law were as the plaintiffs contend, the purchaser would be entitled to recover from the vendor the whole of the purchase money, and have a property worth £20,000 for nothing,

(1) (1903) 1 Ch., 586, at p. 605.
(2) (1904) A.C., 342.
(3) 4 Q.B.D., 678.
(4) 4 Q.B.D., 678, at p. 681.
(5) 4 Q.B.D., 678, at p. 684.
(6) 2 C.P.D., 469.
(7) 3 Macq. H.L. Cas., 783, at p. 798.

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and would get that as compensation for the injury done him by the defendant.

In my opinion, therefore, the plaintiffs' case absolutely fails from every point of view. There is no case of fraud, and, so far as appears, the plaintiffs suffered no loss. The verdict should, therefore, be entered for the defendants on the first count.

There was another minor point taken, which it is not absolutely necessary to decide, but upon which, as it is of general importance in practice, it is perhaps right that we should express an opinion. I refer to evidence tendered by the defendants as to a conversation between one of the defendants and Campbell, who was called by the plaintiffs in reply to contradict that evidence, and in cross-examination refused to make certain admissions. Evidence was then tendered by the defendants to contradict him, relying upon the statutory rule that, when a witness refuses in cross-examination to distinctly admit that he has previously made a statement inconsistent with his present testimony, evidence may be called by the other party to prove that he has done so. The learned Chief Justice who presided at the trial refused to allow the evidence of such a statement to be given on the ground that it could not be given at that stage of the case, taking the view that the section does not apply to the case of a witness called by a plaintiff in reply. But there is nothing in the Statute to limit the admissibility of evidence of that sort so as to exclude its application to the case of a witness called later than the defendant's case in chief. There is no rigid rule as to the point at which evidence is to be closed. The burden of proof may change from time to time during the course of a case. In the case of an action for defamation the plaintiff proves the publication of defamatory matter. Then the defendant may prove that the occasion was privileged. Then evidence may be given by the plaintiff of express malice, then evidence by the defendant to rebut that evidence. It appears to me that the meaning of the section is merely this, that evidence of that sort is admissible and is not to be regarded as *res inter alios*. It is admissible evidence, and the Statute intends that it may be given in any case in which evidence can properly be offered by the party tendering it to contradict that given by the other party.

A defendant cannot tender evidence in contradiction until the plaintiff's evidence has been given, and if that evidence is given for the first time in reply, the defendant cannot tender the evidence in contradiction earlier. The Statute, in effect, puts evidence of that sort on the same footing as any other evidence to contradict, and if the evidence sought to be contradicted is first given by the plaintiff in reply, the defendant is entitled to answer it on the ground that it is new matter. I express that opinion because it is a point of the general interest, and because the learned Chief Justice appears to have taken the opposite view. In the present case, however, I do not think that the proper foundation was laid in cross-examination for the admission of the evidence.

For the reasons I have given I think that the appeal should be allowed and that a verdict should be entered for the defendants on the first count.

O'CONNOR J. I am of the same opinion and have very little to add on the facts, but I wish to make some observations on the two grounds of law upon which the appellants relied. Their application was to have the verdict for the plaintiffs on the first count set aside and judgment entered for them. To succeed in that they must satisfy the Court that there was no evidence on which as a matter of law the jury could have found for the plaintiffs upon the first count. In other words, they must show that there were no facts in evidence from which the jury could reasonably draw the inference that must be drawn before the plaintiffs can succeed. Now, there is only one representation which is in question here. The facts and the course the case has taken have made the other representations immaterial. The one material representation is that there were on the station 1,337 cattle of the number 3 brand and older. I take it that the reference to number 3 means this:—The cattle calved in that year were branded as of that year, and therefore the representation as to the number of the brand contains a representation as to the age. I think it may be assumed, when dealing with the case from the point of view which I am now putting, there was evidence for the jury that the statement made by Trebeck, and

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authorized by Sefton's letter of 20th September, that there were at the time of the statement 1,337 cattle of the number 3 brand on the station, was a statement that was fraudulent in the legal sense. And I think it may also be taken that, if the offer of Trebeck of 20th November in respect of which the statement was made was at that time accepted, there would have been some ground upon which the jury might have come to the conclusion that the contract thus made had been induced by fraudulent misrepresentation. But before the plaintiffs can succeed they must go much beyond that. They must show, not only that the representation was fraudulent, but also that that fraudulent representation induced the contract which was afterwards entered into upon 3rd January. It is upon that part of the case it seems to me that the plaintiffs have entirely failed to put before the jury sufficient evidence to justify the jury as reasonable men in coming to the conclusion to which they came. Now, the requirements of the law with respect to false representations materially inducing a contract is very clearly stated by *Sir John Romilly* M.R. in the case of *Pulsford* v. *Richards* (1):—"With respect to the character or nature of the misrepresentation itself, it is clear that it may be positive or negative; that it may consist as much in the suppression of what is true, as in the assertion of what is false; and it is almost needless to add, that it must appear that the person deceived entered into the contract on the faith of it. To use the expression of the Roman law, so much commented upon in the argument before me, it must be a representation *dans locum contractui*, that is, a representation giving occasion to the contract, the proper interpretation of which appears to be the assertion of a fact, on which the person entering into the contract relied, and in the absence of which it is reasonable to infer he would not have entered into it, or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether." We therefore have to inquire whether there was any evidence from which the jury could reasonably draw the inference that it was the assertion made on 20th November with regard to the

(1) 22 L.J. Ch., 559, at p. 562.

numbers of these cattle, of number 3 and older, that induced the making of the contract of 3rd January.

Now, it is true that, if a fraudulent statement is made which is calculated to induce the person to whom it is made to enter into the contract, the inference may be drawn that the statement was made with the intention of inducing the contract. But that is an inference which may be rebutted by the facts. It appears to me that in this case the facts altogether rebut the inference that the misrepresentation in the proposal of Trebeck of 20th November was an inducing cause in the making of the contract. It is true that Mr. Burgess himself swears that he did believe the statement to be true, and that that induced him to make the purchase. But that is of no moment whatever if, as a matter of fact, it was not reasonable on his part to draw that conclusion. If the person who is offering an article for sale acts in such a way that another may reasonably infer that a certain representation is true, that representation may be taken to have been made to induce that other to purchase the article offered. But unless it may reasonably be inferred from the vendor's conduct or words that the representation was made for that purpose, the law does not cast upon him the responsibility for the representation. His words and acts must be looked at and regarded as an ordinary reasonable business man would look at them. The question for our determination is whether, considering all the circumstances which occurred, particularly the negotiations which took place between the proposal of Trebeck on 20th November and the actual acceptance of the offer on 19th December, the inference can be reasonably drawn that the contract was induced by the misrepresentation. It is not necessary for me to follow my learned brother the Chief Justice in his statement of the facts. I entirely agree with him in the view he has expressed. I would only observe that it appears to me impossible to say that the representations of 20th November materially induced the contract finally made when we consider the change in the form of dealing between the proposal of 20th November and the contract afterwards entered into, the inspection by Campbell, which, though it took place before the actual proposal and was not a direct inspection for the purpose of looking at the stock, was one which

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procured information about the stock, and when we remember that Campbell's inspection was followed by an inspection of the stock made by Easy for the express purpose of informing the appellants. In my opinion, therefore, no jury could reasonably come to the conclusion that the misrepresentation in Trebeck's letter of 20th November was an inducement to the making of the contract of 3rd January. That being so, the plaintiffs failed on that point, and on that ground alone the defendants are entitled to have a verdict entered for them.

There is another question on which it seems to me clear that it is impossible for the plaintiffs to hold their verdict. It is just as material a portion of their case to prove damages resulting from the making of the contract as to prove the misrepresentation itself. But there is no evidence for the jury of any damage arising out of the making of the contract. It seems to have been assumed at the trial that the kind of evidence necessary to prove damage for a breach of warranty is sufficient in a case of this kind. That is not so. The cases which have been cited from *Sedgwick's Ruling Cases* no doubt appear to show that in some States of America the law is as was contended for by the respondents. But it does not appear that even in America that is the general law, because I gather from the statement quoted from *Marshall* v. *Hubbard* (1) that the law in America is just as it is in England, that there must follow upon the making of the contract induced by fraudulent misrepresentation some resulting damage which must be proved before the plaintiff can succeed. It was said in that case by the Judge in summing up to the jury, and the statement was afterwards approved by the Supreme Court of the United States (2):—"But there are certain other elements of fact which necessarily enter into this defence. Not only must the representations be made, not only must they be fraudulent, and not only must it appear that the party relied, and had a right to rely, upon them, but it must also be shown that the representations were material to the contract or transactions which took place between the parties; and, further, that injury has been sustained, damage has resulted to the defendant from the alleged fraudulent representations." That states the

(1) 117 U.S., 415.

(2) 117 U.S., 415, at p. 417.

law in exactly the same way as it is laid down in the cases cited by my learned brother the Chief Justice. I need not repeat the quotations, and as to them I only wish to say that I entirely concur in the statement of the law as laid down in *Broome* v. *Speak* (1). Applying that law to the facts of the case, the only question is, has there been any evidence of this damage? Undoubtedly there is some evidence of damage for a breach of warranty. But the damage to be proved here does not rest on the same principle. Damages for a breach of warranty are given on the principle that, where a person contracts to do something and fails to do it, he must put the other party in the same position as if the thing had been done, so far as money can do it. But where the complaint is that the contract has been induced by a fraudulent misrepresentation, the remedy for that wrong is to put the party, who has been induced to make the contract, as far as possible in the position he would have been in if he had not entered into the contract. To put him into that position he must be recompensed for the damage he has sustained by entering into the contract. In order to ascertain the extent of that damage the whole contract must be looked at. If it should turn out that though in one respect the contract is less beneficial to the other party than it would have been if the representation had been true, yet in other respects it is so profitable that on the whole he loses nothing, no damage has resulted from his entering into the contract and he cannot recover. Thus damage is an essential factor in the cause of action.

Under these circumstances it appears to me that the principle must be applied that material damage is a necessary element in the action, and damage has not been proved. On that ground also the verdict should be entered for the defendants.

With regard to the point of evidence I need add nothing to what has already been said.

ISAACS J. I agree with the opinions just expressed, and would like to add my own reasons out of respect to the Judges of the Court from which the appeal comes. I agree entirely with what has fallen from my learned brother *O'Connor* with

(1) (1903) 1 Ch., 586.

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regard to the first part of the plaintiffs' case, namely, the establishment of fraudulent misrepresentation in the first instance. Whatever view I might personally have taken of the facts, I am not prepared to say that there is no evidence upon which the jury might reasonably, if they thought fit, have come to the conclusion that the statements as to the numbers and ages of the cattle in the letter of 20th November, which were undoubtedly untrue in fact, were also fraudulent. The jury were the proper tribunal to decide that question, and I am not prepared to say, if I had to decide it, that I should hold that there was no evidence. It is not, however, in the view I take of the case, necessary to decide it. But supposing that established. The plaintiffs have not proved all they are bound to prove in order to establish successfully their claim against the defendants on the ground of deceit. Now, in approaching this portion of the case I am fully sensible of the rule, and I give due weight to it in my mind, that the verdict of a jury is not to be set aside unless it is one that no reasonable man could have come to. I am very clear, however, on the facts of this case that, as to the inducement and as to the amount of damages, or as to whether any damage has been proved at all, the rule does apply in this case, that there was no evidence upon which the jury could reasonably find as they did. The plaintiffs have the onus of proving that the representations they complain of were material, and that they were induced to act upon them. If nothing more appeared than the letter of 20th November and a contract following upon that, I think it would be very difficult to say either that the plaintiffs were not induced to act upon the statements in that letter or that they were not material. They were undoubtedly material in fixing the average price of the cattle, and, consequently, the price to be paid for the whole property, supposing a count were taken. But a good deal more does appear in the case. The matter does not rest at that point. It is established law, as I understand it, that, even granting that a defendant has made a representation that is both false and fraudulent, it may be that the plaintiff has not relied upon it, and if he has not relied upon it then he has no case. There is a very old case showing the dis-

tinction between the two positions, *Lysney* v. *Selby* (1). There *Holt* C.J. put the two positions clearly. That was a case in which the defendant was sued for fraudulent representation regarding the rental of some houses sold to the plaintiff. In giving judgment *Holt* C.J. said (2):—"If the vendor gives in a particular of the rents, and the vendee says, he will trust him and inquire no farther, but rely upon his particular; there if the particular be false, an action will lie: but if the vendee will go and inquire farther what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular." In *Redgrave* v. *Hurd* (3) *Jessel* M.R., referring to *Attwood* v. *Small* (4), quoted one paragraph from the opinion of the Earl *Devon*, which he says is the law:—"The whole course of the proceeding from its commencement to its close tends to show that the purchasers did not rely upon any statements made to them, but resolved to examine and judge for themselves." And further on (5), he quoted a portion of Lord *Brougham's* judgment in the same case:—"We find that the purchasers did not rely upon the representation, but said, 'We will inquire ourselves,' that is the second ground; it is the same as Lord *Devon's* ground, and also would be a good answer, though it was not taken by Lord *Cottenham*." These then being the principles, the question is what will be sufficient to displace the *primâ facie* presumption that the plaintiffs did rely upon the false representation and act upon it. As to that also, *Redgrave* v. *Hurd* (6) helps us. *Jessel* M.R. said:—"If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it" (that has been shown since to be wrong, it is an inference of fact, not of law) "and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation." In *Arnison* v. *Smith* (7), Lord *Halsbury* L.C. said:—"It was said,

(1) 2 Raym. (Ld.), 1118.
(2) 2 Raym. (Ld.), 1118, at p. 1120.
(3) 20 Ch. D., 1, at p. 15.
(4) 6 Cl. & F., 232.
(5) 20 Ch. D., 1, at p. 16.
(6) 20 Ch. D., 1, at p. 21.
(7) 41 Ch. D., 348, at p. 369.

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and I think justly, by *Sir G. Jessel* in *Smith* v. *Chadwick* (1), that if the Court sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not." This case was cited by the plaintiffs for the purpose of establishing the position that the correction of the misrepresentation must be clear. But it gives no help here in that respect because his Lordship said the circular was itself fraudulently concocted. He said (2):—"The prospectus appears to me to have been drawn up with the aim of conveying a wrong impression under words sufficiently near the truth to escape being treated as a misrepresentation, and I think that the circular was framed with a similar view, to avoid bringing to the minds of the plaintiffs the real facts of the case while stating enough to enable the defendants to say that the plaintiffs were informed of those facts." That is not an illustration at all apposite to the present case.

Now, if these are the principles, then the main question we have to consider is whether, assuming that there was a misrepresentation in the first instance, the plaintiffs are shown not to have relied upon that misrepresentation. I think the documentary evidence and the uncontradicted oral testimony are absolutely conclusive that the plaintiffs did not rely upon that misrepresentation.

The letter of 20th November is the letter that offers to place under offer for inspection and answer the property until 20th December next as the limit. The number and ages of the cattle are stated as only approximate, and not guaranteed. Mr. Burgess determined to inspect, and a letter was put in evidence, Exhibit D., which, although written by Trebeck to Sefton, was put in by the plaintiffs, and is evidence of this, at all events, as to what the defendants thought Mr. Easy's position would be. It stated that Mr. Burgess had decided to inspect the property, and that he had

(1) 20 Ch. D., 27, at p. 44.

(2) 41 Ch. D., 348, at p. 370.

wired to his agent to inspect and report upon it, so that, at all events, as far as the minds of the defendants were concerned, they honestly believed that Mr. Easy would have full authority to see everything, hear everything, and report upon it to his principals. The letter of 2nd December, written by the plaintiff Burgess himself, is distinct to my mind that he had determined not to buy the cattle until his representative Easy had made a proper inspection, and he describes what inspection he considers a proper inspection, "that is to say such a one as would warrant us in determining upon the purchase of the stock forthwith." That seems to me to show at the very threshold that he is not going to rely upon the representation of 20th November, but on the examination by his own representative Easy. That appears in the first place to form a strong obstacle to the inference of reliance upon the representation in the letter of 20th November. The matter, however, goes further. Mr. Easy was sent up. He went to the station. He met Mr. Baker and stayed, apparently, as long as he wished. There is no evidence that he did not see all that he wanted to see, and when he had been shown as much as he wanted he asked for the latest returns. Mr. Baker had a copy of the September return, and was asked by Mr. Easy to read out the numbers of the cattle. That must mean the respective numbers of the cattle. It was a material point, for Mr. Burgess says the whole question turned upon the ages of the cattle, so we may assume that he had instructed or expected his agent to find out all about them. The agent did so and obtained a knowledge of the exact truth. I think there can be no doubt that if, instead of the agent, Mr. Burgess had been there himself, he could not have been heard to say that he relied any longer upon the representations as to numbers and ages in the letter of 20th November. On 9th December Mr. Trebeck writes to the plaintiffs saying that no business could be done upon the offer of 2nd December, and a fresh offer is made. The offer, which is declared by that letter to be open to 30th December, at least open up to that date for the purpose of seeing whether Mr. Burgess will buy at all, was open for a month longer to enable him to say whether he will buy the station alone or with cattle, and, more than that, he has a further choice, if he does buy with

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cattle, to buy on one of two distinct options regarding them. The report of Easy reaches him on 14th December. He has full time to consider the matter, and on 19th December he takes advantage of this offer and declares that he will buy, and takes further time to declare which of the two options he will select. On the 19th he declares he will purchase and makes up his mind to give £15,000 for property and stock, "walk in and walk out." It was urged on behalf of the plaintiffs that it did not appear that Mr. Easy had authority to receive information on behalf of Mr. Burgess regarding the number and ages of the cattle from Mr. Baker. I think that that is disposed of on the principle that an agent (he was clearly an agent for some purposes) has either the actual authority given him, or the authority within the apparent scope of his employment. Looking at it from the standpoint of the defendants, what would it have been natural for them to conclude as to the authority of Mr. Easy when he inspected? A person authorized to receive information may receive it through his eyes or his ears. Whether Mr. Easy communicated his information to his principals or not we do not know. We know that he communicated something on 14th December. Whether he communicated truthfully and fully all that he learnt we do not know, because the plaintiffs themselves did not put in or tender that evidence. But I take it to be immaterial from the defendants' standpoint whether he did or did not, and I think it was also within the defendants' power as a matter of law to oppose the admission of evidence showing that Easy had not communicated fully. There are two authorities bearing upon this part of the case. One is *Tanham* v. *Nicholson* (1), a case where service of a notice to quit at the house of a tenant upon a person whose duty it was to deliver it to the tenant, was held a good service on the tenant for the purposes of ejectment. The House of Lords held that the presumption was that the notice did reach the tenant, although in fact it was not delivered to him, and that the question was not whether the servant performed his duty but whether he was to be considered the agent for the purpose of delivering the notice. Lord *Hatherley* L.C. pointed out the principle; he said (2):—"If once you have constituted your servant

(1) L.R. 5 H.L., 561.

(2) L.R. 5 H.L., 561, at p. 568.

your agent for the purpose of receiving such a notice, the question of fact as to whether that servant has performed his duty or not, is not one which is any longer in controversy. When once you constitute your servant your agent for that general purpose, service on that agent is service on you—he represents you for that purpose—he is your *alter ego*, and service upon him becomes an effective service upon yourself." He had pointed out a little earlier that you cannot in such a case give evidence to prove that the notice had not in fact been served.

The same principle was applied in a case of insurance agency, where it was proved that there was a distinct misrepresentation in the application which was the basis of the contract of insurance, the proposer having a defect which was obvious to the agent who took the proposal. The misrepresentation was that the man had no physical defect, whereas he had only one eye. It was held that the agent must have known of it, and that the company was bound though the agent had not communicated it to them. That was the case of *Bawden* v. *London, Edinburgh and Glasgow Assurance Company* (1). So that the principle is plain that, if once a person constitutes another his agent to stand in his place, he takes the responsibility of that person doing his duty to his principal. The other party is not concerned with that. It seems to me beyond question that Mr. Easy bound Mr. Burgess and the other plaintiffs by the knowledge he obtained in December, just as much as if Mr. Burgess had obtained the information himself; and if he had, he could not have been heard to say that he was then relying upon the previous statement, however fraudulent it may have been.

With regard to the damages the position seems to me perfectly clear. The cases referred to by my learned brothers are distinct upon the point. I shall only refer shortly to a few cases to show the principle in which damages are to be measured in an action of deceit. In *Thom* v. *Bigland* (2) *Parke* B. said:—"It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage." That is

(1) (1892) 2 Q.B., 534.

(2) 8 Ex., 725, at p. 731.

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the keynote, the alteration of the position he was in before the action of the defendant which caused him to act to his own detriment. In *Edgington* v. *Fitzmaurice* (1) *Bowen* L.J. said :— "But, lastly, when you have proved that the statement was false, you must further show that the plaintiff has acted upon it and has sustained damage by so doing : you must show that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting." He referred to *Clarke* v. *Dickson* (2) as the case where that rule was laid down, in the words which I quoted during argument, that you have to show that real damage was caused by acting upon the fraudulent statement or representation. And in the case *Hyde* v. *Bulmer* (3), *Bovill* C.J. puts the rule thus :—"Although, since the case of *Pasley* v. *Freeman* (4) the law has been that the defendant's advantage is not a necessary ingredient in an action, there must be proof of loss on the plaintiff's part. Lord *Kenyon* C.J. in his judgment in that case, cites *Croke* J. 'fraud without damage, or damage without fraud, gives no cause of action; but where these two do occur, then an action lieth.' There must be *damnum et injuria*; and it seems to me that an action cannot lie at all without loss to the plaintiffs. In all cases of this kind the rule of pleading and of law is that the plaintiff must show in the declaration, and prove at the trial, that the representation of the defendant was false to his knowledge, that it was made under circumstances on which the plaintiff might reasonably act, that the plaintiff acted in consequence of the defendant's false representation, and lastly that the plaintiff has suffered actual loss."

Now, how have the plaintiffs attempted to satisfy that last condition here? They say :—"We bought the station with stock and improvements for £15,000, and we were deceived by a statement that a certain number of the cattle were of certain ages, and if those cattle had been of that number and of those ages we would have been so much to the good; the property would have been worth £2,700 more to us than it actually was." I put this to counsel. Suppose, apart from warranty, the declaration had said that the defendants had fraudulently made a representation

(1) 29 Ch. D., 459, at p. 482.
(2) 6 C.B. (N.S.), 453.
(3) 18 L.T.N.S., 293, at p. 295.
(4) 2 Sm. L.C., 68.

as to the number of cattle on a certain property and thereby induced the plaintiffs to buy the property for £10,000 whereas the property was worth £20,000, but if the representation had been true the property would have been worth £30,000, could the plaintiffs succeed? Counsel said, Yes. That is quite foreign to my notions as to the nature of an action for deceit. It was attempted by the plaintiffs alternatively to show that there was evidence of the value of the property as a whole; that you take the contract and there you find a price fixed by the parties, and, assuming that to be a fair price for the property, you are then at liberty to say that if the representation had been true it would have been worth much more. But the fallacy of that is obvious. If you look for the price in the contract you look for the property in the contract, and the property in the contract does not include the property which is now being sued upon. Therefore, if you say that the property in the contract is sold at a fair price, that ends the matter. But if you wish to prove that the property in the contract was worth much less than the price paid, then to establish the damages sustained you must bring evidence to that effect. Therefore, it is perfectly consistent with the evidence given by the plaintiffs that they have suffered no loss, or even that they have made a good bargain. If they have, then they have not altered their position for the worse, and consequently have failed to maintain the three essentials in an action of deceit, namely, loss occasioned by action which they were induced to take by reason of the defendants' fraud.

With regard to the question of evidence I agree with what has been already said. It seems to me that the section in question was intended to regulate the rule of law which enables a party, not to bring what I may call original evidence in support of his case, but evidence breaking down and discrediting a witness called by his opponent. It would be a singular thing if this class of evidence could be given by the defendant to contradict a witness of the plaintiff on the first part of the plaintiffs' case, and should not be open to him when the plaintiff calls a witness to rebut the case made by the defendant. The object of such evidence is, not to support the party's case, but to break down or

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discredit a witness who has given evidence on the other side. The witness may be asked whether he did not previously make a statement contrary to the testimony which he is then giving. The fact that he had done so would not be regarded as evidence for the other side on the issues in the case, but as tending to break down the evidence of the side calling the witness so far as it depended upon the credibility of the witness. He may be asked whether he had received a bribe to give evidence. If he had, that would simply break down his evidence; or he may be asked whether he had not been convicted of some offence. These are some of the recognized means of discrediting a witness. But a proper foundation has to be laid for the contradiction by a proper cross-examination. A strong case showing that is *Hemming* v. *Maddick* (1). There a witness had made an affidavit on behalf of the plaintiff, and it was sought to put in a statement in writing made by the witness to the defendant's solicitor which was alleged to be inconsistent with the affidavit. It was held that the only purpose for which such a document could be used was to discredit the witness who made it, and that, if it were used for that purpose, the witness ought to have been cross-examined, and then the document might have been put in his hand and he might have been cross-examined upon it. It seems to me that that being the law the evidence may be used at any stage of the case.

For these reasons I agree with the judgment proposed by the Chief Justice.

Appeal allowed with costs. Verdict for the plaintiffs on the first count set aside, and verdict entered for the defendants.

Solicitors, for the appellants, *J. A. Busby* by *Colquhoun & Bassett.*

Solicitors, for the respondents, *Minter, Simpson & Co.*

C. A. W.

(1) L.R. 7 Ch., 395.