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Starke, that in such a case as this the form in which the case comes up to this Court is a mere matter of procedure, but the Court has jurisdiction, and therefore a duty in a proper case, to form its own opinion on the facts. In these cases the facts appear to us to be so clear that, even treating the matter as one where the issue is whether the Magistrate was at liberty to arrive at a particular conclusion, we should hold that the facts are only consistent with one conclusion. They show, in our opinion, that on these occasions there was amusement—that the dancing was for the purpose of amusement—and that whatever instruction was given was merely incidental and subordinate to the amusement character of the proceedings.

We therefore think that the appeals should be allowed.

Appeals allowed with costs. Conviction in each case. Penalty of £4 in one case and £2 in the other, with £3 7s. costs in the Court below.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *R. J. Dawes.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL OF NEW SOUTH WALES . . . . . APPELLANT;
INFORMANT,

AND

PETERS . . . . . RESPONDENT.
DEFENDANT,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *July* 28-30; *Aug.* 4.

Contract—Rescission—False representations—Inducement—Contract made by Crown—Agents of Crown not relying on representations.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

The right of the Crown to a rescission of a contract on the ground that it was induced by false representations must depend on the effect of the representations upon the minds of those who as agents of the Crown made the contract. If

those agents, knowing of the representations, placed no reliance on them, the fact that persons who advised the agents, as to the making of the contract, in giving their advice relied on the representations is not a ground for rescission.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed.

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APPEAL from the Supreme Court of New South Wales.

By an information in the Supreme Court in its equitable jurisdiction a suit was brought against Thomas Peters and John Symonds by the Attorney-General for New South Wales, claiming a declaration that an agreement in writing made on 4th July 1919 between the Minister for Agriculture on behalf of His Majesty the King and the defendants had been induced by certain false and fraudulent statements made by the defendants, and that His Majesty was entitled to be relieved from any obligations in respect thereof; that the defendants should be restrained from proceeding to enforce any rights thereunder against His Majesty; that an inquiry should be had as to the amount of loss and damages occasioned to His Majesty by reason of the premises; and that the damages so ascertained should be ordered to be paid to His Majesty.

In the contract in question it was recited that the defendants had, on 16th February 1909, undertaken the construction and completion for the Government of New South Wales of the Barren Jack dam on the river Murrumbidgee in accordance with certain terms, plans, specifications and conditions; that the defendants had recently made application to the Government to relieve them of the contract and to take it off their hands with all its obligations; and that the Government had consented to comply with the request of the defendants and to take over all the works comprised in the contract upon the terms and conditions thereinafter contained. It was then agreed that the contract would be relinquished by the defendants and taken over by the Government on and from 30th June 1919, the Government agreeing to pay the cost of carrying on the works from 12th June to 30th June 1919; that the Government would take over all buildings, plant, stores, &c., at values to be determined by mutual agreement or, failing such, by arbitration; that the Government would pay the defendants in respect of certain extra costs to them of certain wages, plant, stores, &c.; that the Government would pay the amounts as determined by arbitration

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of certain claims and demands which the defendants might have, or alternatively that the defendants should be entitled at any time to accept £25,000 and to withdraw such claims from the arbitrator. At the hearing the defendant Symonds was, by consent, dismissed from the suit.

The suit was heard by *Harvey* J., who found that certain false representations had been made; he held that it was unimportant what the individual members of the Government might or might not have thought as to the truth or falsity of the representations, because it was clear that the Government acted on the advice of a committee of engineers appointed to advise the Government, and did not exercise or attempt to exercise any individual judgment in the matter, and that the recommendation of the committee of engineers took the form it did because the members of the committee believed the representations to be true. But the learned Judge also held that the Crown was not entitled to say that it was induced to enter into the contract by the representations, because the defendant Peters had told the Government that it must negotiate with him irrespective of whether the representations were true or false. He therefore dismissed the suit with costs.

From that decision the Attorney-General now appealed to the High Court.

Other material facts are stated in the judgment of *Isaacs* A.C.J. hereunder.

Blacket K.C. and *Bethune* (with them *Harry Stephen*), for the appellant.

Leverrier K.C. (with him *Bonney*), for the respondent.

Cur. adv. vult.

Aug. 4.

The following written judgments were delivered:—

ISAACS A.C.J. The Government of New South Wales seeks a decree rescinding a contract dated 4th July 1919 made with the respondent, Thomas Peters, and one John Symonds, whose presence is not now necessary. Peters will be referred to as the sole contractor

with the Government. By that contract, a prior contract dated 16th February 1909 for the construction of the Barren Jack dam was terminated, plant and material were taken over, various payments were agreed to be made by the Government to Peters, including an optional sum of £25,000 for certain claims specified, and other provisions made in favour of the contractor. The Government has since July 1919 itself proceeded with the construction of the dam, and has otherwise acted on the contract now impeached. The ground on which rescission is claimed is misrepresentation, and the material allegations for that purpose are contained in two paragraphs of the information. Par. 3 is in these terms: "During and after the said month of January 1918 it was repeatedly represented to the said Government by the defendants that they had suffered heavy loss in the carrying out of the said contract and in particular that during the three years 1915 to 1917 the said loss amounted to £42,000 or thereabouts and that the total loss suffered by the defendants as aforesaid up to the month of October 1918 amounted to £60,000 or thereabouts." Par. 11 is as follows:—"The informant charges that the said Government entered into the said agreement in reliance upon the truth of the representations made by the defendants as above set out and not otherwise and the informant further charges that the said representations were made by the defendants with the intent to induce the Government to enter into the said agreement and were made falsely and fraudulently and the informant further charges that the defendant instead of having incurred heavy or any losses under the said contract as represented by them had at the time of the said representations as they well knew made large profits out of the said contract. Further the informant submits that whether the said representations were made by the defendants fraudulently or not His Majesty is entitled to the relief prayed."

Harvey J. dismissed the suit on the ground that by a letter dated 4th July 1918, exactly a year before the contract, the respondent made it clear to the Government that the negotiations must proceed independently of the question of his loss or gain on the contract, and that therefore, even if the representations alleged were made and in fact relied on by the Government, it was not competent to

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the Crown to challenge the contract on the ground of the representations being false or fraudulent.

I do not find it necessary to pursue the case so far. There are several possible questions of very great importance, some formidable, which might arise in certain eventualities. Not only the question dealt with by *Harvey* J., but also the further question mentioned by his Honor, namely, the possibility of restitution in the sense necessary to a decree for rescission. And a further question of constitutional import, which the Court would possibly find itself bound to notice, might arise. The Court was informed that the impeached contract rested on no statutory basis, but was rested purely on ministerial authority. Recent cases, as *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (1) and *Auckland Harbour Board* v. *The King* (2), have not been overlooked, but, in the view I take, are not necessary to be considered in connection with the present appeal. I neither express nor suggest any opinion as to this, but merely indicate that I do not lose sight of the problem that might present itself if other obstacles were passed. I am of opinion that the appeal fails at the very threshold.

The appellant, seeking the equitable interposition of the Court to destroy a contract on the ground of misrepresentation and, if necessary, of fraud, has the burden of making out a satisfactory case. That, in view of the specific allegations made, involves proof of (1) the representations charged, (2) their untruth, (3) reliance by the Government on the truth of the representations, and (4), if necessary, the fraud of the respondent. (See *Hallows* v. *Fernie* (3).) Even if it be assumed that the first and second conditions are fulfilled (though the representation secondly alleged in par. 3 of the information has not been shown to be inaccurate), the appellant's case fails to establish the third condition. The consequence is that, granting for the moment no obstacle from the standpoint either of restitution or illegality, the appellant is not entitled to a decree. The failure with regard to the third condition appears from the facts as to the circumstances in which the contract was made, and these are referred to in order to understand and appraise the competing

(1) (1922) 31 C.L.R. 421. (2) (1924) A.C. 318.
(3) (1868) L.R. 3 Ch. 467, at p. 478.

arguments. The original contract of 1909 was a schedule of rates contract. In excavation, class 2, the estimated approximate quantity of excavation, namely, 50,000 cubic yards, was in fact greatly exceeded, and by 17th April 1918 reached 210,000 cubic yards. This unexpected development, according to the contractors, so changed the character of the work from their standpoint, notwithstanding all counterbalancing considerations, as to make a difference to them of £69,088 5s. 7d. by the date mentioned. The contractors therefore sought from the Government an increase of 16 per cent of schedule rates to operate as from the beginning to the end of the work, if they were to complete it, or alternatively that the Government should take over the work and make compensatory payments and allowances. The Government deputed certain engineers to investigate the position and interview the respondent. The alleged representations were made to the engineers, who reported to the Government and, it may be assumed, based their recommendations upon those representations among other circumstances. That is a considerable concession to the appellant, because as to the most important of the alleged representations, namely, an absolute loss of £60,000, the recommendations of the engineers not only did not expressly rest upon it, but were, on the contrary, expressly stated not to be based on any definite amount of loss. Passing that by, however, it appears that the Cabinet, after Ministers had individually received copies of the engineers' recommendations, appointed a sub-committee of its members to finally decide what should be done with respect to those recommendations. The sub-committee consisted of Mr. Hall, Attorney-General, Mr. Garland, Minister of Justice, and Mr. Grahame, Minister of Agriculture. These gentlemen decided to accept the recommendations, and deputed Mr. Grahame to sign the contract.

Learned counsel for the Crown contended that, inasmuch as, upon the assumptions so far made, the false representations were made to the Crown officials to procure a favourable recommendation, the respondent knowing the recommendations would have weight with the Ministry and those recommendations having in fact been adopted by the Government, the misrepresentations must be held to vitiate the ultimate bargain contemplated by the respondent. That might

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be so, if the Government either relied on the representations being true or, not knowing of them, relied on the honesty or accuracy of whatever information the respondent gave. The latter, however, is not the case set up. The case as charged is the former, namely, actual reliance by the Government on the specific representations alleged. From the mass of events—some of them confused—there emerges one broad fact, without reference to which it is impossible to form a just estimate of the position. The Government were faced with a complicated position. The work had been in progress for ten years, and, as Mr. Holman said, should have been finished years before. It was one of great public importance. The first question the Cabinet had to decide in 1919 was whether it would give any consideration to Peters's claim. They felt that, in view of the serious and unlooked-for discrepancy between the anticipated amount of excavation and the actual amount, he had a fair moral claim for consideration. The next question was, how should that be done consistently with the best public interests? Mr. Holman says that Peters could not be relied on: he was failing and becoming eccentric and untrustworthy. For that and other reasons the Government determined not to adopt the alternative of giving Peters the pecuniary increase of rates and forcing him to proceed, but to take the whole matter over, and arrange his compensation in another way. Had the first alternative been adopted, the question of the amount of his actual loss would have been more definitely essential to be probed and measured. But, seeing that the latter alternative was resolved on, which meant breaking the contract of 1909 altogether, and this partly, if not chiefly, for public reasons, it is quite understandable that those public reasons so dominated the minds of Ministers that, coupled with the knowledge of the unexpected disparity between actual and anticipated excavation, the fact or the amount of contractors' loss was considered immaterial. Mr. Hall and Mr. Grahame concur in stating that they did not rely on the statements as to loss. Mr. Grahame says that Mr. Garland did not believe Peters. They did not believe those statements, and yet, for the public reasons mentioned, as determined by Cabinet, they accepted the committee's recommendations. If so, how can the Crown now hark back and complain of the inaccuracy or fraud

of statements well known at the time, then disregarded, and now undo to the contractors' disadvantage the arrangement then made, after taking advantages, taken by way of furthering what was considered public policy and public benefit ?

The Crown's argument on this appeal is all rested on the effect of the representations upon the engineers. Their recommendations, it is said, would have been different had they not relied on the representations. Very likely, but they were not the persons representing the Crown for the purpose of entering into the contract of July 1919. Their function ceased when they placed their recommendations before the Government. The Government, His Majesty's Ministers, were the agents of the Crown to determine whether the bargain with Peters should proceed upon the footing of those recommendations, and the right of the Crown to rescind the contract must depend upon the effect of the representations on the minds of those representing the Crown in making the bargain. Those agents distinctly say the representations had no effect upon their action, and were not relied on, though well known to them.

In my opinion that ends the case, and the appeal must fail.

GAVAN DUFFY J. I agree in thinking that the contract sought to be rescinded was not obtained by the alleged misrepresentations, and that the appeal should be dismissed.

STARKE J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Pigott & Stinson.*

B. L.