

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Miza Mohamet Tackey v. R. S. F. McBain, from His Britannic Majesty's Supreme Court for China at Shanghai; delivered the 31st October 1911.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD MACNAGHTEN.]

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This is an Appeal from an Order of the Supreme Court for China and Korea sitting as the Full Court at Shanghai. The Order appealed from dismissed an application made on behalf of the Appellant—the Plaintiff in the action—for a new trial on the ground of misdirection. The trial had taken place before Sir Haviland de Sausmarez, C.J., and a jury. The Full Court consisted of the C.J. and an Assistant Judge. The C.J. held that there was no misdirection in his charge to the jury. The Assistant Judge took a different view. According to the rule of the Court the opinion of the C.J. prevailed.

Disembarrassed of the wild rumours which seem to have been rife on the Shanghai Stock Exchange, reduced to its proper proportions, and confined to the real point in controversy, the case does not present any difficulty. The action was an action of deceit. In such an action it is incumbent on the Plaintiff to prove actual

fraud. That has been the law in this country from the earliest times, and the law has been emphatically reasserted in the comparatively recent cases of *Smith v. Chadwick*\* and *Derry v. Peck*.†

After a trial which lasted four days and a most elaborate summing up by the C.J., the jury returned answers to certain questions in the result negating altogether the charges of fraud and dishonesty which had been brought against the Defendant.

Mr. McBain, the Defendant in the action and Respondent in this Appeal, was a Director and the General Agent at Shanghai of an oil-producing company commonly known as the Langkat Company. The Company, whose chief property was in Sumatra, had been established for several years. Apparently it was paying satisfactory dividends, but there was a good deal of gambling in its stock, and in March 1909 there were rumours of a corner in Langkats.

On the 10th of April 1909, the Saturday before Easter Sunday, Mr. McBain received a telegram from the manager in Sumatra, stating that hole No. 94 which had been recently opened was producing oil in large, and, indeed, unprecedented quantities. Mr. McBain sent the manager a congratulatory telegram. Then he bethought him that in February he had sold for the June settlement 400 shares, a number which exceeded his actual holding by 110 shares. He was going up country in the afternoon, so he sent a note to Mr. Elmore, who had been in his employ since 1902, requesting him if there should be any decided strength or advance in Langkats in the early part of the following week to buy for him 400 or 500 shares for the June settlement. On the evening of Wednesday the 14th Mr. McBain returned to Shanghai. The next day, Thursday the 15th, is the most

\* 9 A.C. 190.

† 14 A.C. 337.

important date in the history of the proceedings which led to this litigation. On that day Mr. McBain went to his office at 9.30 a.m. At 10 a.m. his broker, Mr. Benjamin, called. The rise in Langkats was the subject of conversation between them. Mr. Benjamin had returned to Shanghai too late on the 14th to do anything in execution of Mr. Elmore's order, so Mr. McBain asked him to buy back if he could the shares which he had sold in February for the June settlement, and said he should like 200. Mr. Benjamin said he would do what he could and left the office. At 10.30 a.m. Mr. Benjamin returned and said that he had bought 200 Langkats. This amount more than covered the number by which Mr. McBain had sold short. At 11 a.m. Mr. Arthur Anderson, who was then Chairman of the Shanghai Stock Exchange, looked in to find out, if he could, for his own advantage, what was the cause of the sudden advance in Langkats, and what news, if any, the Directors had received from Sumatra. He had been acquainted with Mr. McBain ever since Mr. McBain came to Shanghai. Mr. McBain, he says, was very affable and chatty as usual. Mr. Anderson plied him with suggestions and questions until at last Mr. McBain, who had done his best to avoid disclosing confidential information, was driven into a corner, and then (as perhaps better men have done in the stress of similar circumstances) took refuge in a false statement. He said that the Company had received no information, good, bad, or indifferent. There can be little doubt that Mr. McBain did say so for he made the same statement to another broker later in the day, and apparently on that occasion without any pressure. It is hardly conceivable that he would have so made such a statement unless he had been already committed to it.

In the afternoon of the same day Mr. Benjamin offered Mr. McBain 95 shares in Langkats for cash, and Mr. McBain, objecting to the price, took them rather unwillingly.

On the 17th of April there was a meeting of the Directors. In the meantime a telegram had been received from Sumatra in answer to an enquiry from Shanghai, saying that the yield from hole 94 was maintained. Then in view of the excitement on the Stock Exchange, and a strong suspicion of leakage in the office, the Directors resolved to publish the news in the *North China Daily News* and to send a circular to the shareholders. This circular was delivered to the shareholders on Monday the 19th of April.

On that Monday, Mr. Benjamin offered Mr. McBain 200 more shares in Langkats. Mr. McBain did not want to take them. He thought the price was then too high and he thought it would soon fall as in fact it did. But Mr. Benjamin, to use his own words, "forced those " shares down his throat."

That is the sum and substance of Mr. McBain's dealings in Langkats in April 1909. He was censured very severely and very properly by the learned C.J. for gambling in the shares of a company of which he was a Director and he was taunted throughout the proceedings with having told a lie. But for all that he seems to have given his evidence in a very straightforward manner and to have made a favourable impression on the Judge and on the jury.

In determining whether the untrue statement made by Mr. McBain was uttered with the fraudulent intention of depressing the shares in the Langkat Company for his own advantage, all the circumstances of the case, including of course the position in which Mr. Anderson had

placed him, and the difficulty of escaping from Mr. Anderson's pertinacity, must be taken into consideration. One thing at least is clear. It could not have been originally any part of the fraudulent scheme attributed to Mr. McBain to use the Shanghai brokers as his instruments in depressing the market. He did not seek them out. They flocked to his office. Mr. Anderson and other brokers descended upon him in the hope of picking up some confidential communication not intended for their ears. It is, perhaps, conceivable, but not by any means likely, that when Mr. McBain was pressed by Mr. Anderson he saw his opportunity and determined on a sudden to use Mr. Anderson as an instrument for disseminating false news. Mr. McBain was severely cross-examined. He stated on oath that in withholding from the public the news received from Sumatra he never thought of his own private interest, such an idea, he said, did not enter his head. The Judge and the jury saw his demeanour in the witness box. And apparently they believed him. Moreover, it must be borne in mind that at the time when the untrue statement was uttered Mr. McBain had already secured as many shares as were wanted to make him safe for the June settlement. And he was evidently unwilling to buy more at the price which they had then reached.

Mr. Anderson's justification or excuse for his conduct in seeking to extract a confidential communication seems to have been a bold assertion that it was the practice of the Company to publish at once all telegrams as they were received. That assertion, however, was absolutely disproved. The only foundation for it was that on one occasion the Directors did publish a wire stating that oil had been found. That was on a concession at Acheen, about a hundred miles away from Langkats. The field had not been

developed or proved at the time. So that was a very different case. Then it was said that every broker in Shanghai was ready to do what was done by Mr. Anderson. That is true more or less. All the brokers examined on behalf of the Plaintiff, with one honourable exception, had no scruples on that score. Mr. Benjamin, however, who seems to be the leading broker in Shanghai, in cross-examination as to his interview with Mr. McBain on the 15th of April, being asked what Mr. McBain said to him answered: "I went there, I told him, I said "there seem to be quite a boom in Langkats but "I did not ask him why because I knew he "would not tell me. I did not think it was my "business to ask him as a broker." All the other brokers examined on behalf of the Plaintiff were shocked to think that the manager of a company could tell an untruth to a broker, but there was not one of them who seemed to have thought that there was any harm in a broker trying to worm out secrets from the confidential manager of a company.

Now, if the case had been left to the jury on this simple issue—fraud or no fraud—probably they would have had no difficulty in coming to a conclusion. But unfortunately, and apparently at the instance of the Defendant's Counsel, a set of questions was put to the jury framed on the propositions laid down by Lord Cairns in *Peek v. Gurney*. Undoubtedly there is a superficial resemblance between this case and the case with which Lord Cairns was dealing. There is however this essential difference. In *Peek v. Gurney* there was a prospectus adjudged to have been fraudulent as between the promoters and the persons who took shares on the faith of the statements it contained. The only question was:—Could the Plaintiff connect himself with that prospectus as

one of the class of persons to whom it was addressed? Here the real question is:—Was Mr. McBain's statement, though undoubtedly untrue, made with the fraudulent intention attributed to Mr. McBain by the Plaintiff? The question whether the Plaintiff was in a position to connect himself with the person or persons to whom the statement was made is another question which does not arise unless the statement was fraudulent as well as untrue.

It is not necessary to set out or discuss the questions left to the jury by the C.J. On the material question which involved the question of fraudulent intent the jury at first hesitated under a misapprehension, not improbably created by the questions which were left to them and the learned disquisition of Counsel on authorities more or less irrelevant. They came back for further directions. But on being instructed, and as their Lordships think properly instructed by the C.J., they found a verdict which completely absolved the Defendant from the fraud attributed to him.

It would serve no useful purpose to discuss the judgment of the learned Assistant Judge. Their Lordships are unable to agree with his view as to the facts or his view as to the law.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be dismissed.

The Appellant will pay the costs of the Appeal.

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In the Privy Council.

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MIZA MOHAMMET TACKEE

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R. S. F. MCBAIN.

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DELIVERED BY LORD MAGNAGHEN.

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