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*Nov. 22.
*Dec. 13.

ERNEST PITT (PLAINTIFF).....APPELLANT;

AND

J. P. DICKSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action for deceit—Agreement for sale—False representations—Compromise—Notice.

P., living in Montreal, owned stock in a Cobalt mining company, and D., of Ottawa, looked after his interests therein. Being informed by D. that the mine was badly managed and the property of little value, and that other holders were selling their stock, P. signed an agreement to sell his at par. D. assigned this agreement to a third party. Later P., learning that the stock was selling at a premium and believing that he had made an improvident bargain, entered into negotiations with the holder of his agreement, and a compromise was effected by a portion of P.'s holdings being sold to the assignee at par and the remainder returned to him. It transpired afterwards that D. and the assignor were in collusion to get possession of the stock, and P. brought action against D. for damages.

Held, that the compromise having been effected when P. was in ignorance of the real state of affairs, it did not bind him as against D. from whom he could recover as damages, the difference between the par value of his remaining shares and their market value at the date of such compromise.

Judgment of the Court of Appeal (12 Ont. W.R. 824) reversed and that of the trial judge (9 Ont. W.R. 380) affirmed by a Divisional Court (11 Ont. W.R. 127) restored.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of a Divisional Court(2), which affirmed the verdict for the plaintiff at the trial(3).

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

(1) 12 Ont. W.R. 824. (2) 11 Ont. W.R. 127.
(3) 9 Ont. W.R. 380.

The material facts are sufficiently stated in the above head-note.

Lafleur K.C. for the appellant.
Chrysler K.C. and *Larmonth* for the respondent.

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be allowed with costs.

DAVIES J.—I concur in the reasons given by Mr. Justice Duff for allowing the appeal.

IDINGTON J.—I so far agree with the reasoning and conclusions of the judgment of the learned trial judge and of Mr. Justice Riddell, that I need not add more than to indicate wherein, I respectfully submit, error exists in the views expressed in the Court of Appeal.

These judgments accept, save in one instance, the findings of fact of the learned trial judge, but assuming all that, find the respondent discharged by appellant's accepting the price agreed for and executing an assignment by him to Beament of the shares in respect of which the damages have been assessed.

If that had been done by appellant with a full understanding of all the facts finally disclosed at the trial, it might well be treated either as a release of all damages or waiver of any claim thereto or of further profit in the sale of his shares, and, held, that he could not be damnified by what he assented to.

The radical error consists in overlooking, almost if not entirely, the fact that there was no such disclosure when this assignment was executed on the 13th of November and that it was but the formal confirma-

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tion of what the assignor had already been induced by the fraudulent practices of the appellant to commit himself to.

He had been induced by fraud to sign a document enabling the respondent as his trusted agent to sell fifteen thousand shares and to accept, as if they had been sold to some third party, three thousand dollars on account thereof.

Disturbed by what he had heard after receiving this money as to the prudence of the transaction and its results and doubting what to do he wrote respondent to this effect.

The matter was, however, then represented to him by respondent on his expressing this to him, in such a way as to lead him, and as might have led a man exercising reasonable care, to believe that a sale of the whole had been made to some one in Toronto, and that one Beament was going there to see what could be done in the way of rescission as to this and other sales.

This Beament was a party to this latter bit of deception, but the appellant was ignorant of that as well as of the relations between Beament and respondent regarding the whole business.

Relying upon respondent's good faith as to the scheme for rescission of the whole sale or redemption or rescue, as it were, and wholly ignorant of respondent's fraud and duplicity and also of the duplicity of Beament, he recognized Beament and the fruits of his mission in the following telegraphic correspondence which took place between them, Beament being in Toronto and appellant in Montreal.

12.30 p.m., TORONTO, Nov. 10th, 1906.

Ernest Pitt,

Canadian Railway Accident Insurance Co., Ottawa.

Without prejudice will amend contract as follows: Seven thou-

sand five hundred shares at par, thirty-five hundred to be released now, and four thousand on payment at par within thirty days.

T. A. BEAMENT.

OTTAWA, November 10th, 1906.

T. A. Beament,
King Edward Hotel, Toronto.

Cannot accept offer. Will release three thousand, consideration cash already paid in full settlement without prejudice; offer good to-day only.

ERNEST PITT.

TORONTO, November 10th, 1906.

Ernest Pitt,
Canadian Railway Accident Insurance Co., Ottawa.

Your telegram received. Will accept offer therein contained. Leave order on trustees in my favour.

T. A. BEAMENT.

6.50 p.m., OTTAWA, November 12th, 1906.

Ernest Pitt,
78 Union Ave.

Unless order for shares received to-morrow will take proceedings. Answer.

T. A. BEAMENT.

November 12th, 1906.

T. A. Beament,
Ottawa.

George F. Henderson acting for me. See him.

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Appellant had been induced thus by the fraud not only to agree to sell, but to compromise what up to that time he had no more than supposed possibly an imprudent or improvident sale.

In the entire absence of any knowledge of the fraud practised, how could such a compromise, which, in effect, was but a buying back of his shares, have been made in law as any answer to the series of frauds in this case?

The Court of Appeal assumes appellant not only absolutely free, but so clearly so on the 13th November that he could without risk repudiate the whole trans-

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action, including this compromise. If he fully knew what fraud had been practised, of course he was free to repudiate. I will in such a case even assume, not as undoubted law, but for argument's sake, he was bound to repudiate and refuse to deliver his goods by the delivery of the assignment.

But the appellant fell far short of possessing such vantage ground.

He was bound in honour, if no honest excuse at hand, to implement his bargain for a compromise with an unknown vendee not the respondent.

The law imposes on no man the duty to dishonour himself under pain of sacrificing his legal rights and remedies.

But, besides that, this man was bound by law to fulfil the contract he had entered into, as he was led to believe both from what he knew and had been a party to, and what he had been told by respondent had been done on the faith thereof.

It seems idle in face of all these considerations to say he was free to repudiate and refuse to carry out the compromise. He had to do that or submit to worse.

It seems equally idle to say he absolved by this compromise the respondent, who induced by his fraud the whole thing.

This is not the case of a *joint tort feasor* or of principal and agent wherein one having been deliberately or even improvidently released by the wronged party, that release enures to the benefit of the other. Beament was no party to the original fraud so far as we know.

Now, is there anything that occurred at Ottawa, when the parties met on the 13th of November, to put

appellant in a different position from what I have up to this assumed as the facts found of his being ignorant of the fraud practised?

Only two pieces of evidence came into play there and then which are relied upon to weaken this position of appellant.

One is the fact that respondent had indorsed a transfer of the written authority on which he acted to the man Beament.

I fail to see how this, executed two hours before its delivery and thus virtually concurrent with the execution of the compromise assignment can help respondent.

He is thereby re-asserting by his acts his story of Beament going to Toronto to redeem these shares. The inference to be drawn from that act alone was that he had succeeded as to part. He was empowered thereby and by the cancellation that followed to mitigate or relieve the situation. He accomplished this and the so-called compromise by the fraudulent concealment of his gross breach of trust. How can he plead fraud for acquittance of fraud?

How is the respondent who stipulated for nothing, who was in appearance no party to what was being done, further relieved thereby?

He says now, he was Beament's agent and Beament being released he is. Who said he was Beament's agent ? He never claimed in face of appellant to be anybody's agent but his.

If he had any relations with Beament he chose to conceal them and cannot now set them up to the detriment of the man who trusted him as a friend and agent and knew nothing then of such relationship with another.

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One other piece of evidence deserves notice and that is the conversation between Beament and appellant which disclosed at this meeting not the full facts, but the incorrect statement by Beament to appellant that he throughout had been the purchaser and no one in Toronto was concerned. The fact was he and respondent had been the purchasers. As the statement also included an express denial that appellant had ever been told Toronto people were concerned and an implied denial of anything leading to such belief when the appellant certainly had been (if his word accepted by the learned trial judge be true) led to believe the reverse of this, why should he accept the statement? It might well have aroused his suspicions, but, beyond that, what significance should he have attached to such a statement, coming from a man who had already failed in candour and helped, by going to Toronto to express his thoughts thence by wire, to keep up the delusion appellant laboured under.

Was he bound to assume therefrom that respondent was either the agent of Beament or his partner in the deal? Neither was explicitly stated.

Above all, was he bound thereby to ignore the fact that respondent was his agent and owed to him a primary duty and to suppose that by his dealings with or through Beament to ameliorate a threatened loss, he was releasing respondent for or in respect of any obligation he was under as trustee for himself?

I need hardly state that in my view this relationship between the parties hereto was that of principal and agent.

That is to my mind clear. We must look to the substance of what men are about and not merely to

the form in which they put their authority for the transaction by one of business for another.

It is often expedient in business in order to facilitate dealings to arm an agent with the title and give him an appearance of ownership.

Third parties are protected thereby, but the doing so does not affect the actual relations between the principal and the agent and their mutual obligations.

I have not adverted to the information, whatever it was, derived from Beament and possessed by appellant's solicitor or the reservation he was instructed by appellant to make for the simple reason that there is no evidence of either having been communicated by the solicitor to his client or to any one. He was assured, moreover, by the solicitor his assignment and cancellation left him free as regarded the respondent.

I think the appeal must be allowed with costs here and in the Court of Appeal and that the judgment of the learned trial judge be restored.

DUFF J.—The facts in this case are fully stated in judgment of the learned trial judge and it is unnecessary to re-state them.

I think the appeal should be allowed and the judgment of the learned trial judge restored.

The only question in my view of the case which it is necessary to discuss is whether, assuming that, as against Beament, the appellant had a good defence to the demand to have the stock transferred, he has by his settlement with Beament lost his right of action against the respondent. Assuming Beament to have been liable to the appellant as the respondent's principal in respect of the respondent's misrepresentations, I am quite satisfied that, having regard to the

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findings of the learned trial judge, we are not entitled to conclude that the appellant knew this at the time of the settlement with Beament. The settlement, therefore, cannot be treated as involving a composition in respect of such liability and, consequently, no question can arise touching the application of the rule governing the effect of the release of one of several joint tort-feasors. The sole question is whether the damages claimed can be said to arise out of the original misrepresentation.

The argument is that the damages, as being the result of the appellant's own act, are not recoverable. I cannot agree with this. It was the respondent whose misconduct had placed the appellant in the situation in which he must—or at all events might, reasonably think he must—engage in litigation with Beament or accept the settlement offered; and he cannot now complain that the appellant did not get the best possible settlement if he did not by his unreasonable conduct increase the damages. If Beament had abandoned his claim *in toto* the appellant would have suffered no loss; and if it had appeared that the settlement was made with full knowledge that Beament's demand must fail the appellant might be in the same position; but he was not bound to engage in doubtful litigation with Beament in order to protect the respondent. In the circumstances the loss suffered by the appellant must be regarded as the natural and normal consequence of the situation in which he had been placed by the fraud of the respondent.

For these reasons I am unable to agree with the judgment of the court below and would allow the appeal.

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Appeal allowed with costs.

Solicitors for the appellant: *MacCraken, Henderson, McDougall & Green.*

Solicitors for the respondent: *Chrysler, Bethune & Larmonth.*