# REPORTS OF CASES

DETERMINED IN THE

# HIGH COURT OF AUSTRALIA

1908-9.

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[HIGH COURT OF AUSTRALIA.]

BAYNE . . . . . APPELLANT;
DEFENDANT,

AND

STEPHENS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 6, 10, 11, 18.

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

*New Trial—Agent entrusted with money to invest—Failure to account—Interest.*

The plaintiff in the early part of 1896 entrusted the sum of £4,000 to the defendant as his agent for investment purposes. In December 1896 defendant repaid £500, and in June 1897 an additional £1,700, leaving a sum of £1,800 still to be accounted for. The principal brought an action asking for a return of the £1,800 with interest from the date of issue of the writ or an account of the way it had been expended. The defendant in his defence set up that he had made three investments on the plaintiff's behalf.

The jury was asked to find whether these investments had been properly made, and answered as to one of them in the affirmative, and as to the other in the negative. The defendant appealed against the second finding to the Full Court, which refused to disturb it.

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*Held*, that the jury's finding as to one of the investments was entirely against the weight of evidence.

*Held*, on the evidence (*Griffith* C.J. dissenting) that the conclusion as to the other was not an unreasonable one for the jury to come to and should not be disturbed:

*Held*, by *Griffith* C.J. that as the jury had been invited to regard, and had regarded, the conduct of the appellant with respect to the investment which the Court held to be proper, as fraudulent, and to judge of his action with respect to the others by that standard, the verdict was unsatisfactory and should be set aside.

The Judge at the trial allowed interest on the judgment at the rate of £8 per centum, which was reduced to 6 per cent. by the Full Court.

*Held*, that this was a case in which interest should be allowed, and also that the reduction by the Supreme Court, exercising their knowledge of local affairs, was correct.

*Harsant* v. *Blaine, Macdonald & Co.*, 56 L.J.Q.B., 511, followed.

Judgment of the Supreme Court of Western Australia varied.

APPEAL from the Supreme Court of Western Australia.

The facts are fully set out in the judgment of *Griffith* C.J. hereunder.

*Keenan*, A.-G. for Western Australia, and *Parker*, for the appellant. The matter of the Menzies Kensington shares was dealt with as one of fraud, and it was in this light that the jury really viewed the transaction in the Great Eastern mine, whereas the defendant proved direct authority for the investment. The jury did not view the matter in accordance with the principles laid down by Lord *Herschell* in *Jones* v. *Spencer* (1). If fraud is set up the *onus probandi* is on the person alleging it. The plaintiff failed in this respect entirely.

As regards the question of interest, this was a matter for the jury acting under 3 & 4 Wm. IV. c. 42, but no notice had been given in accordance with the provisions of the Act. [Counsel referred to *Metropolitan Railway Co.* v. *Wright* (2); *Harsant* v. *Blaine, Macdonald & Co.* (3); 4 Ann c. 16, sec. 37.]

(1) 77 L.T., 536, at p. 538. (2) 11 App. Cas., 152.
(3) 56 L.J.Q.B., 511.

*Pilkington* K.C. and *Stawell*, for the respondent, referred at length to the evidence in support of the jury's conclusions.

As to the question of interest on the judgment, where an agent or any person in a fiduciary position fails to account when asked to do so, a Court of Equity will allow interest from the date of such failure. This case must be treated as an equity case. An account was asked for, the jury's functions being to try certain issues only. The *Judicature Act* enlarged the Judge's jurisdiction very greatly. The case of *Harsant* v. *Blaine, Macdonald & Co.* (1) covers the matter entirely. [Counsel referred to the following:— *Jones* v. *Spencer* (2); *Jenkins* v. *Bushby* (3); *Phillips* v. *Homfray* (4); *In re Barclay*; *Barclay* v. *Andrew* (5); *Seton on Judgments*, 6th ed., p. 1386; *Supreme Court Act* 1880 (44 Vict. No. 10), sec. 7; *Bowstead on Agency*, 3rd ed., p. 125; *Mayne on Damages*, 6th ed., p. 166.]

*Cur. adv. vult.*

The following judgments were read:—

November 18.

GRIFFITH C.J. The circumstances of this case are unusual, and in some respects remarkable. The transactions on which the plaintiff's claim is founded occurred in 1897, but the trial did not take place till 1907, when it was manifest that the facts had almost entirely faded from the memory of the parties.

The plaintiff, who is a gentleman residing in England, in 1896 placed a sum of £4,000 to his own credit in a bank at Perth, Western Australia, and on the recommendation of a Mr. Briggs executed a power of attorney in favour of the defendant, with whom he was not acquainted, and who was then the manager of a mine near Cue, in Western Australia, and authorized him to operate on the account and to invest the money in mining adventures in Australia. There is no evidence available as to the actual instructions given, but it has been assumed that the defendant had an uncontrolled discretion as to the investments to be selected. The defendant accepted the authority, and operated on the plaintiff's bank account by cheques signed in the plaintiff's name by the defendant as his attorney. The total

(1) 56 L.J.Q.B., 511.
(2) 77 L.T., 536.
(3) (1891) 1 Ch., 484.
(4) 44 Ch. D., 694.
(5) (1899) 1 Ch., 674.

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number of cheques so drawn was eight. The first, dated 9th March 1896, was for £50 for travelling expenses. The next, for £89 16s. 8d., drawn in April 1896, was for an interest in land at the Darling Range, near Perth. The next, drawn on 17th December 1896, was for £27 for travelling expenses. The next three, each for £500 with exchange added, were debited to the bank account on 17th December 1896, 4th March 1897, and 19th June 1897, respectively. Another, for £53 0s. 7d., was debited on 31st March 1897. The last, for £33 5s. 2d., was debited on 1st October 1897. The name of the payee was always stated on the face of the cheque. One cheque was drawn by the plaintiff himself on 17th December 1896, as will be afterwards stated.

The questions as to which the verdict is impeached related to two investments alleged by the defendant to have been made by him for the plaintiff, one in a mine at Bendigo in Victoria called the Great Eastern mine, in respect of which the three cheques for £500 odd were drawn, the other in 300 shares in a gold mining company in Western Australia called the Menzies Kensington Company, for which the defendant paid the £53 0s. 7d.

I will now state briefly the material facts so far as they can be discovered from the evidence.

On 20th April 1896 the defendant wrote to the plaintiff telling him of the first investment which he had made for him, and which consisted of the interest in the land near Perth. No question now arises as to this transaction. He said that "as for mining" he could not see his way to put the plaintiff "into anything here," *i.e.* in Western Australia. He went on to say that he had a very good investment in Victoria, and added: "The mine I am about to offer you is my own, and I would rather place all the facts before you and receive your instructions direct. The mine I speak of is known as the Great Eastern at Bendigo, Victoria." He then gave details of the property and of the probable capital which would be required for its development. The plaintiff says that he wrote in reply saying that he would not have anything to do with the Great Eastern, but the letter was not produced, and its non-production by the defendant was satisfactorily accounted for. The defendant put in evidence a press copy of a letter dated 13th July 1896 addressed by him to the plaintiff at his London

address. The plaintiff says that he does not remember receiving it, and his counsel suggested that it was never sent, and is in short a forgery. The letter-book in which it was copied was however produced, and contains nothing to suggest that the letter was not written and press-copied at the time of its date. The book was still in use by the defendant at a date long subsequent to 1896, and before any notion of fabricating such a letter could have occurred to him. If this letter is genuine, it is of great importance. It begins : "Yours of 27th May I have just received." The reference is apparently to a letter written by plaintiff in answer to defendant's letter of 20th April. It goes on : "Am pleased to think we shall meet about December when I hope to have a few weeks to myself and will be only too pleased to show you over these fields and those of Victoria." After stating that since his last letter he had not made any investments on plaintiff's behalf, he added: "The Victorian property" (*i.e.* the Great Eastern mine) "I shall put £1,000 of yours into it, and would like to place all, but being my own I consider it would not be the right thing to do although I am quite satisfied as to the results. I am having the best reports from the mine, and I have quite made up my mind to invest what money I have belonging to Mr. Briggs in it."

The Attorney-General argued that if this letter is genuine it shows that the plaintiff's memory is inaccurate when he says that in his letter in reply to the defendant's letter of 20th April he refused to have anything to do with the Great Eastern mine, since it is inconceivable that in view of such refusal defendant could have at once replied that he was going to put £1,000 of plaintiff's money into it.

Defendant did not, however, at that time put any of the plaintiff's money into the mine. The bank account of the mine was put in evidence, from which it appears that the adventure was apparently not in want of any money before the end of the year. In December 1896 plaintiff came to Western Australia, where he met the defendant and was in his company for some days. He says that he and the defendant had talks fairly often about the Great Eastern mine, and that the defendant wanted him to take an interest in it. "I said, No. I never agreed to put any-

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thing into the Great Eastern." This is the whole of the evidence for the plaintiff on the question of the defendant's being authorized to put the £1,500 into that adventure, except that he says that he did not know anything of having put money into it until after he revoked the defendant's power of attorney, as will hereafter appear. On 17th December the plaintiff while in Perth drew £500 from his account by his own cheque. He left Perth for Aden and the Somali Coast on 18th December.

The defendant said in his evidence that he and the plaintiff had many conversations about the mine, that he asked the plaintiff to put £1,500 into it, that the plaintiff was to have a half interest, and that the plaintiff agreed to this. On 17th December, while defendant was still in Perth, defendant drew £500 from the plaintiff's bank account and sent it to the Great Eastern mine. They left Perth together, and parted at Albany, plaintiff going west and defendant east. Defendant says that he wrote to plaintiff on 11th January and sent the letter to him at Aden as directed. Plaintiff says that he did not receive the letter.

On 4th March 1897 defendant remitted another sum of £500 of the plaintiff's money to the Great Eastern, and a similar sum on 16th June, the amount in each case being drawn by cheque in favour of "G. Eastern G.M.C."

On 13th May 1897 plaintiff wrote to defendant a letter revoking his authority. On 22nd June the plaintiff's bankers received a cable message from him asking them to remit to him £2,000 and referring them to the defendant, but he did not inform them of the revocation of authority. The bank informed defendant of this message. On 30th June 1907 defendant wrote to plaintiff a letter which contained the following passages:— "I was a little surprised at receiving a telegram from the manager of the Bank of New South Wales saying he had received a cable from you requesting that £2,000 should be telegraphed at once; that wire I received on Monday night. I replied to him on Tuesday advising him to wire £1,700 and keep odd money back so as to keep account open. Since the above wire I have received your letter dated 13th May 1897, this makes the thing more complicated than ever. On 11th January

1897 I wrote you a long account of the Great Eastern and full particulars of all that was going on, and asking you if you felt inclined to stay in with me in the spec. The mine is looking well and is a safe investment; my intentions were if you had been willing to spend about £4,000 on the property and then place it on the London market; but not having any reply from you I was in a fix for a time and had to go on as I had the money to spend. You are in to the amount agreed upon, as you will see in my statement which I am sending you by the following post. I have wired the manager for the pass book and will make a full statement. I have been much handicapped in not being able to get away from Cue, and am a little too careful to invest on other people's reports. My time is more than up in this place, and I am now trying to arrange to move over to Bendigo where mining is looking well and take charge of the Great Eastern. . . . . What has become of the letters I sent you in January I cannot understand. I addressed them to Aden as required and I have not been advised of their being returned. I have invested a few shares in Kalgoorlie, which you will see in the statement. I think they have a very good chance. . . . . Trusting my statements which will follow will be satisfactory. If I leave this part I shall be only too pleased to have your business if you have confidence in me."

The sum of £1,700 was remitted to plaintiff by his bankers as stated in the letter.

The plaintiff received this letter, but did not reply to it.

The Attorney-General suggests that, if this letter is not a tissue of falsehoods, it shows that defendant on 11th January, shortly after the plaintiff's departure from Australia, had written to him stating frankly that plaintiff was committed to an investment in the Great Eastern mine, and that the defendant had given him information as to its operations and had asked for authority to make further advances beyond the amount already agreed upon, whatever that was, and further that in the absence of a reply from plaintiff to these letters he had made further investments to "the amount agreed upon." This appears to me a fair inference. The answer made by the plaintiff is that the letter is a concoction, that the alleged letter of 11th January is a

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fiction, and that the defendant had dishonestly and in direct contravention of his instructions given him in December expended £1,500 of the plaintiff's money on this mine, £500 being so spent while the plaintiff was himself in Perth. This would be not only a fraud, but an incredibly impudent fraud. The plaintiff says further that his letter of 13th May 1897 should in the usual course of post have reached Cue on 14th June before the last cheque for £500 was drawn. It appears, however, that defendant lived at some distance from Cue, and he had to send for his letters, which he did not do every day. He denies that he received the letter before drawing the third cheque for £500.

It was further urged that the statement "I wrote . . . asking you if you felt inclined to stay in with me in the spec." is inconsistent with the plaintiff's having already agreed to go into the speculation, since if he was already embarked in it he could not avoid remaining in it. The words immediately following, in my opinion, entirely rebut this inference. "My intentions were if you had been willing to spend about £4,000 on the property and then place it on the London market; but not having any reply from you I was in a fix for a time and had to go on as I had the money to spend. You are in to the amount agreed upon." This seems to me quite consistent with the statement that the plaintiff had agreed to take a share in the mine, and to advance money for working it to the extent of £1,500 and no more, and to show only that the defendant was disappointed at the plaintiff's not agreeing to extend that limit, when requested.

It is further said that this letter is inconsistent with the defendant's statement, made for the first time at the trial, that the plaintiff was to have a half share in the mine for the £1,500. What defendant actually said was this:—"I spoke to him about the Great Eastern. We had many conversations. I asked him to put £1,500 into it. He was to have a half interest in it." And in cross-examination:—"I recollect the agreement about the Great Eastern mine being made in the Shamrock Hotel. On the balcony we made the agreement. The bank book recalled to my recollection the amount of the agreement (*sic*). I remember the agreement but not the amount." He was not further cross-examined on the point. This is, in substance, a statement that

the plaintiff and defendant were to be equally interested in the mine, but that the amount which the plaintiff would spend upon it was limited. The words "stay in" used by a man with these facts before his mind may be ill chosen, but are quite consistent with the meaning of further prosecuting the adventure by a contribution of additional funds.

So far, there is, on one side, the plaintiff's statement that he forbade any investment in the Great Eastern mine, and on the other, the defendant's statement that he authorized such investment, corroborated by contemporaneous documents if they are genuine.

I pass to the transactions as to the Menzies Kensington shares. It appears that early in March the defendant bought 300 shares in that company which were transferred direct to plaintiff, share certificates being issued in his name on 8th April 1897. The cheque for £53 0s. 7d. was drawn in favour of Kensington Gold Mine, and was paid to the defendant's credit. There is no doubt that in fact the defendant did invest the plaintiff's money in these shares, and it is not disputed that the reference in the secondly quoted passage of the letter of 30th June is to them. The plaintiff's answer is that the shares were not originally bought by the defendant for the plaintiff, but for himself, and that in a falling market he passed them on to the plaintiff. There is some evidence of a fall in price during March. This suggestion, for it is no more, is based on the following facts. The defendant paid for the shares in the first instance by his own cheque on his own bank dated 24th March, which was drawn for a sum including the price of the shares and another sum due by himself to the vendor; it does not appear that he gave the plaintiff's name to the vendor as that of the purchaser; and on the 27th, when the cheque, drawn by him on the plaintiff's account to recoup himself, was placed to his credit in his bank, his account which had been depleted by the amount paid for the shares would have been overdrawn if it had not been replaced.

On these facts, as I will afterwards show, the jury were invited to find that this transaction was a fraud on the part of the defendant.

As already stated, the plaintiff did not reply to the letter of

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30th June 1896. The plaintiff offered no explanation of his not replying. It was pointed out that if, as he now says, he had forbidden any investment in the Great Eastern mine, it is strange that when it was brought to his notice while the matter was fresh in his memory he should not have taken any notice of so flagrant a breach of duty. It is also suggested that the plaintiff's telegraphing for £2,000 to be remitted to him soon after he had revoked the defendant's authority indicates that he knew that a sum of about £1,500 had been drawn from his account by defendant. This suggestion is answered by a statement that the plaintiff while in Perth had told the defendant to buy for him 1,000 shares in the Golden Horseshoe Gold Mining Company at about thirty shillings a share. The defendant, on the other hand, denies this, and it was admitted that at that time the Golden Horseshoe mine was shut down, so that it was not a probable investment. It is common ground that both the plaintiff and defendant discussed both mines, and it is an undoubted fact that defendant acted as if the authority had been to invest in the latter, and not in the former, and that he told the plaintiff that he had done so. A confusion of the plaintiff of one mine for the other is not improbable. The plaintiff, however, took no notice of this information. It is suggested that he waited for the promised statements, which for some unexplained reason the defendant never sent. The plaintiff could, if he had asked for it, have obtained a statement of his bank account, which would have shown the exact state of his account and the cheques that had been drawn upon it.

On 1st October there was a balance of £33 12s. 5d. standing to the credit of his account, of which defendant drew £33 5s. 2d., which he placed to his credit in his bank. This drawing was improper, his authority having been revoked, although the plaintiff had not given the bank notice of revocation. The defendant said that he could not say for what purpose this cheque was drawn. It appears, however, that he never received any remuneration from the plaintiff for any services rendered by him, and he may have desired to pay himself. Being unable to offer any explanation he admitted liability for this sum.

No further communications passed between the parties, but in October 1898 plaintiff came to Australia, and instructed a firm of

solicitors in Melbourne, with whom he had apparently already been in communication. They called upon the defendant for an account, which was promised but apparently was not sent. The defendant indeed telegraphed that he had sent it. This misstatement is not explained, but it may be accounted for without imputing fraud to the defendant in the appropriation of the £1,500. On 8th November 1898 the writ was issued in the action. The defendant instructed a solicitor who entered an appearance.

The statement of claim, which was delivered on 19th December 1898, alleged that :—

In the early part of the year 1896 the plaintiff entrusted to the defendant as his agent for the purposes of investment the sum of £4,000 ;

That in or about the month of December 1896 the defendant repaid to the plaintiff the sum of £500 (this was in fact drawn by the plaintiff's own cheque), and in or about the month of June 1897 the further sum of £1,700, making in all the sum of £2,200, leaving a balance of £1,800 in the hands of the defendant;

That on several occasions since the said month of June 1897 the plaintiff had demanded accounts from the defendant as to the disposal of the said balance of £1,800 remaining in his hands, but without effect.

And the plaintiff claimed :—

1. A return of the said sum of £1,800 with interest thereon at £8 per centum per annum from the date of issue of writ to payment or judgment, or

2. An account of the disposal of the said sum of £1,800 and for transfer or delivery of any securities or investments representing such sum.

3. Payment of all interest or profits received or paid on account thereof.

4. Payment of any balance found to be due by defendant to plaintiff on the taking of the said account.

Some correspondence appears to have then taken place between the plaintiff's and defendant's solicitors. The defendant says that he asked the plaintiff's bank for a copy of the plaintiff's bank book, which would have enabled him to give a full account,

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but the bank refused it. He also says that his solicitor told him that the action would not be proceeded with. Judgment was, however, signed for £1,908 on 17th August 1899 for default in delivering defence. The defendant says that he was not aware of this until October 1905, when he received from plaintiff's solicitors a demand for the judgment debt and interest. His solicitor, to whom he had handed his letters and papers (which did not include the letter-book already referred to) had died in the meantime, and it is not known what became of the papers. Defendant then made application to set aside the judgment, which appears to have been irregular, and in support of the application made an affidavit which was inaccurate in many respects. In particular he said that to the best of his recollection he had invested the plaintiff's money in, amongst other ventures, two mines called the Red White and Blue mine and the Trilby mine to the extent of about £200 and £140 respectively. This was quite wrong. He also said that he had invested £500 or more in the Great Eastern mine and had bought a few shares in a mine at Kalgoorlie the name of which he left blank. He gave further particulars of the Red White and Blue mine and the Trilby mine, and made a point of the fact that he was himself interested in those mines. The plaintiff in answer made an affidavit in which, amongst other things, he said that he had instructed his bank to remit to him "the balance to his credit" and "in this manner" received from the bank the sum of £1,700.

The defendant then put in a defence, alleging, as amended on 7th August 1907, that he had purchased for the plaintiff interests in different mining speculations and had furnished an account of them to the plaintiff and had incurred considerable expenses in connection therewith. Without admitting liability he admitted for the purposes of the defence the plaintiff's right to the sum of £33 5s. 2d. (the amount of the last cheque drawn). The defendant had on 25th May 1907 delivered particulars of his original defence, in which he alleged that he had invested plaintiff's money in the three mines mentioned in his affidavit and also in another called the Douglas Extended Syndicate, as to which also he was in error. It is extraordinary that he did not then obtain a copy of the plaintiff's bank account, which would have enabled

him to avoid these errors. In amended particulars he stated the facts substantially as they were established at the trial and as I have stated them. It is manifest from what I have said that the defendant's memory as to what he had done with the plaintiff's money was wholly unreliable, but his actual dealings with it are not in doubt.

At the trial the case made by the plaintiff was substantially that the defendant was a rogue, that his alleged investment in the Menzies Kensington shares was a mere fraud, and that a man who would be guilty of such a fraud would be likely to fraudulently misappropriate the £500, even while plaintiff was in Perth, to forge the letter of 13th July 1906, and to concoct that of 30th June 1907. The learned Judge allowed the case to go to the jury on that footing. This was in substance a case of fraud, and nothing else.

The jury found that the plaintiff did not agree to put £1,500 into the Great Eastern mine in return for one-half interest in the mine, and that the defendant did not *bonâ fide* invest the sum of £53 0s. 7d. in the purchase of the Menzies Kensington shares on behalf of the plaintiff.

In my opinion there was no case of fraud fit to be left to the jury with regard to the Menzies Kensington shares. Fraud must be proved, and cannot be inferred upon a mere suggestion. Various points were discussed as to onus of proof, but whatever the onus of proof may be in other cases the onus of proof of fraud is on the party alleging it. In my opinion, therefore, the verdict as to the shares cannot be supported. And, as the jury were invited to find fraud in this transaction, and from it to infer forgery and fraud in connection with the larger transaction, and so to disregard altogether the contemporaneous documents, I have come to the conclusion that it is at least highly probable that they did not apply their minds to the real question for determination as to this transaction, which was simply whether the plaintiff did or did not forbid the investment. On this question the contemporary writings were of the highest importance. It was, no doubt, ultimately for a jury to say what weight should be given to them. A jury might perhaps think that the defendant honestly misunderstood the plaintiff's instructions, but no

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such case was presented at the trial. The case then made was fraud, forgery and concoction of evidence, not honest mistake. On the whole, considering the long lapse of time, the defective memory of the parties, and the absence of anything more than the defendant's failure to keep and render proper accounts, together with the stupid mistakes which he made nearly ten years after the events as a foundation for a charge of deliberate fraud, upon which the jury apparently acted, I think that there is strong ground for holding that the jury did not weigh the evidence in the right balance, and that consequently on this point also the verdict is so unsatisfactory that it should be set aside.

But there is another aspect of the case which deserves consideration. The only relevant question with respect to the £1,500 was whether the expenditure of that sum in the Great Eastern mine was in fact authorized by the plaintiff. The rights which the plaintiff was to have in that mine in consideration of that expenditure were not in issue. In many, indeed in most, cases it is difficult if not impossible to separate the fact of authority to make a payment from the proprietary rights intended to flow from it. But the difficulty does not arise in this case. Having regard to the circumstances of time and place, the unbusinesslike habits of the parties, and the speculative nature of the business, it was not at all unlikely that authority to expend money upon the mine should be given without any definite agreement as to the future rights of the investor, which would be left to be inferred from the circumstances. It is still less improbable that the exact terms agreed upon should be forgotten after the adventure failed.

The expenditure might be by way of loan repayable on demand, or at a fixed date, or out of profits, or by way of purchase of a share in the adventure. And after many years it might be difficult, if not impossible, to establish the actual facts on this point, however clearly the authority to make the payment itself was established.

This one relevant fact has not been found by the jury. They have only found that the plaintiff did not agree to advance £1,500 in purchase of a one-half share. In other words, they have found that the defendant's recollection (as stated at the trial for the

first time) of the conditions, not of making, but of securing or repaying the advance, is incorrect, and the question left to them was only as to the accuracy or inaccuracy of this statement. It was certainly not directly supported by the documentary evidence or by any previous statement. But, as already said, the sole question on this point was whether the expenditure was authorized when made. If it was, the plaintiff must fail in this action, whatever rights he may have in another claiming an account of profits or repayment of the money as money lent. It is not surprising that the defendant should have meant the plaintiff to have a half share in the mine, or that he should have said that it was so agreed at the time. It would have been only honest and reasonable that some such terms should be made, and very likely they were, whether formally expressed or not. To any one acquainted with the history of Australian mining the absence of a written agreement should not have a feather's weight as evidence of fraud.

For these reasons I am of opinion that the finding of the jury in answer to this question does not entitle either party to judgment.

I think, therefore, that there should be a new trial of the whole case except as to the Darling Range land.

With regard to the question of interest I do not see my way to distinguish this case from that of *Harsant* v. *Blaine, Macdonald & Co.* (1), by the authority of which I think we are bound.

BARTON J. I begin by quoting and adopting the opinion of a very high authority as to the principle on which the verdict of a jury ought to be considered when the question whether it should or should not be allowed to stand is to be answered by a Court of Appeal. In the case of *Jones* v. *Spencer* (2) Lord *Herschell* says:— "I think that the hesitation of a Court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied there has been a miscarriage because a verdict has been found

(1) 56 L.J.Q.B., 511.

(2) 77 L.T., 536, at p. 538.

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that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict. If we think the verdict wrong in this sense, that one would not have given the verdict one's self, still if one sees that the question was properly submitted to the jury, that is not enough ground for granting a new trial. But if one comes to the conclusion that the verdict is not one which one would have given, and is wrong in that sense, I think that one is perfectly justified in saying that there shall be a new trial if one sees that the real question that had to be determined was not so put before the jury as to reasonably satisfy the tribunal that has to determine the question whether there shall be a new trial or not that the mind of the jury was so applied to the question to be determined that they did determine the case upon the answer to that question."

Only three questions remained for the consideration of the jury at the close of the summing up. On these they gave their findings, namely:—(1) That the defendant did honestly invest the sum of £89 16s. 8d. in the Darling Range Land Syndicate on the plaintiff's behalf; (2) that the plaintiff did not agree to put £1,500 into the Great Eastern gold mine; and (3) that the defendant did not *bonâ fide* invest £53 0s. 7d. in the purchase of Menzies Kensington shares on behalf of the plaintiff.

No question is now made about the first of these findings. As to the other two I am of opinion that, considering the case in the light of the principle laid down by Lord *Herschell*, the finding as to the £1,500 should stand, and that as to the £53 0s. 7d. is plainly unsustainable. I prefer at this stage to deal with an argument for the defendant, now appellant, which if sustained by the conduct of the case would be of great weight. He contends that the fact that the question as to the £53 0s. 7d. paid for Menzies Kensington shares was left to the jury, or at least the manner in which it was put to them, was likely to have

influenced them to come to a conclusion which otherwise they would not have come to concerning the £1,500, as to which the defendant says the plaintiff authorized him to buy therewith from himself a half interest in his Bendigo mine for the plaintiff. In respect of that part of the case, namely the £1,500, can it be said that the question to be determined was "so left to them that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict?" I am of opinion that it was so left to them, and in saying so I do not mean to convey that I think the preliminary difficulty has in my case been got over, of showing me that the finding is one which I should consider wrong. But throughout the jury were reminded that this question of the £1,500 was the main question—"the bone of contention," as *Burnside* J. called it. What his Honor asked the jury to consider in respect of the Menzies Kensington share transaction was whether it was carried out in the spirit of the instructions given, or was "an afterthought of the defendant to pass these shares on to the plaintiff in order to recoup himself on a bad investment?" He asked the jury, in short, to consider upon the evidence whether it was or was not a *bonâ fide* transaction. It is true that, in my opinion, he ought to have told the jury that there was not sufficient, if any, evidence for the plaintiff on this head to shake the account of the purchase given by the defendant. But that of itself does not affect the question of the Bendigo mine. That was left to the jury on an entirely independent basis, and I have not been able to find any expression of his Honor, or anything in the conduct of the case, which tends to show that the one question, so far from having been confounded with, was allowed to influence the determination of the other. That other question so towered above all others in its importance, and in the volume of evidence and effort brought to bear on it by both sides, that it may be possible that in finding upon it adversely to the defendant the jury were led to doubt his *bona fides* in the share transaction. That, however, is immaterial, for the defendant will nevertheless prevail as to the share transaction. But it cannot, I think, reasonably be said that the converse was the case. Everything, indeed, points the other way. It is not the less that

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influences the greater, but the greater the less. And if as between the two questions in the dealing with them any such influence can be supposed at all—which I do not think—such a speculation, for it is no more, cannot be taken to have diverted the minds of the jury from the real question as to the £1,500. The real question, then, is whether as to either of the two questions mentioned the jury have returned such an answer as no reasonable men could have given. Taking the comparatively unimportant matter first for convenience, I do not see that the facts on the part of the plaintiff are such as to be of any avail against the defendant's version. If there were any evidence, apart from mere suspicion, that the shares really belonged to him at the time of the purchase, that would be cogent in view of the relations of the two as principal and agent. But I see no real evidence of that, either by way of express proof or by way of inference from facts, and so I think this sum of £53 0s. 7d. should not be allowed to stand part of the judgment. The Full Court have not reduced the judgment by that amount. With great respect I think they should have done so, and it becomes our duty, therefore, to make the deduction.

Now as to the matter of the £1,500. If that had been put before the jury in some misleading way, so as to justify a tribunal which did not agree with the finding in ordering a new trial, I should feel that this is a case in which a tribunal could hardly say positively that a wrong, even if not unreasonable, finding had been arrived at. For to my thinking it is a matter on which one would be at a very great disadvantage in deciding between the parties without having seen and heard them. They have both pursued very unbusinesslike methods, though it was palpably the duty of the recipient of the money to be ready at all times with his accounts. It is his contract to account on demand. To be able to do that it was necessary to preserve records of transactions as well as of receipts and disbursements. Yet here is an agent who keeps no book, no memorandum of sales or purchases of interests, so that his principal may show title to his own; who does not even record his dealings as agent on the stumps of his cheques. From first to last he renders no account until he is forced into Court. Are his dealings marked by good faith?

Well, the jury have instances. He does not keep many, if any, of the promises which appear on the evidence. On 20th April 1896 he writes to England to his principal, "I shall forward you a statement of accounts every three months, and also advise you regularly of what I am doing for you." He fails to keep that promise. On 30th June 1897 he again promises a full statement, and winds up by saying, "trusting my statements, *which will follow*, will be satisfactory." He does not send any. He sends his principal no line of information for fifteen months. On 31st August 1898, the plaintiff having come to Australia and instructed a solicitor, that gentleman presses the defendant by letter for an account. That letter is received, but is fruitless. On 24th September following the solicitor telegraphs:—"Unless substantial remittance forwarded immediately must issue writ." He makes no direct answer to that demand, but three days later telegraphs to say:—"All necessary papers have been forwarded to you. You will have them in about a week." The statement was untrue. No papers had been forwarded. This he admitted in cross-examination. The promise was equally false. He says he could not get the pass book from the bank, as the account was closed. That did not justify untruth. But on 27th September the account was not closed. He had left a credit balance of a few shillings, for the purpose, as he says, of keeping the account open, and this balance was transferred to Melbourne as late as October. So the reason he gives is not a true one. Afterwards, on 11th October, the solicitor telegraphs him:—"Received wire, no letter Stephens here, wire list investments and balance in hand otherwise writ. He wanting return England immediately." To that he replies on the 13th:—"In answer to your wire, Great Eastern (Bendigo) Trilby (Cue) Darling Range Land Syndicate. Now have all particulars am sending them by next mail." So apparently it is possible to obtain particulars after the account is closed, unless the pass book was still denied to him, if ever it was. Here, again, is an untrue assertion, if we are to judge by events, for he sends no particulars. But if his version of the merits was true, was there anything to prevent him from giving it as soon as asked? He was owner of the Great Eastern mine, or at least half owner with an undisclosed co-owner. The bank account of that mine

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was in the Bank of Australasia, Bendigo, and it would be a tax on one's credulity to believe that he never saw the pass book of it. There all the transfers for that mine from Stephens' bank account in Perth were shown, as he must have known. His own account in Cue at his bank was available to show the Menzies Kensington transaction and his Trilby payments, which he had just been naming, quite incorrectly, among the plaintiff's investments. We see, too, that though the Great Eastern mine is mentioned, nothing is said about the vital terms of the agreement —that is, the extent of the interest and the price. In fact he does not mention that till April 1907. And here must be observed a strange thing about the defendant's memory, if it is his memory wholly that is at fault. He seems to remember things badly in 1898, much worse in 1905 (see his extraordinary affidavit), as badly in 1906 (see his statement of defence of 3rd September) and yet quite brightly in April 1907. In 1898 he adds the Trilby to the Great Eastern and the Darling Range transactions, forgetting the Menzies Kensington. But as he goes on he wrongly adds the Red White and Blue and the Douglas Extended to the Trilby, and sets up, of course rightly, the Menzies Kensington. In August 1907 his amended defence does not specify the investments at all. But in his amended particulars of defence he at last settles down to the matters on which he now relies. And in fairness it must be remembered that he succeeds as to two of them. Now the question is whether the jury, taking the documents into due consideration, were entitled to say:—"We have seen and heard both these men under the open tests of the witness box. Looking at the papers, seeing how the men demeaned themselves, having in view their manner of giving evidence and the quality of their respective memories, considering that in one of them error shows itself not only in the lapse of events from recollection but in the fashioning or conjuring up of fresh ones to take their place, are we satisfied with the way the defendant endeavours to account for his disposal of the funds with which the plaintiff, living many thousand miles away, entrusted him ? Has the use made of his opportunities been a *bonâ fide* use in the interest of his principal?" To the extent, if any, to which it is not so, the use was *malâ fide* and the interest his own. I think the jury were entitled to

examine the evidence from the standpoint I have outlined, and to see how much general credit the defendant deserved. They could then reasonably form the opinion that the defendant was a man whose evidence was of a totally unreliable kind, having in view his obvious lapses of memory, if they were really entitled to so mild a name. His broken promises, his misstatements, his failure to account, could be taken in connection with matters in which the fault could scarcely be that of memory, for instance, in the case of what an ordinary layman might reasonably consider the trumping up of alleged investments which the defendant must have known not to exist—for example, the Red White and Blue, the Trilby and the Douglas Extended, which all vanished into thin air when the defendant, who had at first only remembered £500 as the price of a half share in the Great Eastern, improved in memory so largely that he recollected £1,500 as the true sum. And the truth, no doubt, is either £1,500 or nothing.

Now there are two considerations which the jury might well bear in mind in approaching the evidence. One is that the defendant stood in a fiduciary relation to the plaintiff, and that under such circumstances an alleged purchase by the defendant for the plaintiff of property of the defendant, with the moneys committed to him, called for their close and jealous scrutiny, and that they might well demand clear and convincing evidence before holding it to be established. The other is that the parties were in direct contradiction as to the only real question in controversy, that is the question of authority. Taking both these considerations into their minds, they might reasonably say, how shall we decide between those two? Shall we conclude that the letter of 30th June 1897 actually convinces us, or shall we remember that it must be taken in connection with what we know of the plaintiff by the other evidence and by his demeanour?

The matter on which most stress has been laid is the letter written by the defendant to the plaintiff on 30th June 1897. That letter, it has to be remembered, came from a person who had promised the plaintiff to furnish him with accounts at any time, but who, the plaintiff says, had never furnished one. The defendant says in his evidence that on 17th January 1897 he wrote to the

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plaintiff a long account of the Great Eastern, giving full particulars of all that was going on, and asking plaintiff if he felt inclined to stay in with him in the "spec." That letter the plaintiff says he never received. The plaintiff also says that before going to England he told the defendant that he intended calling on the way at Aden, and he gave the defendant an address at Aden at which letters might be addressed to him. As a matter of fact he says that he did stop at Aden, or a place opposite it called Zala, for nearly a month on his way, and then he went on to his residence or office in Jermyn Street, London. The plaintiff also tells the jury that he has never known a letter sent to his address in Jermyn Street, London, to go astray, and that if the letter had been sent to Aden it would have been forwarded to him. This Court cannot say anything about that, of course; there were possibilities one way or the other. However, the plaintiff says that the letter said to have been written on 17th of January did not reach him, and one of the questions in the case is whether such a letter, containing such information, was ever written. That question was one for the jury to make up their minds upon, and I do not think it is possible for this Court to affirm that the letter was written. In view of the better opportunities the jury had of deciding as to the credibility of the plaintiff and the defendant by observing their demeanour in the witness-box, and the manner in which each gave his evidence, I do not think this Court can say that the jury were not acting as reasonable men might act in coming to the conclusion that the letter said by the defendant to have been written was never written. And if it was not written there is only one inference possible, that is, that the defendant was a person who alleged the writing of that particular letter in order, as was said at the bar, to cover his tracks. There is nothing more natural than to suppose, if, as the plaintiff says, the defendant had misappropriated the plaintiff's money by investing £1,500 in the Great Eastern without his authority, that he would, in view of the possibility of a charge being brought against him, also write on 30th June 1897 saying that he had already written a letter on 17th January 1897. I have no right sitting here to come to an absolute conclusion in regard to that aspect of the case, but it seems to me that in all the circumstances of the

case the jury cannot be held to have been unreasonable—in view of the opportunities they had to regard the demeanour of the parties in the witness-box, to weigh their varying weaknesses of memory and to decide which of them was better worthy of credence—if they came to the conclusion that the alleged letter of 17th January was never written by the defendant. It is clear the jury must have come to that conclusion before they could find the verdict they did. Such a conclusion was open to them, and it was also open to them to say that the letter of 30th June 1897 which was received by Mr. Stephens had certain statements inserted in it by the defendant to cover his footsteps. That was the theory for the plaintiff, and if, in the circumstances of the case, the jury chose to adopt it, I do not see that this Court can take the very responsible step of disturbing their verdict. I quite see that strong reliance may be placed on the document of 30th June 1897, but I also see that the answer to it is that it is a matter of the credibility of the plaintiff or the defendant, and that the jury, having had the advantage of seeing them both in the witness-box, might within reason believe the story told by the plaintiff. I am therefore under the necessity of reluctantly differing from my learned brother in the conclusion he has come to. I am of opinion that in regard to the £1,500 the verdict of the jury should not be disturbed, but I am of opinion that in respect to the £53 0s. 7d. the verdict was distinctly against the evidence, and that that sum should be deducted from the judgment together with a proportionate amount of interest dating back to the issue of the writ.

In regard to the question of interest I desire to apply to this case a few words from the judgment of Lord *Esher* M.R. in *Harsant* v. *Blaine, Macdonald & Co.* (1):—"The question now arises whether the defendants are liable to pay interest on the amount of the proceeds. The action must be taken to be for money had and received. Before the Judicature Acts such an action could only have been brought at common law, and would not have been one which would carry interest, so that if it had been tried as one for money had and received it was not an action in which the Court could have allowed a jury to give interest

(1) 56 L.J.Q.B., 511, at p. 512.

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upon the sum recovered, and consequently the plaintiff could at common law have recovered only the proceeds of the sale of these shares. But since the Judicature Acts, whether an action is brought in the common law or in the Chancery Division, principles of equity have now to be applied by each side of the Court. It is true that the suit would not have been brought in a Court of equity for money had and received but for an account; but although the suit would not have been in the same form, yet the Court of equity would have had to decide it on precisely the same materials. The question, therefore, is whether the Court would have given interest to the plaintiff. The defendants here were the plaintiff's agents to sell the shares and hold the proceeds for the plaintiff. The defendants were, in equity, bound to account for and, in law, to pay the proceeds to the plaintiff. The mere fact of refusing to pay money which was owing to a plaintiff would not of itself in equity induce the Court to give interest against the defendant. But there was a rule that if a person in the position of an agent refused to pay or give an account of money which belonged to his principal, the Court would, when the agent was sued by his principal, compel him to pay interest on the money. A person who denied that he was an agent and refused to recognize the title of his principal would undoubtedly have been made to pay interest. It was suggested as a defence to the present claim for interest that the defendants ought not to pay interest because they *bonâ fide* believed that they were right in refusing to recognize the plaintiff; but they have had the use of and interest on this money, and it would be hard on a plaintiff, who has been kept out of his money through the mistake of his agent, to refuse to give him interest." Now whether this action be regarded as a common law action or described as a suit for an account, I think on the authority of that case is immaterial. The underlying fact is that there was a fiduciary relationship. That is a position in which an account is always demandable, and it seems to me on the authority of that case that the Full Court came to a right conclusion in allowing interest, and I also think that, seeing they are acquainted with the local conditions, they were really more competent than this Court to determine the rate of interest which should be allowed.

O'CONNOR J. The jury which heard the case has found for the plaintiff after a prolonged and careful investigation, in the course of which the plaintiff and the defendant both gave evidence. The Supreme Court has refused to interfere with the finding. It is contended that the Court in so doing was in error, and we are now asked to reverse their judgment, to set aside the jury's verdict, and to send the case back for trial before another jury.

The law applicable to such a case may be summed up in the last few words of Lord *Herschell's* judgment in the *Australian Newspaper Co.* v. *Bennett* (1):—"The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men." The jury did not give a general verdict. Their findings were in the form of answers to three questions submitted to them, and on these findings judgment was entered by the Judge for the plaintiff. The answer to the first question was in the defendant's favour, and becomes immaterial in the present inquiry. The second and third questions relate to distinct transactions; each stands on an entirely different footing from the other. The answer to the latter is not only against the weight of evidence, but there is, in my opinion, no evidence on which it can be supported. That I shall consider later on. The only subject matter therefore in reference to which the question of new trial is arguable is that involved in the second question with which I shall now deal. As to £1,500 of the moneys entrusted to him, the defendant's account was that he had under agreement with the plaintiff and on his behalf paid it into a gold mine of his own at Bendigo called the Great Eastern, as consideration for the sale of one half of his interest to the plaintiff. That was the largest item of the account, and by far the greater part of the evidence and argument were directed to its consideration. The jury found in answer to the second question as it was put by the Judge that the plaintiff did not agree to put £1,500 into the Great Eastern mine in return for one-half interest in the mine.

Before this Court can set aside that finding and send the case

(1) (1894) A.C., 284, at p. 287.

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back for trial by another jury, it must be satisfied that the finding was such as no jury could have found as reasonable men. Some things in the case are perfectly clear. The defendant agreed to act as the plaintiff's agent in the investment of money in Australia. £4,000 was placed in a bank in Perth to the plaintiff's credit as a fund for these investments, and the defendant was, by power of attorney, authorized to operate on it. I gather, from the evidence and the Judge's view of it as disclosed in his summing up, that the plaintiff had no previous knowledge of Australian or any other mining, and very little business capacity. The defendant was a mining manager of some experience, and was then managing a mine at Cue. The first mention by the defendant of his Great Eastern mine as an investment was in his letter to the plaintiff of 20th April 1896. He again refers to it in his letter of 13th July of the same year. However, nothing was settled pending the plaintiff's arrival in Western Australia, which was in December 1896. It was the plaintiff's first visit to Australia. The plaintiff and defendant then met for the first time in Perth, and amongst other things they discussed this investment. So far, the parties are in agreement. But the defendant says that as the result of their discussions the plaintiff agreed to take a half interest in the mine for £1,500, and authorized the payment of moneys to that amount out of the fund. The plaintiff on the other hand says that he refused to have anything to do with the investment. Upon that verbal agreement the defendant relies for his authority to expend £1,500 of the plaintiff's money.

The whole controversy on this part of the claim turned upon whether the jury believed the plaintiff's or the defendant's version of those conversations in December 1896. Each party relied on certain circumstances in corroboration of his story. But there was no record of the agreement in any form. The defendant seems to have had no book for recording his dealings with his principal's moneys. He did not even keep the butts of his cheques. The Great Eastern mine was on 50 acres of land registered in the defendant's name, and considering the well known obligations of an agent in dealing with his principal's moneys, it does seem an extraordinary circumstance that if such an agree-

ment was made it was not put into writing even in an informal way, so that in the event of the death of the plaintiff there would be some evidence which might show to his representatives the existence of the interest for which he had undertaken to pay so large a sum as £1,500. It appears that the first portion of the £1,500 was paid by a cheque for £500 drawn on the plaintiff's account by the defendant under the power of attorney on the day before the plaintiff left Perth for Aden on his return to England.

It is urged on the defendant's behalf that this circumstance is a strong corroboration of his version of the transaction, that an agent who would make an unauthorized payment of that kind out of his principal's moneys, and thus commit a breach of duty which might be discovered at any moment, must be possessed of an audacity beyond belief. But whether or not such an inference can be drawn depends, as Mr. *Pilkington* pointed out, very largely on the character, temperament, business knowledge and capacity, of the parties respectively, and it is suggested that under the circumstances of this case it was evident that the defendant knew his man, and was satisfied that he ran very little risk of discovery. In reality the true weight and bearing of those probabilities can only be properly gauged by a tribunal which has had the advantage of seeing both men in the witness box.

The defendant relies in corroboration of his story on his letter to the plaintiff of 30th June 1897. It is the only written corroboration which he has put forward. If it is a true statement it is beyond question a very strong piece of evidence in his favour. But the *bona fides* of its statements are attacked; it is said to be part of the scheme by which the defendant lulled the vigilance of his principal. Whether the plaintiff's or the defendant's view of the letter is correct depends largely upon the view which may be taken of the defendant's conduct and character as disclosed by the whole of the evidence. On the face of it, however, the letter is not completely satisfactory. It was written after the plaintiff had cabled to his banker to remit £2,000 of the fund to London, after £1,700 had on the defendant's advice been actually remitted, and after the defendant had received the plaintiff's letter of 13th May 1897 revoking the power of attorney. In

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other words, it was written at a time when it was plain that the plaintiff had altered his mind as to the continuance of further expenditure in Australian mining investments under the defendant's guidance. The letter contains this passage :—"On 11th January 1897 I wrote you a long account of the Great Eastern and full particulars of all that was going on, and asking you if you felt inclined to stay in with me in the spec." But according to the defendant's evidence the plaintiff had then definitely bought by verbal agreement one-half interest in the mine and £500 of his money had been paid into the mine by the defendant on the 17th December, less than a month before, in pursuance of that purchase. At that time, if the transaction had been carried out with proper formalities, the plaintiff would have had his title to the half interest and the defendant could have insisted on payment of the balance of the £1,500. It would be entirely inconsistent with the existence of such an agreement that the plaintiff's "staying in the spec" with the defendant should depend upon whether or not he felt inclined. Even if the letter of 11th January 1897 was written by the defendant as he states, it is clear that he did not wait for an answer before drawing the next instalment of £500. On 3rd March, long before he could have received from the plaintiff in England an answer to his letter, a telegram came from his manager Barker at Bendigo. "Houses well on. Contract machinery progressing. Send thousand without delay," and the next day he drew a cheque on the plaintiff's account for the second payment of £500.

It was suggested by the plaintiff's counsel that the defendant's letter of 30th June 1897 was not a true statement of events that had happened, but that it was written because he then well knew that the day of accounting for the expenditure of the plaintiff's moneys was inevitably coming. The interpretation of the letter in light of all the circumstances, and its proper weight as corroboration of the plaintiff or the defendant, were important matters for the jury, and in considering them they were entitled to look at the whole of defendant's conduct in accounting to the plaintiff. Admittedly, he kept no accounts in the ordinary book-keeping sense of his dealings with his principal's moneys. He alleges that he sent accounts in January 1897 to the plaintiff at

Aden. It is possible that postal methods in that part of the world may be lax and that his letters may not have been delivered to the plaintiff, but he was equally unfortunate in the statements which he says in his letter of the 30th June 1897 he is sending by the following post, and which would be addressed to London. Indeed it may be said in a word that, from beginning to end of the plaintiff's connection with the Great Eastern mine, he never seems to have received a statement of account from the defendant, although the property rapidly went from bad to worse and at last fell into the hands of the defendant's creditors, thus making a dead loss of the whole £1,500 of the plaintiff's money. Again, when the plaintiff returned to Australia in 1898 determined apparently to obtain if possible some account of his moneys from the defendant, and placed the matter in his solicitor's hands, he is equally unfortunate in his endeavour to obtain accounts. The first letter from Mr. H. W. C. Simpson demanding an account of the £1,800 which the plaintiff claims as unaccounted for is dated 31st August 1898. The defendant received it but did not reply. On 24th September he received a telegram from the same quarter threatening proceedings, and three days afterwards he telegraphed in reply: "All necessary papers have been forwarded to you. You will have them in about a week." In evidence he admitted that he had not sent any papers. Indeed it is clear that he never sent any statement until 13th October 1898, when, in reply to a demand from the plaintiff's solicitor to "wire list investments and balance in hand otherwise suit," he sent the following telegram: "In answer to your wire Great Eastern Bendigo Trilby (Cue) Darling Range Land Syndicate. Now have all particulars and am sending by next mail." The reference to Trilby was an error as none of the plaintiff's money was invested therein, but, what is more important, neither the promised particulars nor any other information or explanation were sent, and on 8th November following the writ was issued. This attempt to extract accounts from the defendant began only fifteen months after the letter of 30th June 1897, on which the plaintiff has placed so much reliance, and not more than a year and nine months after the date of the verbal contract

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by which the expenditure of the plaintiff's £1,500 in the Great Eastern mine was alleged to have been authorized.

No matter how loosely the defendant's accounts were kept it seems difficult to understand how he could at that time have completely forgotten the transaction on which he now relies to account for the expenditure of £1,500 out of the £1,800 claimed. If he had not forgotten it one may reasonably ask why, when asked to account, he did not write to the plaintiff the simple explanation which he afterwards gave in the witness box. The misstatements and discrepancies in the affidavits in 1905 and the subsequent statements of particulars may possibly be explained by lapse of memory, but that explanation cannot apply to his statements in 1898, and his conduct in dealing with these demands of the plaintiff's solicitor for information and accounts may be fairly used to throw doubt on the *bona fides* of his statements in the letter of 30th June 1897 as well as upon his version of the whole transaction.

These circumstances were all before the jury and open for their consideration. They were fully explained by the Judge, whose charge to the jury has not been complained of by the defendant, and indeed, in my opinion, could not be complained of. It is not necessary for this Court to determine whether its own finding on the facts would have coincided with that of the jury. It is, however, clear to my mind that there was abundant evidence upon which the jury might reasonably find as they did. If the defendant is in reality innocent of any disregard of his duty to his principal, and the conduct on his part on which the plaintiff relies as showing want of *bona fides* arose in reality merely from stupidity, carelessness, or blundering, he has only himself to blame. By neglecting the most ordinary precautions which an agent should observe in keeping records of his dealings with his principal's moneys, he has given the jury an occasion for drawing quite legitimately inferences against his honesty.

For these reasons I am therefore of opinion that there is no ground for disturbing the finding of the jury in reference to the Great Eastern mine transaction.

As to the Menzies Kensington shares the position is this. The defendant alleges that he expended £53 0s. 7d. of his own moneys

in the purchase of these shares on the plaintiff's behalf, and afterwards recouped himself out of the plaintiff's moneys. That allegation he has proved to my mind beyond question. But it is said that the shares which he transferred really belonged to him, and that he passed them off on the plaintiff to get rid of them in a falling market. If that contention were proved it would answer the defendant's *primâ facie* accounting. But there is no fact or document in the case from which any such inference could lawfully be drawn. There are grounds for suspicion—nothing more —and as far as that item is concerned the learned Judge should, in my opinion, have directed the jury to find for the defendant.

It follows that the Judge of first instance in directing the entry of judgment should have omitted the amount of £53 0s. 7d. on the ground that it had been properly accounted for. Not having done so the Supreme Court on appeal should have directed that that amount be deducted from the judgment. To that extent their order must in my opinion now be varied.

As to the interest allowed by the Judge the Attorney-General raised two objections. First, that the Supreme Court adopted a wrong basis in varying the rate allowed. That objection cannot in my opinion be sustained. The reduction in the rate is under all the circumstances just and reasonable. The second objection rests on the contention that, the interest being part of the plaintiff's claim arising out of the accounting, it was for the jury alone to determine, and as they had awarded no interest the Judge had no jurisdiction to award it. I was at first impressed by the Attorney-General's argument, but it will not bear full examination. In this kind of claim the jury could give interest only by virtue of 3 & 4 Will. IV. c. 42. But that Statute was not applicable. Interest could not in this case have been awarded by the jury if it had been claimed under the Statute because there was no evidence of that notice in writing which is a condition precedent to the existence of the statutory right. But in another aspect of the case the plaintiff was entitled to interest in equity. His position was exactly that of the plaintiff in *Harsant* v. *Blaine, Macdonald & Co.* (1), described by *Lopes* L.J.

(1) 56 L J. Q.B., 511, at p. 514.

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"It is clear," says the learned Lord Justice, "that he (the plaintiff) would not have been so entitled if this action had been brought at common law before the Judicature Acts; but since these Acts were passed principles of equity are to be applied where the action is brought in the Queen's Bench Division, and we must therefore see what would have been the practice in equity in such a case. That being so, the authorities, of which the important one is *Pearse* v. *Green* (1), seem to show that in equity interest ran against an agent who held money which he was bound to account for and pay to his principal, and which he had refused to hand over." On that ground interest was awarded. Although the whole case there was tried by the Judge without a jury the principle is equally applicable in a case where the jury have no power to award interest, but the Judge has. Here the jury having found the amount due, the Judge was entitled to give effect to the plaintiff's right to interest by making the order he did make.

On the whole case, therefore, I am of opinion that the Supreme Court were right in declining to disturb the finding of the jury as to the £1,500, but that the judgment must be varied by deducting £53 0s. 7d. from the amount entered together with the interest therein from the date of the writ at the rate allowed by the Supreme Court.

*Judgment of Full Court of Western Australia varied by reducing judgment by sum of* £57 0s. 7d. *with proportional interest, dating back to issue of writ.*

Solicitors, for appellant, *Keenan & Randall.*
Solicitors, for respondent, *Stawell & Cowle.*

H. V. J.

(1) 1 Jac. & W., 135.