[HIGH COURT OF AUSTRALIA.]

MANUEL . . . . . APPELLANT;
PLAINTIFF,

AND

PHILLIPS . . . . . .
DEFENDANT,

AND

MOSS (OFFICIAL RECEIVER, TRUSTEE OF THE BANKRUPT ESTATE OF THE APPELLANT) . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 1, 4.

Griffith C.J., Barton and Isaacs JJ.

Partnership—Dissolution—Agreement—Sale of Assets—Undervalue—Breach of agreement to buy in—Release obtained by fraud—Rescission—Accounts—Measure of damages—Costs.

A party to a deed of mutual indemnity and release sought rescission of a covenant of release made by him, without repudiating the whole of the deed; it further appeared that he had benefited considerably by the performance of the covenants in the deed by the party resisting rescission, whom he could not restore to the same position as before, and the rescission was sought for the purpose of bringing an action for breach of contract in which the plaintiff could recover at most only nominal damages.

Held, that the rescission claimed could not be granted. A release contained in a deed cannot be severed from the rest of the document.

Urquhart v. *Macpherson* (3 App. Cas., 831), applied.

CROSS-APPEALS from the judgment of the Full Court setting aside the judgment of *McMillan* J.

The appellant Manuel and the respondent Phillips were partners since 1901 in a station property. In 1904 Dalgety & Co., being creditors for nearly £16,000, called for payment, and the partners then decided to sell the partnership assets and dissolve partnership. There were a few other creditors for small sums. An agreement, alleged by appellant, and found by the jury, was made that the respondent Phillips should at the auction sale buy in the property and stock at fixed prices totalling over £18,000, if those prices were not bid by other persons, and the property so bought in was to be disposed of again for the benefit of the partnership. At the sale, however, an agent for a firm of Forrest, Emanuel & Co., bought substantially all the assets for about £12,000; the respondent Phillips made no bids, although he was present, and the appellant protested against the continuance of the auction and against the respondent's failure to bid. Subsequently, and, as the jury found, on the faith of a false representation made by Phillips that Forrest, Emanuel & Co. were the *bonâ fide* purchasers of the property, the appellant executed a deed of indemnity and release, the other parties to the deed being the respondent Phillips and Dalgety & Co. Under this arrangement Manuel was released by Phillips and Dalgety & Co. from all the obligations of the partnership, and assigned to Phillips all his interest in the assets of the partnership, Phillips becoming solely answerable for all debts and liabilities. In April 1905 Manuel was adjudicated bankrupt, and the respondent Moss was appointed trustee of his estate. In realizing the estate Moss discovered that at the auction sale Forrest, Emanuel & Co.'s agent had in fact been acting on behalf of Phillips, who was the secret purchaser in his own interests. Manuel, having obtained his certificate of discharge in the bankruptcy, then obtained from Moss an assignment of the right of action of Moss, as trustee of the bankrupt estate, against Phillips arising out of the contract of partnership between Manuel and Phillips. As assignee of this right of action, Manuel, in conjunction with Moss, sued to have the deed of release set aside, and to have the property which was purchased at the auction declared partnership property, also for an account, and for damages for breach of the agreement to bid, and for the false

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representation. The action resulted in the release being set aside; but *McMillan* J., finding that the agreement to buy in, if carried out, would have resulted in involving Manuel in greater losses than if not carried out, gave judgment for the plaintiffs for a shilling damages, with costs of action. Manuel and Moss appealed to the Full Court to have the damages increased to half the difference between the price bid by Phillips at the auction and the price Phillips had agreed to bid. Phillips lodged a cross-appeal to the judgment of *McMillan* J., setting aside the deed of release. The Full Court dismissed the appeal, allowed the cross-appeal, and entered judgment in the action for Phillips with costs of the appeal, but made no order as to the costs of action. Manuel appealed to the High Court, Moss being joined as an appellant without his authority. He appeared in person to object to being joined as an appellant, and the Court then joined him as a respondent, with liberty to oppose Phillips' cross-appeal.

Villeneuve Smith and *F. S. Harney*, for the appellant. When the appellant was deceived into signing the deed of release, he was tricked out of a right to elect between rescinding the sale and affirming it. The right to rescind is not gone by reason of subsequent events, and he is relegated to his right to disaffirm the deed of release and sue for damages. It is immaterial for the respondent Phillips to urge that he ended by losing money on the manœuvre; he must be held bound by his agreement to bid the fixed prices for the partnership assets, which would have left a surplus over the total debts.

[GRIFFITH C.J.—You do not dispute the finding of fact by *McMillan* J. that the performance of the agreement must have ended in a loss; and you can hardly come into a Court of Equity to set aside a deed of release in order to enable you to recover 1/- damages: *Maturin* v. *Tredennick* (1).]

Burt K.C. and *Draper* (*F. Burt* with them), for the respondent Phillips. The appellant cannot claim rescission of the deed of release and an account, unless he is in a position to restore the respondent Phillips to his former position. The appellant has

(1) 12 W.R., 740.

enjoyed the full benefits of the deed of release, and circumstances have so altered that restitution cannot be made: *Urquhart* v. *Macpherson* (1); third parties have come in, whose interests would be affected: *Clough* v. *London and North Western Railway Co.* (2); and the appellant's bankruptcy, wherein he has obtained a discharge, stops all recourse against him, and third persons would also lose the right of proving in bankruptcy, examining the bankrupt as to assets, and opposing his discharge.

If the trustee in bankruptcy, knowing the facts of the case, recommended Manuel's discharge, he elected thereby to set up a claim for damages only, and abandoned any claim for an account.

The concealment by Phillips of the fact that he was the real purchaser was immaterial to the question of damages; at the time that Manuel signed the deed of release he was well aware that he had a right of action against Phillips for damages for breach of his contract to bid; the concealment had nothing to do with the release of that right of action; and Manuel ratified and acknowledged Phillips' dealings with the station as his own property, even making him an offer to purchase it.

On the 1/- damages that were awarded no costs should have been allowed, or at most only Local Court costs; there was no need to come to the Supreme Court: English *Judicature Act* (36 & 37 Vict. c. 66), sec. 89; *Local Courts Act* 1904 (W.A.) (4 Edw VII. No. 51), secs. 36, 39. If the judgment of the Full Court is upheld, the respondent Phillips should be allowed all costs of the action and the appeals; and if the judgment of *McMillan* J. is upheld, the respondent is equally entitled to costs, as the action was clearly unsubstantial. There is "good cause" why the appellant should be ordered to pay the costs: *Forster* v. *Farquhar* (3); Order LXI., r. 1 (W.A.); Order LXV., r. 1 (Eng.).

Villeneuve Smith in reply. The trustee in bankruptcy recommended the bankrupt's discharge on the sole ground of his conduct during the bankruptcy; and his recommendation was given a month before he learned of the respondent's false representations.

(1) 3 App. Cas., 831, at p. 838. (2) L.R. 7 Ex., 26.
(3) (1893) 1 Q.B., 564.

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The Local Court cannot deal with a suit for rescission. The finding of fraud still stands against Phillips, and the Full Court was therefore right in refusing him costs of trial: *Bostock* v. *Ramsey Urban Council* (1); *Scottish Gympie Gold Mines Ltd.* v. *Carroll* (2). The only question found against the appellant was the chance fact that the damages could only be nominal. The appellant was not a stranger or speculator in the action; the trustee in bankruptcy assigned the cause of action to him for the benefit of the creditors.

The following judgments were read:—

November 4th.

GRIFFITH C.J. This is an action brought by the purchaser from the Official Receiver in bankruptcy of a supposed asset in the estate of one Manuel, a bankrupt. The purchaser happens to be the bankrupt himself, but that circumstance is quite irrelevant. The local law allows an asset of that sort to be assigned, and, if the bankrupt himself after obtaining his discharge becomes the purchaser from the Official Receiver, he is in the same position as anyone else who purchases an asset in the bankrupt's estate. The cause of action as set up at the trial was twofold, for breach of an agreement, and for damages for fraudulent representation by which the bankrupt was induced to execute a release of any claim for damages for the breach. The bankrupt and the defendant had been partners in a pastoral property, and they desired to wind up that partnership. It was accordingly arranged that the partnership assets should be offered for sale at auction. The plaintiff alleges, and the jury have found, that the defendant agreed with the bankrupt that he would attend the sale and would bid certain specified sums for the various items of the property, if other intending purchasers did not bid so much. In the event of the defendant being the highest bidder his purchase was to be for the benefit of the partnership, and the property was to be disposed of in some other way. An auction was accordingly held, at which the bankrupt and the defendant both attended. The defendant did not bid according to the terms of the alleged agreement, and the property was knocked down nominally to the firm of Forrest, Emanuel & Co. Shortly afterwards, in

(1) (1900) 2 Q.B., 616. (2) 1902 St. R. Qd., 311.

August 1904, a deed of mutual release was drawn up and executed, to which the bankrupt, the defendant, and their principal creditor were parties. The substantial effect of this deed was that the defendant should take over all the unsold assets of the partnership and assume all its liabilities, and that the creditor should release Manuel's liability to him. The deed included a mutual release of all claims. The defendant accordingly took over all the liabilities, and realized the unsold assets for his own benefit. Some months afterwards Manuel became bankrupt. In the meantime the terms of the deed of release had been carried out, and the defendant had discharged the liabilities of the partnership. In June 1905 an examination in bankruptcy disclosed the fact that at the auction sale the defendant had really bought the property for himself. The jury have found that Manuel was induced to execute his release by the false representation that Forrest, Emanuel & Co. were the purchasers. It is contended that the Official Receiver, on discovery of this fact, became entitled to elect to avoid the release and claim any rights to which he would have been entitled if it had not been executed. If the release had been out of the way, or could have been got out of the way, the Official Receiver might perhaps have been entitled when he discovered this fact to say that the property which the defendant bought under such circumstances continued to be partnership property for which he was liable to account. But he did not do so. In fact he did nothing. In December 1905 the bankrupt obtained his discharge, and in the same month was informed of the fact that defendant had bought for himself. On 8th January he brought this action, setting up the alternative claims which I have stated, and another to which it is not necessary to refer. It is plain that the action was wrongly brought, for, whatever the Official Receiver's rights were, they had not then been assigned to the plaintiff. The Official Receiver was subsequently joined as a co-plaintiff, and in July 1906 he executed an assignment to the plaintiff of "a certain cause of action arising out of a contract" between the bankrupt and the defendant. I will assume (without deciding) that this assignment comprised the two causes of action now set up, namely, for damages for breach of the promise he had made

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to attend the sale and bid up to a certain amount for the partnership property, and for damages for the fraudulent representation. To the first claim the release is an obvious answer, unless it can be got out of the way. The jury have found the fact of fraud in the plaintiff's favour. Supposing the release to be out of the way, the relief to which the plaintiff would be entitled in respect of the breach of contract would be such an amount as would put him in the same position as if the contract had been performed. *McMillan* J., to whom the question of damages was left, found that if the contract had been performed the plaintiff would have been in a worse position than he was when it was broken, since the property if bought in and resold would have realized much less than the defendant gave for it. He was, therefore, at most, only entitled to nominal damages, a shilling. The original competency of this appeal depended upon an impeachment of this finding, but on that point the appellant hopelessly failed. It follows that he cannot succeed on his alternative claim for damages for the fraud, since actual damage must be established in order to support an action for fraud. The plaintiff, however, claims that, the appeal being competent, he is entitled to have the deed of release set aside in order to enable him to recover that one shilling for breach of contract. His counsel concedes that, unless this can be done, he cannot maintain the action, even for the shilling. I remark, in passing, that the alleged fraudulent representation was absolutely irrelevant to the release of that cause of action, because what the bankrupt lost by his partner not bidding at the sale was the same whether the property was sold to the defendant or to a stranger at the same price. It may therefore be contended that the fraud was not *fraus dans locum contractui.* It is not, however, necessary to express any opinion as to the solidity of such a contention. For, in order to avoid a contract for fraud, the plaintiff must show both that he could repudiate and that he did repudiate the fraudulent contract. In this case there is no evidence whatever of any repudiation before the assignment of the cause of action to the plaintiff. It is not necessary to determine whether a right of election to repudiate a contract for fraud can be assigned and exercised by the assignee, but I must not be under-

stood to assent to the affirmative of that proposition. I think further that it was not competent under the circumstances for either the bankrupt or the Official Receiver to repudiate it. In my opinion the case of *Urquhart* v. *Macpherson* (1), referred to by the learned Judges of the Full Court, is exactly in point. The deed of release in question in that case was very like that in the present case. *Sir Montague Smith*, delivering the opinion of the Judicial Committee, said (2):—"The general scheme of this deed of dissolution is, that the plaintiff was to take over the whole of the assets of the partnership, the stations, the stock, and all the credits, and was to pay all the debts and liabilities of it. It appears too by this deed that the tracts of land which had belonged to the defendant were assigned by him absolutely to the plaintiff, with the exception of the *Chintin* station, which was to be retained by him. . . . Such being the general nature of the deed, the release which it contains is found at the end of it, and is in these terms: 'And this indenture lastly witnesseth, that in consideration of the premises, each of them the said *George Urquhart* and *Duncan Macpherson*, for himself, his heirs, executors, and administrators, doth hereby remise and release, and for ever quit claim unto the other of them, his executors, administrators, and assigns, all actions, suits, accounts, reckonings, claims, and demands whatsoever at law or in equity, which either of them the said parties, his heirs, . . . now hath or hereafter may have, claim or demand against the other of them, his heirs, . . . for or by reason of any matter or thing whatsoever touching or concerning the said joint trade or partnership, subject and without prejudice nevertheless to the covenants and agreements herein contained.' Therefore the object of this release, so far as the defendant was concerned, was to release him from all matters and things whatever touching or concerning the joint trade, without prejudice to the covenants which he had entered into for the security of the plaintiff with regard to certain matters.

"It seems to their Lordships impossible to sever this release from the rest of the deed. There is but one contract for the dissolution of partnership, though containing many terms, of

(1) 3 App. Cas., 831.

(2) 3 App. Cas., 831, at pp. 836-8.

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which this release is one. It is expressly said to be made 'in consideration of the premises,' that is, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, and his own runs, which at the end of the partnership would otherwise have reverted to him.

"Then, if the release cannot be separated from the rest of the contract it falls within the ordinary principle. Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state. The plaintiff has taken the whole benefit of the deed so far as it was beneficial to him, without at any time attempting to repudiate it, and it now being impossible to restore the defendant to his original position, he seems to destroy one particular part of the contract, and that their Lordships think he cannot do."

So here the bankrupt took the whole benefit of the deed, so far as it was beneficial to him, without attempting to repudiate it, and it is impossible to restore the defendant to his former position. I therefore agree with the learned Chief Justice, although I do not attach so much importance to the mere fact of Manuel having become bankrupt. Even without the bankruptcy it would have been impossible to restore the parties to the same position which they occupied before the release was executed. In my opinion, therefore, the action cannot be maintained either for breach of contract or for fraud.

With respect to the costs of the action, the Full Court ordered judgment to be entered for the defendant without costs. We have not had the opportunity of knowing the reasons for making that order, but I think that in a purely speculative action which is unsuccessful the defendant should not be deprived of his costs, except so far as he may have been to blame for setting up untrue defences. I think that the defendant should have the costs of the action except so far as they were increased by issues upon which he failed.

BARTON J. I concur, and have very little to add. With respect to the agreement between the two parties, the position

when they made it was that, unless the amount of debt were realized from the money of an outside purchaser, there would be a balance of debt to be discharged by Manuel and Phillips. This they wished to avoid, and by an agreement between them, separately from their principal creditor, Dalgety & Co., certain sums were to be bid by Phillips as reserved prices, that is to say, he was only to bid if an outsider did not bid them. Clearly they were to be bid merely to protect the property and stock, and to save them for future sale if a sale should thereafter be attempted. That is the arrangement, and it is alleged that the defendant did not keep it. If that was the case, and we have to look upon it in that light, seeing that the jury have found that such an arrangement was made and broken, we then have to consider what are the damages flowing as a natural consequence from that breach. If the prices obtained were fair, and the learned Judge has so found, and, I think, with reason, there was no loss by reason of the non-bidding of a higher price by one who, by the terms of the agreement, would not have become in truth a purchaser. If value was obtained—and apparently it was—there was no damage. Although it may have been a good speculation to buy the property in upon a chance of getting a higher price in the future, we have to remember that, as a matter of fact, if the contract had been performed the plaintiff would have lost heavily. As to the claim for a cancellation of the release, I am satisfied that no Court of Equity would set aside that release to enable the plaintiff Manuel to claim, under circumstances such as these, damages which, if they existed at all, could not be more than nominal at best. As there were none, it would be merely *brutum fulmen* to set the release aside. Finally, I agree with the Full Court of this State that, in any event, it would have been impossible to restore the parties to their original position even in substance. Upon every ground the plaintiff has failed. The appeal should therefore be dismissed.

Isaacs J. Even if the plaintiff had sued for damages for being fraudulently led into this agreement of 8th August 1904 which includes the release, he would have failed, because he benefited by the transaction. If the contract to purchase at the auction

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sale, which is sued upon, had been carried out, and there had been no purchase by Forrest, Emanuel & Co., and no release, the property would have simply been bought in. It was only in name that Phillips was to agree to give a sum of money for the partnership property. If he had done so that would only have been a payment to themselves, and consequently any breach of that agreement would only entitle the plaintiff to, at the most, one shilling damages unless he proved that substantial damage had ensued, as by some other person getting the property for less than its value. There is no claim here on the basis of a fiduciary relation as between one partner and another in regard to partnership property. The plaintiff's claim is limited to the barest technical point. He has shown no substantial damage at all, and, in my opinion, he has failed in the action, although he might be entitled to one shilling damages. The substance of his claim was that by reason of the breach of agreement to purchase, he suffered the loss set out in the 16th paragraph of the statement of claim which alleges that, by reason of the matters stated, the plaintiff was deprived of his share of the true net value of the land and stock. He has altogether failed to prove that. He has only succeeded in proving that in the result he has benefited by any moral delinquency of which the defendant has been guilty. As to setting aside the release for the purpose of getting the nominal damage of one shilling, I fully concur in what has been said by the Chief Justice. For the reasons stated in the case of *Urquhart* v. *Macpherson* (1), I do not think this release could be set aside at all. The substantial position here was that there had been an agreement to sell the partnership property and dissolve the partnership. A sale was held, but the final completion of the agreement is to be found in the indenture of 8th August 1904. That was the act of final dissolution between the partners, and the final settlement of their mutual rights. Reference is made in that document to a dissolution of partnership, and, although in some parts it is referred to as "the late partnership," still there is a passage showing that the parties understood that the dissolution was not absolutely complete until this document was executed. I find these words in that document, "And

(1) 3 App. Cas., 831.

the company in consideration of the said Henry William Manuel relinquishing to the said Samuel James Phillips all the rights and claims of him the said Henry William Manuel in and to the assets of the partnership heretofore existing between the said Samuel James Phillips and Henry William Manuel doth hereby at the request of the said Samuel James Phillips release the said Henry William Manuel from all personal liability in respect to the mortgage and other debts due or owing by the said partnership firm to the company and from all claims and demands in respect thereof." I take it that that is a document finally concluding the partnership and mutually settling the rights of the partners on such dissolution; and, as I said before, under the authority of *Urquhart* v. *Macpherson* (1), you cannot sever the release from the rest of the document, nor can you, with the consequences of that document before you, by any means place those parties back in their former position. That would be to restore the partnership. Under these circumstances the release cannot be rescinded, and if so there is no power to give even one shilling damages. I do not think that the mere fact of a party having been defrauded and becoming insolvent is in itself sufficient to prevent his assignee in insolvency asking for the rescission of a contract induced by fraud. Rescission implies that the party wishing to avoid the contract is prepared to do equity, which means restoration to the former situation, and if that is so I cannot see that it is any answer in the mouth of the present plaintiff to say merely that insolvency has intervened.

Plaintiff's appeal dismissed. Judgment varied by directing the plaintiff to pay costs of the action, except so far as they were increased by the issues on which he succeeded, and to pay costs of the appeal.

Solicitors, for the appellants, *Harney & Harney.*
Solicitors, for the respondent Phillips, *Parker & Parker.*

N. G. P.

(1) 3 App. Cas., 831.