Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Douglas v. Franz Sander and Company, from the Supreme Court of Natal; delivered the 14th May 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.

[*Delivered by Lord Robertson.*]

On 4th May 1897, the Respondents, who were carriers at Durban, in the Colony of Natal, sold to the Appellant the whole of their business and plant for 4,400*l.* The Appellant took possession and carried on the business in the premises which had been occupied by the Respondents for that purpose. Those premises were held by the Respondents under a lease from one Acutt, and it had been contemplated that the Appellant should take over the lease. Owing to the disputes out of which the Appeal has arisen, this was never done; and Acutt compelled payment from the Respondents of the rent due for the period of the Appellant's occupancy. On 2nd April 1900 the Respondents sued the Appellant to recover the sum thus paid by them; and in answer to this suit the Appellant made, in reconvention, a claim for 750*l.* as damages. The present Appeal relates solely to this claim in reconvention; and no question is raised as to

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the merits of the principal suit. On 3rd August 1900, the Judge of the Durban Circuit Court gave judgment in the Appellant's favour for 600*l*. On 2nd November 1900, the Supreme Court of the Colony reversed this judgment and disallowed the claim. The present Appeal is to have the Circuit Court's judgment restored.

The Appellant's demand is clearly set out in his claim in reconvention, and is expressly made for damages for fraud. The fraud alleged consisted in a false statement by Franz Sander, one of the partners of the Respondents' firm, which statement induced the Appellant to enter into the contract of sale of 4th May 1897, whereby he suffered damage. The statement made by Sander was that no *post mortem* examination had been held of any horse belonging to the Respondents, whereas the fact was that such a *post mortem* examination had, to the knowledge of Sander, been held and had proved the horses of the Respondents' establishment to be infected with glanders, at the time of the negotiations for the sale. This disease, having, by that time, got hold of the stables, again broke out in the time of the Appellant's occupancy and caused a loss in horses amounting to the sum of damages claimed.

The answer made by the Respondents to this claim was that at the time of the sale of the business and plant, the Appellant was well aware that sickness had occurred among the horses, that several animals had been shot and that a "*post mortem*" had been held which clearly "established the existence of the disease called "glanders."

On all the questions raised by the pleadings the evidence was highly conflicting, but at their Lordships' Bar the conflict was greatly narrowed by the admission of the Respondents that Sander did make to the Appellant the false statement

that no *post mortem* examination had been held although he had in fact been present at a *post mortem* examination, and knew that it revealed glanders. The sole question therefore came to be whether in fact the Appellant knew before the bargain that there had been glanders in the stable in 1897. If he did, then plainly the false statement did not induce the contract.

The following facts and dates are necessary for the due understanding of the controversy. The Appellant had for some time prior to the bargain in question acted as manager for Benningfield & Co. who were carriers at Durban and had, besides, business concerns at Johannisburg. The Respondents' firm consisted of Franz Sander, whose fraud is the central fact in the case, and R. H. Tatham. These two persons had carried on the business in question from 1st July 1896 to 30th April 1897; and their predecessor in the same business had been one Mitchell. In 1895 in the time of Mitchell and again in June 1896 in the time of the Respondents there had been glanders in the stables, although the degree of virulence of the disease and the amount of publicity of its occurrence at the time must not be assumed to have been very great. In March and April 1897 there occurred an outbreak, the seriousness of which was put beyond all doubt before the sale now in question by a *post mortem* examination, the denial of which is the basis of the Appellant's claim.

The case of the Appellant on the question whether he knew of the outbreak of 1897 is that while he had heard rumours that there had been cases of glanders in the stable in 1896 he did not know at all (and still less for certain) of an outbreak in 1897 and that he accepted as true the following statement which Tatham, one of the Respondents, when examined in this case admitted that he made to the Appellant while

the proposal for sale was on foot:—" I told him " that glanders had been said to have existed in " Mitchell's time and that there was a difference " of opinion between the laymen and the pro- " fessionals then, but that in any case the loss " of five or six horses a year which was all I had " experienced merely meant 100*l.* or so." This statement seems to their Lordships to be of capital importance. In the first place, it was quite untrue. At the time it was made, Tatham knew that the Government Inspector had been down and had condemned the stable a few days before, the presence of glanders having been demonstrated by a *post mortem* examination of a horse selected and killed as a specimen. All these things were in the immediate and personal knowledge and recollection of Tatham. His fraud, of which there can be no doubt, is not directly in issue, but on the issue immediately under consideration, viz., the knowledge possessed by the Appellant, it is extremely difficult for the Respondents to maintain that the Appellant did not believe the statements of Tatham. It has however been maintained with some plausibility that the rumours which had reached the Appellant as to glanders in 1896 must have put him on his guard and that it is difficult to suppose that a fact so interesting to one in his trade as the outbreak of 1897 had not reached him. There are however several answers to this contention, the main and primary one being that the Judge who heard the witnesses believed the Appellant in his assertion that he did not know of the outbreak of 1897. The Appellant's testimony moreover is supported by various considerations, the first of which is to be found in the interesting evidence given by the Government veterinary surgeon as to the nature of the disease in question. It appears that in South Africa glanders often occurs with symptoms

much less pronounced than in England and that it runs (as he expresses it) a much more chronic course than in England, so that men really acquainted with horses would not think anything the matter, except in advanced cases. There would, he says, be nothing extraordinary in the Appellant not detecting glanders from inspection; even a professional man could not detect it without the mallein test, unless the horse showed potent symptoms. And he goes on to say that a horse might last a good many years with glanders.

This evidence is important in itself, as preparing one the more readily to accept the Appellant's testimony and it also shows how the question about the *post mortem* examination assumed the crucial importance assigned to it by the Appellant, as determining his decision whether to buy or not. Their Lordships consider the evidence to justify the conclusion of the Judge who heard the witnesses, and they hold that the Appellant had no independent knowledge preventing his accepting the statement made by Tatham, his vendor, according to Tatham's own testimony. This conclusion is supported by the admission of Sander that the price paid was a high price, and one which he for his part would not have given if he had known there were glanders in the stable. On a specific point made by the Respondents about a notice of the outbreak appearing in a local newspaper, their Lordships have no reason to reject the explanation given by the Appellant and accepted by the Circuit Court that he was at Johannisburg at the time and did not see it. The incredulity expressed by the Supreme Court does not rest on any positive basis and has no affirmative evidence to support it, having regard to the desperate position of both Tatham and Sander as witnesses of credit.

The Respondents however have maintained an argument against the present claim which is independent of testimony. They say that the Appellant has lost his remedy and that the present claim is untenable in Roman-Dutch law. Shortly stated, the argument is as follows:—In Roman law a person induced by fraud to enter a contract may elect to set aside the contract by the *actio redhibitoria*, in which case he must sue within six months, or he may sue an action *quanti minoris* to recover the difference between what he ought to have had and what he has had, in which case he must sue within 12 months. The Appellant, say the Respondents, was in this case; according to his own showing, he might have had either action and he has sued neither. What he has done is to sue an *actio doli* (or action of deceit), but this remedy is only given to those to whom no other action was ever available; and that, as already pointed out, is not the case of the Appellant.

Now assuming that the question is to be determined exactly as if it had occurred in Rome and before the praetor, one important qualification must be made of the doctrine thus stated. In the chapter in the Digest *De Dolo Malo*, it is indeed laid down that if another action had been open to the Plaintiff the *actio doli* must be refused. But the text goes on to give the reason,—*sibi imputet* that he has not a remedy,—"*qui agere supersedit*," and then it is added, "*nisi in amittenda actione dolum malum* "*passus est.*" It thus appears that if the same fraud which has induced the contract also operates to deprive the Plaintiff of his other remedies, the praetor will give the *actio doli*. This is the same thing as saying that if the Plaintiff only discovers the fraud more than a year after the bargain, the *actio doli* is open to him. Now their Lordships are satisfied that this

is the case of the Appellant. He says, and their Lordships believe, that he only learned in August 1898 of the *post mortem* examination and of the fact of glanders and that was more than a year after the date of the sale. The *actio doli* would thus be open to the Appellant even on pure Roman law as administered by the praetor. To the objection that the *actio doli* was itself limited to two years, the Supreme Court give the answer that in Roman-Dutch law the Roman rule has been departed from in favour of the general prescription of thirty years; and their Lordships see no reason to question this conclusion. On these grounds the action is defensible and the decree given by the Circuit Court was right.

Their Lordships think it right however to add that they do not desire to assert as on their own authority that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman law. The argument at their Lordships' Bar on this matter was, to say the least, not copious; and no reference was made to authorities more modern than Van Leuwenn. On such an argument they would be reluctant to stereotype according to ancient procedure what is a matter of practice affecting mercantile transactions, the more especially as the reluctance of the praetor to grant the *actio doli* was expressly rested on the ground that it was *actio famosa*, involving infamy to the person against whom fraud was proved. This consequence would not follow a successful action of deceit in Natal; and it is impossible to avoid asking whether this chapter of the Roman texts is part of the living Roman-Dutch law, and whether the action of deceit is hampered for those obsolete reasons, the more especially, seeing that in the comparatively modern work of Van Linden an action of damages is spoken of as the normal remedy for fraud inducing a contract. In the meantime it is

not necessary to enter on these questions, for the present case admits of decision on grounds consistent with the archaic procedure invoked.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court ought to be reversed with costs, and the judgment of the Circuit Court of Durban restored. The Respondents will pay the costs of the Appeal.