Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of George Urquhart v. *Duncan Macpherson, on Appeal from the Supreme Court of the Colony of Victoria; delivered May 22nd*, 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE Appellant and Respondent in this case were partners as sheep farmers and graziers upon certain stations, one of them called Glen Urquhart, in the colony of Victoria. The action was brought by the Appellant against the Respondent for alleged breaches of certain covenants contained in the deed of partnership, and also for an alleged breach of one covenant contained in the deed of dissolution of partnership. There is also a count founded upon an allegation of fraud committed by the Defendant in obtaining the deed of dissolution.

The general facts are these: the Plaintiff, who had carried on the business of a sheep farmer at Glen Urquhart for some years, being desirous of going to England, negociated a partnership with the Defendant. It was part of the terms of the original treaty that the capital should be 20,000*l*., each partner bringing in 10,000*l*. in cash; and instructions were given for the deed of partnership upon that footing. Whilst the deed was in preparation, the parties came by a parol agreement to a totally different arrangement regarding the capital. It appeared that the Defendant had sheep to the value of about 18,000*l*.,

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with which he was ready to stock the stations, and the Plaintiff had upon the runs sheep of the value of about 8,000*l.*; and in order that the Plaintiff might balance the value of the sheep brought upon the station by the Defendant, he agreed to advance the sum of 10,000*l.* in cash; each, therefore, in that way contributing 18,000*l.*, making a total capital of 36,000*l.* But the parties did not think it worth while to have any alteration made in the deed, which still stands as a deed by which the parties were to contribute 20,000*l.* in equal proportions in cash.

What happened with regard to the capital so arranged was this: Messrs. Power and Rutherford had been the agents for Glen Urquhart and the other stations held by the Plaintiff for some years, and it was arranged that they should continue to be the agents. As far as the evidence, which is extremely scanty and obscure, furnishes information, it would seem that the financial business of the stations was managed during the partnership by Messrs. Power and Rutherford. They acted as the factors and financial agents of the partnership; the moneys derived from sales passed through their hands; and indeed from the entries in their accounts it would seem that they conducted the sales, or that the sales were in some way made through them. It appears also that both the Plaintiff and the Defendant had private accounts with Messrs. Power and Rutherford. Power and Rutherford had advanced to the Defendant the money to purchase the sheep which he was going to bring upon the stations. Those sheep were apparently valued at 17,365*l.* A balance was owing on the Defendant's private account to them (caused, no doubt, by the advance made by them for the purchase of the sheep,) of 13,686*l.*,—being 3,000*l.* and upwards less than the value

of the sheep. Messrs. Power and Rutherford, in their account with the partnership, debited the partnership with the full value of the sheep, 17,365*l.*, treating that as the capital brought in by the Defendant, and debiting the partnership with it. At the same time they gave credit to the Defendant in his private account for the same amount. Much the same course was taken with respect to the Plaintiff. Power and Rutherford, in their account with the partnership, debited the partnership with 8,226*l.*, the value (apparently) of the Plaintiff's sheep; and as they had credited the Defendant's private account with the value of his sheep, they credited the Plaintiff's with the value of his, namely the 8,226*l.* Then there was the 10,000*l.* which the Plaintiff had agreed to supply in cash. As far as the obscure state of the evidence allows an opinion to be formed, it would appear that this sum was not really advanced by the Plaintiff, but was raised upon a cash credit bond given to the Oriental Bank, under which bills were drawn by Macpherson upon Urquhart, which were discounted by that Bank, and the proceeds placed by Power and Rutherford to the credit of the partnership. When the bills became due they do not appear to have been taken up by the Plaintiff, but to have been retired by Power and Rutherford; and Power and Rutherford having retired them, appear to have placed what they had so paid to the debit of the partnership. Therefore the partnership was debited with the capital of both partners, neither having brought in any cash, but one having brought in sheep to the value of (say) 18,000*l.*; the other, sheep to the value of (say) 8,000*l.*, and lent his credit for the 10,000*l.*, upon which credit the money was raised. On looking at the bond which was given to the Oriental Bank, it appears that Macpherson was

treated in it as the principal, and Urquhart as the surety, although Urquhart had agreed to supply the 10,000*l.* as part of his share of the capital of the partnership.

It is to be observed that the action was not brought until more than 15 years after the dissolution had taken place. The first four counts of the declaration are founded upon four covenants in the deed of partnership. The first count is for the Respondent's breach of the covenant to contribute the sum of 10,000*l.* as capital; the second is for the breach of the covenant to keep proper books of account; the third is for the breach of the covenant by the defendant not to withdraw his share of the capital from the partnership; and the fourth for a breach of the covenant to pay all monies received on account of the partnership into the Oriental Bank. The jury at the trial found that the breaches alleged in these four counts were proved.

Upon the case coming before the Court on a rule to enter a nonsuit, or for a new trial, the Court having power to draw inferences, (which power must however be taken to be subject to the findings of the jury, and limited to this, that the Court might enter a nonsuit or change the verdict if there was no evidence upon which the jury could reasonably act,) the Judges agreed with the jury that the breaches alleged in the second and fourth counts were proved; but thought there was no evidence to sustain the breaches in the first and third counts. They were of opinion that it was not shown that the Defendant had not contributed his share of the capital, nor was it shown that he had withdrawn any of it. In deciding upon those breaches the Court referred to the state of facts which has been already described. Their Lordships do not think it necessary to enter at present upon a consideration of those facts. It will be sufficient

to say that they agree generally with the findings of the Court; a decision on the breaches having become immaterial, because upon the plea of release to the four first counts of the declaration their Lordships think the Defendant is entitled to succeed.

The plea of release alleges that by the deed of dissolution of this partnership the Plaintiff released the Defendant from all the claims mentioned in the first four counts. There is no doubt that the deed contains such a release. To that plea there is a replication that the release was obtained by fraud. The Court held on demurrer that this replication was no answer to the plea, inasmuch as the Plaintiff has not disaffirmed the contract of which the release forms a part, and in fact was not in a condition to disaffirm or rescind it, being unable to place the Defendant in his original position.

With reference to the main argument by which it was sought by Mr. Herschell to impeach the decision of the Court, namely, that this release is severable from the rest of the deed, it will be necessary to refer shortly to the deed of dissolution. It recites the deed of partnership which was dated 28th January 1859, from which it appears that there were some stations or tracts of land brought into the partnership by the Defendant in addition to the stations which the Plaintiff possessed. The general scheme of this deed of dissolution is, that the Plaintiff was to take over the whole of the assets of the partnership, the stations, the stock, and all the credits, and was to pay all the debts and liabilities of it. It appears too by this deed that the tracts of land which had belonged to the Defendant were assigned by him absolutely to the Plaintiff, with the exception of the Chintin station, which was to be retained by him. The deed also contains covenants on the part of the Defendant,

one of which covenants is the foundation of the fifth count of the declaration, to be presently adverted to, by which the Plaintiff secured himself against certain contingencies and liabilities.

Such being the general nature of the deed, the release which it contains is found at the end of it, and is in these terms: "And this indenture lastly witnesseth, that in consideration "of the premises, each of them the said George "Urquhart and Duncan Macpherson, for himself, his heirs, executors, and administrators, "doth hereby remise and release, and for ever "quit claim unto the other of them, his "executors, administrators, and assigns, all "actions, suits, accounts, reckonings, claims, and "demands whatsoever at law or in equity, which "either of them the said parties, his heirs, "executors, or administrators, now hath or "hereafter may have, claim, or demand against "the other of them, his heirs, executors, administrators, or assigns, for or by reason "of any matter or thing whatsoever touching "or concerning the said joint trade or partnership, subject and without prejudice nevertheless to the covenants and agreements "herein contained." Therefore the object of this release, as far as the Defendant was concerned, was to release him from all matters and things whatever touching or concerning the joint trade, without prejudice to the covenants which he had entered into for the security of the Plaintiff with regard to certain matters.

It seems to their Lordships impossible to sever this release from the rest of the deed. There is but one contract for the dissolution of partnership, though containing many terms, of which this release is one. It is expressly said to be made "in consideration of the premises," that is, in consideration of the Defendant having given up the whole of the partnership assets

to the Plaintiff, and his own runs, which at the end of the partnership would otherwise have reverted to him.

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

If authority were wanted in support of a principle so common as that to which their Lordships have adverted, it may be found in the case which is referred to in the judgment of the Court below (*Clarke* v. *Dickson*, Ellis, Blackburn and Ellis, 148.) In that case Mr. " Justice Crompton says,—" When once it is " settled that a contract induced by fraud is " not void, but voidable at the option of the " party defrauded, it seems to me to follow that " when that party exercises his option to rescind " the contract he must be in a state to rescind, " that is, he must be in such a situation as to " be able to put the parties into their original " state before the contract."

The Plaintiff was not without remedy. He was entitled to an action founded upon the fraud in which he would recover the true amount of damages which he had sustained. Indeed the sixth count of his declaration is founded upon such a cause of action. To that count however there is a plea of the Statute of Limitations,

namely, that the action did not accrue within six years. The Plaintiff replied to that plea, that he did not know of the fraud until within six years of the commencement of the action. The Court has held that this replication is no answer to the plea, and the learned counsel at the bar have not attempted to dispute the correctness of that judgment. The replication, which is an equitable one, was held by the Court to want the allegations necessary to constitute a good equitable answer to the plea.

The only remaining count is the fifth, which is founded upon a covenant contained in the deed of dissolution. The principal argument of the Appellant has been directed to the support of this count. Before adverting to the transactions which it is contended are a breach of this covenant it will be well to refer to the words of it as laid in the declaration. The fifth count states that the Defendant covenanted that he "had not at any time theretofore "assigned, released, discharged, or received any "of the credits of the said partnership except "such as were entered as received in the books "of the said partnership, or had done any "other act whereby the credits and effects by "the said last-mentioned deed assigned to the "said George Urquhart, or intended so to be, or "any part thereof, had or had been, or should "or might be charged or incumbered in any "manner howsoever, yet the Defendant hath "broken his said covenant in this, to wit, that "he had before the date of the said deed "assigned, released, discharged, and received "divers credits of the said partnership other "than those which were entered as received "in the books of the said partnership, whereby "the assets of the said partnership became "and were greatly reduced in value to the "Plaintiff, and the Plaintiff believing that all

" the credits of the said partnership which " had been assigned, released, discharged, or " received had been entered in the said books, " and there was a large amount of outstanding " credits due to the said partnership, released the " Defendant therefrom and took upon himself " all the liabilities of the said partnership." The Plaintiff says he was led to suppose that there were outstanding credits. In this statement of damage he puts his own construction upon the meaning of the covenant.

The Defendant asked for and obtained particulars of the breaches of the covenant. There are three transactions given in those particulars as breaches. The first and main one is with respect to the 17,365*l.*, which Power and Rutherford had debited to the partnership account. The particulars state the breach in this way: " A credit of the partnership mentioned " in the declaration, amounting to the sum of " 17,365*l.* 17*s.* 9*d.*, received by the Defendant " in manner hereinafter set forth, and not " entered as received in the books of the said " partnership." Then, " the said amount was, " as on the first day of January 1859, placed " to the credit of the said Defendant by Power " and Rutherford, and by them charged against " the said partnership in manner following "—stating the amounts transferred from Macpherson's account. " By the means aforesaid the said Defendant received the sum of " 3,699*l.* 6*s.* 11*d.*, and was released and discharged " of and received a debt then owing by him to " the said Power and Rutherford, amounting " to the sum of 13,666*l.* 10*s.* 10*d.*, and the said " partnership or the Plaintiff subsequently paid " the said Power and Rutherford the said sum " of 17,365*l.* 17*s.* 9*d.*" This transaction was stated at the outset of the present observations; and if it were correctly stated (and as far as

the obscurity of the evidence allows the statement appears to be correct) the transaction with one partner balanced that with the other; the capital of each being dealt with in the accounts of Power and Rutherford in the same manner.

Then, has there been a technical breach of this covenant? Their Lordships do not think there has been. The debit to the partnership of the 17,365*l.* cannot be said to be the receipt of a credit of the firm by the Defendant within the meaning of this covenant. It may be that that sum was debited to the firm without sufficient authority on the part of the Plaintiff, and that he was entitled to challenge it; but it does not seem to be in any sense a credit of the firm received by the Defendant which he should have entered in the partnership books. To bring this case within this covenant the Plaintiff must first establish that it was a credit; then that it was received by the Defendant, and lastly that it ought to have been entered in the books. It is true he got credit for a similar sum in his private account, but that credit which Power and Rutherford gave him in his private account does not seem to be one which required to be entered in the partnership books. Their Lordships think the transaction in its nature and in effect is not one of those that fall within the limited scope of the covenant upon which the breach is alleged.

It may be observed that the Court below do not advert to this transaction in their decision upon this breach; and apparently, if argued at all, it must have been given up before the Judges delivered their judgment. If, as at their Lordships' bar, it had been relied upon as the main ground upon which the breach in question could be supported, it is inconceivable that the Court should not have noticed it in the judgment they delivered upon that breach.

The judgment of the Court is confined to the second transaction contained in the particulars, which is thus stated in the particulars: "Credits "of the partnership mentioned in the declara- "tion received by the Defendant from the "several persons hereinafter mentioned (whom "he released from payment thereof), and "assigned by him to the said Power and "Rutherford, without having been entered "as received in the books of the said partner- "ship." Their Lordships think that this is a wholly incorrect description of what occurred. It appears that Power and Rutherford were the salesmen, or employed salesmen, to sell for the firm; that they had sold wool and skins to Goldsborough and had received the proceeds. They received the proceeds, and it is incorrect to say that the Defendant received them and assigned them to Power and Rutherford. The latter received the money as the factors for the firm, and apparently in the ordinary course of business. It is impossible therefore within the terms of the covenant to convert this and other similar transactions into a receipt of credits by the Defendant assigned by him to Power and Rutherford, and their Lordships entirely agree with the view taken by the Court below upon this point.

The remaining transaction is thus stated in the particulars: "A credit of the partnership "assigned by Defendant (without having been "entered in the books of the said partnership) to "Power and Rutherford, by granting them his "promissory notes or acceptances as under," and then certain promissory notes and acceptances amounting to 10,770*l.* are set out. Their Lordships think that these notes and acceptances were not existing credits due to the partnership transferred to Power and Rutherford. It appears by the terms of the deed that the Defendant had

authority to draw bills and give acceptances for the purposes of the firm, and that those in question were given to Power and Rutherford in order to put them in funds for carrying on the business of the firm. It is incorrect therefore to describe these transactions as assignments by the Defendant of credits of the firm.

On the whole, therefore, their Lordships are of opinion that the Court below was right in the judgment which it has given, and they will humbly advise Her Majesty to affirm that judgment with costs.