Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Murphy and another v. *Glass, from Victoria: delivered on the 19th February*, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

THIS is an Appeal from a Judgment of the Supreme Court of the Colony of Victoria upon demurrer.

The Plaintiffs (the Appellants) declared as indorsees of two bills of exchange, one for 10,266*l.* 13*s.* 2*d.*, the other for 1,642*l.* 13*s.* 3*d.*, dated the 2nd March, 1865, drawn by the Plaintiffs upon and accepted by Patrick Higgins, indorsed by the Plaintiffs to the Defendant (the Respondent), and by the Defendant to the Plaintiffs; and also upon an instrument under seal whereby the Defendant bound himself to secure payment by Higgins of his two acceptances. The counts upon the bills averred that the Plaintiffs endorsed the bills to the Defendant without consideration, in order that they might be indorsed by the Defendant to the Plaintiffs for the purpose of the Defendant becoming surety as such indorser for the payment of the bills by the acceptor Higgins to the Plaintiffs.

The Defendant, as to 4,606*l.*, parcel of the moneys secured by the bills and deed, pleaded for defence on equitable grounds that before the making of any of the bills there was an agreement between the Plaintiffs and Higgins for the sale and payment of certain stations for the sum of 46,199*l.* 19*s.* 1*d.*, subject to the condition that in case any dispute should arise between the vendors and the purchaser as to any matter or thing connected with the sale

and purchase, such dispute should not annul the sale, but should be settled by arbitration. That such a dispute did afterwards arise, and that upon a reference to arbitration the arbitrator awarded that the Plaintiffs should pay Higgins 4,606*l.* in satisfaction of his claim. That the bills were made by the Plaintiffs and accepted by Higgins for and on account of the said sum of 46,199*l.* 19*s.* 1*d.*, and upon and for no other consideration whatsoever; and that before the commencement of the suit Higgins claimed and offered, and still claims and offers, to deduct and set-off the said sum of 4,606*l.* against an equal amount or part of the said sum of 46,199*l.* 19*s.* 9*d.*

To this plea the Plaintiffs demurred.

They also replied, first, that an award was made under the power of reference in the contract of sale before the making of the award stated in the plea.

And, fifthly, they traversed the last allegation in the plea.

The Defendant demurred to these replications, and Judgment was given for him upon all the demurrers.

The Appeal from the Judgment upon the demurrers to the replications may be very shortly disposed of.

The first replication is clearly bad, as it does not aver that the claim in respect of which the 4,606*l.* was awarded was or could have been included in the former reference.

The fifth replication is bad, as it tenders an immaterial issue.

The question as to the validity of the plea depends upon this, whether, upon the averments it contains coupled with those in the declaration, a Court of Equity would, upon the application of the Defendant against the Plaintiffs, without bringing Higgins before the Court, grant an injunction to restrain the Plaintiffs from suing out execution upon a judgment for the sum of 4,606*l.* to which the plea applies.

From the nature and terms of the contract set forth in the plea, it is obvious that the compensation admitted to have been awarded was an abatement of the price of the stations, and reduced *pro tanto* the amount of the purchase money then unpaid. If, at the time of making the award, the sum secured by the Bills was all that remained due of the purchase

money, the Defendant might in equity have claimed the benefit of the amount of compensation awarded, as a deduction from that sum. If so, he was entitled to put this forward as a defence on equitable grounds to so much of the cause of action as was covered by this amount.

But it was contended on the part of the Appellants that the Defendant could have obtained no relief in equity without bringing Higgins before the Court, as he might be able to show the existence of equitable circumstances which required that the 4,606*l.* should not be deducted for the benefit of the surety, and, therefore, as Higgins could not be made a party to the action, the plea was necessarily insufficient.

To sustain this objection, however, it must appear that at the time of making the award there was more of the purchase-money due and owing to the Plaintiffs than was secured by the Bills of Exchange.

It was urged that to make the plea good, it should have been expressly averred that no more of the purchase money was due than the amount secured by the bills, and that, in the absence of an express averment, it must by the rule of pleading be taken against the Defendant that the fact was otherwise.

But this rule does not apply to the pleading of matters which are peculiarly within the knowledge of the opposite party (Hobson *v.* Middleton 6 B., and Cr. 302). And with reference to this equitable plea, it may be observed that the same exception to the rule that pleadings are to be taken most strongly against the party pleading is recognized in Courts of Equity. See Mitford on Pleading (5th Ed.) pp. 45, 347.

The Plaintiffs were at liberty in this case to reply and avoid the plea on equitable grounds, but they chose to demur, and thus leave the allegations in the plea without denial or qualification. Every fair and reasonable intendment, therefore, ought to be made in support of the plea so far as it relates to matters peculiarly within the knowledge of the Plaintiffs.

The Plaintiffs had the fullest means of knowing the state of the accounts, and what balance of the purchase-money was due from Higgins at the time of the award. If more was owing than was covered

by the bills, that fact should have come from the Plaintiffs by way of replication. In the state of the pleadings it must be taken that the only unpaid part of the purchase-money was that which was secured by the bills. This being so, it does not appear that there is any ground for the objection that the Court could not do complete and final justice between the parties upon the equitable plea, because Higgins was not before them. If the Defendant had been compelled to pay the full amount of the bills, he would of course have had a remedy over against Higgins; and if a Bill had been filed by the Defendant to restrain the Plaintiffs from issuing execution upon a Judgment for the 4,606*l.*, and Higgins had been made a party to the suit, what equity could he possibly have urged against the Defendant? The plea, therefore, constitutes a good equitable defence to the action, so far as relates to the sum of 4,606*l.*; and their Lordships will recommend to Her Majesty that the Judgment appealed from be affirmed, and the Appeal dismissed with costs.

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