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which the document was designed to obviate—cannot, in my opinion, spell out of it any authority for the Company to gamble on the jute market.

The appeal should be allowed.

Appeal dismissed with costs.

Solicitor for the appellant, *Morris Crawcour.*

Solicitors for the respondent, *Robinson, Cox & Wheatley.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

A. H. McDONALD AND COMPANY PROPRIETARY LIMITED . . . . DEFENDANT, APPELLANT;

AGAINST

WELLS . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 29; *July* 4.

Rich, Starke and Dixon JJ.

Contract—Rescission—Restitutio in integrum—Whether possible—Damages—Translating damages from foreign currency into sterling—Translating damages from currency of one Dominion to currency of another.

Rescission must be of the entire transaction, and a substantial restoration of the parties to the position they occupied before they embarked upon it must be possible.

Held, in a transaction made up of successive agreements, that there could be no rescission unless the parties were restored substantially to the same situation as before the first of them.

The question whether upon rescission of the contract in question *restitutio in integrum* was possible upon the facts of this case considered.

The rule that, in translating damages from foreign currency into sterling, the date at which that process has to be effected is the date of the breach of contract, which was laid down in *In re British American Continental Bank Ltd.: Goldzieher & Penso's Claim*, (1922) 2 Ch. 575, at p. 587, is applicable to the case of currencies between the Dominions although expressed in sterling.

Judgment of the Supreme Court of Victoria (*Irvine* C.J.) discharged and new order substituted.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by William Wells against A. H. McDonald & Co. Pty. Ltd., the plaintiff claimed (*inter alia*) specific performance of an agreement dated 29th March 1928 made between him and the Company, or (alternatively) damages for breach of the contract. The defendant counterclaimed for (*inter alia*) rescission of the agreement above mentioned on the ground of misrepresentation.

Irvine C.J., who tried the action, gave judgment for the plaintiff for £2,291 5s. 3d. damages for breach of contract with costs, and dismissed the defendant's counterclaim with costs.

From this decision the Company now appealed to the High Court.

The facts are fully stated hereunder in the judgment of the Court.

Wilbur Ham K.C. (with him *Ellis*), for the appellant.

Arthur Dean, for the respondent.

Cur. adv. vult.

July 4.

THE COURT delivered the following written judgment:—

This is an appeal by the defendant from a judgment of *Irvine* C.J. by which he awarded to the plaintiff (respondent) £2,291 5s. 3d. for breach of contract, and dismissed a counterclaim by the appellant for rescission on the ground of misrepresentation.

The contract upon which the plaintiff (respondent) sued was made on 29th March 1928 and it rescinded a prior agreement between the parties dated 11th August 1927. In substitution for the agreement so rescinded the parties agreed that certain letters patent, fourteen

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in number, which were the subject of the previous agreement, should be divided between them upon certain terms and conditions. The transaction from which this agreement arose began in May 1927. The respondent had acquired from one Forsyth an option to buy, for the sum of £5,000, letters patent for the Commonwealth of Australia for inventions relating to pulsators in milking machines, and he himself was the owner of a patent relating to the same subject. At the time when the respondent obtained the option a contract subsisted between him and Forsyth, the substance of which was that he should be employed to exploit the patents by disposing of licences in Australia. He was bound to devote his whole time and attention to doing so, except that he might accept employment from any licensee. In consideration of devoting himself to this work he would receive half the royalties obtained in respect of the patents. Although the time limited for the exercise of the option actually expired on 4th March 1927, Forsyth seems to have treated it as extended. Shortly before or early in May 1927 the respondent opened up negotiations with the appellant Company. He proposed that Forsyth's interest should be acquired and that they should jointly exploit the patents by forming a new company. The option would be exercised and the patents would be transferred to the new company which would find the money to pay the price to Forsyth. Shares in the company were to be allotted, five thousand of £1 each fully paid up to the respondent and five thousand to the appellant Company. In making this proposal the respondent represented that he was entitled to a half-interest in the patents, and that Forsyth was entitled to the other half-interest, but was willing to sell it at a price of £5,000. The whole property in the patents was valued at £10,000. In support of this value the respondent gave £1,000 per annum as an estimate of the revenue which might be produced from royalties, and he says a capitalization on a ten-years' basis was adopted on the part of the appellant. In point of fact, some of the more important patents had more than ten years yet to expire, although many of the patents would expire at much earlier dates. Written notes of the proposals were placed before the appellant Company, and finally an agreement was arrived at. On 10th May 1927 the appellant Company handed the respondent a letter stating

that, subject to his making satisfactory arrangements with Forsyth in exercising his option over the interests in the Australian patents, it was prepared to pay a preliminary deposit and to form a small proprietary company to take care of all further payments. A sum of £250 was handed to the respondent and it was arranged that he should go to New Zealand and secure Forsyth's interest in the patents. He accordingly went to New Zealand and entered into an agreement with Forsyth on 20th May 1927 whereby Forsyth sold the whole of the patents in Australia for £5,000 payable by a deposit of £200, an instalment of £800 on 1st January 1928 and of £1,000 on 1st January 1929, 1930, 1931, and 1932. The patents were not transferred by Forsyth but were retained by him pending payment of the purchase-money. The agreement, however, was expressed to be between Forsyth and the respondent. On the respondent's return to Melbourne the preparation of an agreement between the parties was put in hand. On 11th August 1927 the appellant Company and respondent entered into a contract the effect of which was that the respondent sold to the appellant one-half share in the letters patent and inventions in consideration of the appellant paying Forsyth a sum of £5,000, and the parties agreed to incorporate a proprietary company to be called the New Zealandia Milking Machine Company Proprietary Limited with a capital of 12,000 shares of £1 each, of which 5,000 fully paid up were to be issued to each of the parties in consideration of a transfer to the Company of the patent rights. The Company was to grant an exclusive licence to the appellant Company at certain royalties. After the execution of this agreement the respondent entered the service of the appellant Company pending the formation of the New Zealandia Company in order to superintend the operations of the appellant Company in exercising the exclusive licence. Considerable time elapsed before the documents of incorporation of the New Zealandia Company were ready for registration, and eventually disputes arose between the parties, as a result of which the agreement sued upon was made. The patents which had been dealt with by the previous agreements fell into two classes: one related to an invention for what is called a rotary pulsator; the other class related to an invention which was called the New Zealandia invention.

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The parties decided that they should abandon the project of forming a company and continuing a joint adventure, and should divide the patents, the appellant Company taking the patents for the rotary pulsator and the respondent taking the New Zealandia patents. The agreement of 29th March 1928 accordingly expressed a sale by the respondent to the appellant Company of the patents for the rotary pulsator in consideration of a covenant to pay to Forsyth the instalments of purchase-money payable to Forsyth by the respondent. It also gave the appellant Company a non-exclusive licence in respect of the New Zealandia inventions when used in conjunction with the rotary pulsator. The agreement contained a provision enabling the respondent to rescind it if the appellant Company should fail to discharge any instalment payable to Forsyth. The result of this agreement was to leave the appellant Company entitled to the beneficial interest in the patents for the rotary pulsator, the legal title of which still resided in Forsyth. The respondent remained entitled to the beneficial interest in the New Zealandia patents. The appellant Company exercised the inventions allotted to it by manufacturing and selling milking machines.

On 15th April 1930 the appellant Company purported to rescind the agreement of 29th March 1928 on the ground of misrepresentation by the respondent. The managing director of the appellant Company had been in New Zealand and had seen Forsyth, and had discovered from him that the appellant had no interest in the patents save that conferred by the agreement with Forsyth that in consideration of devoting himself to the exploitation of the patents he should receive half the royalties. Thereupon the respondent instituted this action for specific performance of the agreement of 29th March 1928, and in the action the appellant Company counterclaimed for rescission.

Irvine C.J. found that the respondent "did represent clearly, not once but many times, that he had a half-interest in the patent rights in Australia." He found, however, that upon some early occasion when that representation was made the appellant had with him the written agreement between himself and Forsyth under which he was entitled to share in the royalties, and that it was available to the managing director of the appellant Company if he had chosen

to examine it, but that he did not examine it carefully and did not come to know the real contents of it, so that the respondent's representation that he was entitled to a half-interest was left not explained or modified by his showing, or causing the managing director actually to examine, the nature of the interest which he possessed. He found the representation was honestly made. Further, his Honor came to the conclusion, after examining the agreement between Forsyth and the respondent, that, in effect, it did give him a one-half interest in the patent. He found against some other representations which were relied upon, and accordingly dismissed the counterclaim for rescission.

During the course of the hearing, for reasons which do not clearly appear, the respondent's counsel had departed from his statement of claim, which sought specific performance of the agreement, and had made a case for unliquidated damages for loss of the respondent's bargain, contained in the agreement of 29th March 1928, based upon the view that the attempt of the appellant Company on 15th April 1930 to rescind the agreement amounted to a repudiation or that the refusal to pay the instalment due to Forsyth amounted to a breach going to the root of the contract. On the real facts no such case could be made because, so far from the respondent accepting either the renunciation or the breach as discharging the contract, he evinced an intention of holding the appellant Company to the contract, by at once issuing a writ for specific performance. It is said, however, that at the trial counsel for the appellant Company raised no such point, and was content to adopt the assumption that if the respondent was entitled to relief he should obtain damages for loss of his bargain. We are unable to agree with the learned Chief Justice in his opinion that the representation, which he found that the respondent made, was, in substance, true. His contractual right to a half-share in the royalties, even if absolute, would differ considerably from a half-share in the property in the patents. But his right to participate in dividends was anything but absolute: it was conditional upon him continuing to devote his whole time and energies to the exploitation of the patents in Australia except in so far as he was employed by a licensee; and even then he was required to continue to use his best endeavours to exploit the patents and to

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extend the use of articles manufactured under the patents. The difference between this position and that of full ownership was material from the point of view of the appellant Company, because it was led to believe that Forsyth was demanding £5,000 for a half-interest in the property in the patents, the full interest in which the respondent estimated by reference to the royalties at £10,000. In point of fact Forsyth was demanding £5,000 for an interest considerably better than a one-half interest would be. Moreover, we are unable to agree with the opinion of the Chief Justice that the representation did not induce the original transaction. There is more doubt whether it continued to operate as an inducement when the agreement of 29th March 1928 was made. By that time the appellant Company had more experience of the inventions covered by the patents, and had exercised the patents to some extent, and must have been in a better position to judge of their value. If the evidence of the managing director of the appellant Company were accepted, there could be no doubt that the inducement still operated, but the respondent's evidence was in conflict with him upon the conversations from which this conclusion would be drawn. On the whole, however, we think that, having regard to the findings of the learned Chief Justice as to the representations and as to the ignorance of the appellant of the true position, the proper conclusion is that the contract of 29th March 1928 was also induced by the misrepresentation. We are, however, unable to arrive at the conclusion that the representation was fraudulent. We think that the finding of the learned Chief Justice that the respondent was not fraudulent must be sustained. The result is that the appellant cannot obtain relief save upon the footing of innocent misrepresentation, and this means that he is limited to rescission. But rescission requires *restitutio in integrum* and it cannot be granted unless the parties can be restored substantially to the position which they occupied before the transaction was entered upon. No doubt it is not necessary to restore them precisely, and Courts of equity give relief by way of rescission when by the exercise of their powers they can do practically what is just in the restoration of the parties. (See per Lord *Blackburn* in *Erlanger* v. *New Sombrero Phosphate Co.* (1).) But the entire transaction must be rescinded; and in this case

(1) (1878) 3 App. Cas. 1218, at p. 1278.

we think the entire transaction includes the oral agreement made between the parties before the respondent went to New Zealand to obtain Forsyth's interest in the patents. At the time when that transaction was entered upon, the respondent had obtained an option to acquire Forsyth's interest, which, although the time limited for its exercise had expired, Forsyth appears to have been willing to recognize. If the respondent did not acquire the patents, he was entitled, by performing his agreement with Forsyth, to obtain half the royalties from the patent; if he did acquire the patent, that agreement came to an end. By entering into the agreement with Forsyth for the purchase of the patent the respondent unalterably changed his position. If the whole transaction were rescinded he would be left with the patents upon his hands and with a liability for the purchase-money. One or more of the patents expired before 15th April 1930. Moreover, the appellant Company has exercised the inventions, and even after 15th April 1930 sold articles which had been manufactured thereunder. The opportunity of exploiting the patents during the three years which passed cannot be restored, and this loss to the respondent cannot be met by compensation, at any rate, without great difficulty.

We think that the case is one in which restoration of the parties to their previous position is not possible, and no relief can be moulded which will accomplish an approximate restoration that will be just. We are, therefore, of opinion that the appellant Company cannot succeed in its counterclaim for rescission.

On the other hand, the misrepresentation which has been established affords a complete answer to the plaintiff's suit for specific performance. The remedy of specific performance would have been available apart from that defence (see *Cogent* v. *Gibson* (1)), and it is not easy to understand why or how the respondent was permitted to depart entirely from the form of action which he adopted and convert the suit into an action of damages at law. Still more difficult is it to understand why he was permitted to obtain damages for the loss of the contract which he had affirmed. It is, however, clear that as the appellant cannot obtain equitable relief from the contract the respondent is entitled to recover upon it at law. Having

(1) (1864) 33 Beav. 557; 55 E.R. 485.

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affirmed the contract upon the appellant's refusal to perform it, the respondent is not entitled to recover damages for loss of the contract, but is confined to damages for the appellant's failure to pay the instalment of £1,000 on 1st January 1930. A question would arise what the measure of those damages is, but we are disposed to think that the respondent's counsel is right in his suggestion that the appellant's counsel was content to accept the assumption that the true measure of damages was for loss of the contract. We accordingly proceed to consider what those damages are.

The benefit which the respondent would derive from the performance of the contract would consist in the discharge of his liability to Forsyth; the detriment would consist in the transfer of the rotary pulsator patents to the appellant and the existence of a non-exclusive licence in respect of the New Zealandia inventions. The measure of damages consists of the amount by which the benefit exceeded the detriment. By losing the benefit of the contract the respondent remains under an obligation to pay Forsyth £3,000 with interest. He is, therefore, entitled to the sum of £3,000 with interest to 15th April 1930 less the value, as at 15th April 1930, of the patents of the rotary claw pulsator and the withdrawal of the licence.

We cannot agree with the valuation of the patents adopted by the learned Chief Justice, who has taken into account deterioration of the patents after 15th April 1930; but to arrive at any definite conclusion as to their value upon the evidence which has been given is a matter of great difficulty. Little evidence was led upon the subject and the estimates which the parties themselves gave were largely argumentative and wholly conjectural. The respondent denied that the rotary pulsator inventions had any value in April 1930, but conceded that the withdrawal of the licence to use the New Zealandia patents might be worth £500. It is, however, clear that in May 1927 the respondent assigned to both sets of patents a value of £10,000, and he says that in support of this value he relied upon an estimate of the royalties they would produce which the appellant's managing director capitalized at a ten years' purchase. As at March 1928 half this sum was considered by the respondent to be the fair value of the rotary patents. On 15th April 1930 less than three years of the ten years had expired. If no other

element entered into the question save that of time, the value of the rotary patents upon this basis would have diminished by £1,500. There can, however, be no doubt that the circumstances of trade in April 1930 were much less favourable than in May 1927. On the other hand, the parties must have contemplated a greater expenditure in the earlier period of the ten years in developing the patents than in the later, and it appears that the appellant in fact did incur a considerable sum in the exploitation of the invention. It is true that royalties were looked for from the New Zealandia patents rather than the rotary pulsator, but even in the first year of the appellant's use of the latter the revenue produced was by no means insignificant. The variation of circumstances and the other elements tending towards a reduction of value must be contrasted with the considerations pointing to some possible increase in value, and it must be remembered that the withdrawal of the appellant's licence to use the New Zealandia invention conferred some appreciable benefit upon the respondent. It does not appear that in April 1930 the exchange between New Zealand and Australia had risen so as to make it proper to increase the sum of £3,000 which then remained unpaid, and we do not think that exchange should be allowed at any later date for the purpose of assessing damages. The "rule is that, in translating damages from foreign currency into sterling, the date at which that process has to be effected is the date of the breach of contract" (per *Warrington* L.J., in *In re British American Continental Bank Ltd.: Goldzieher & Penso's Claim* (1); and the rule must be the same between currencies of the Dominions although expressed in sterling. In these circumstances we are not prepared to hold upon the evidence as it stands, that the respondent has established any substantial damages as a result of the loss of the contract. We think, however, that as we are setting aside the assessment of damages made by the trial Judge, and as the materials for making any assessment are so unsatisfactory, we ought to allow a reference as to damages if the respondent desires it, but it must be at his own risk as to costs. Otherwise the judgment must be for the recovery only of nominal damages. We do not think an

(1) (1922) 2 Ch. 575, at p. 587.

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inquiry as to profits made by the appellant by the use of patents after 15th April has any place in these proceedings.

The question of costs has given us some difficulty. The appellant has substantially succeeded upon this appeal, and, in so far as the respondent has succeeded in the action, it has been by the desertion of his pleading.

On the other hand the appellant made a charge of fraud and failed, and the respondent should receive the costs of defending himself from such a charge. On the whole, we think a just order will be that here and in the Supreme Court both parties should abide their own costs.

Appeal allowed without costs. Judgment of the Supreme Court discharged; in lieu thereof order that if within seven days the plaintiff by notice to the defendant's solicitors elects to take a reference for the ascertainment of damages at his own risk as to costs, it be referred accordingly to the Chief Clerk of the Supreme Court to inquire and certify to the Supreme Court what damages have been suffered by the plaintiff by reason of a renunciation by the defendant as on 15*th April* 1930 *of the contract dated* 29*th March* 1928 *and the cause be remitted to the Supreme Court for further consideration; otherwise judgment for the plaintiff upon his claim for one shilling without costs. Judgment for the plaintiff upon the defendant's counterclaim without costs.*

Solicitors for the appellant, *Haden Smith & Fitchett.*

Solicitors for the respondent, *Fink, Best & Miller.*

H. D. W.