ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Farran.

MANCHUBHAI NAVALCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* JOHN H. TOD AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1894. *December* 14.

Principal and agent—Consignment for sale—Unauthorized sale by agent below limit—Measure of damages.

The measure of damages, in a case where an agent has in breach of his duty sold goods of his principal below the limit placed upon them by the principal, is the loss which the principal has sustained, and if he has sustained no loss he can only ask for nominal damages.

THE plaintiff, a Bombay merchant, sued the defendants, a London firm carrying on business in Bombay by their constituted attorney, to recover a sum of Rs. 6,144-1-6 deposited by the plaintiff in the Bombay Bank in his own name and in that of the Agra Bank on behalf of the defendants.

This amount represented the difference between the plaintiff's and defendants' statement of accounts current between them, and the difference included the equivalent, in Rupees, of £ 280—about Rs. 4,000 at the exchange of the day—which the plaintiff claimed to be entitled to charge to the defendants as the difference between £ 270, the price at which their London firm had sold a parcel of pearls (No. 183) which he had consigned to them for sale, and £ 550, the limit he had placed on the parcel.

The suit was heard by Mr. Justice Parsons, who decided that the terms of the agreement between the parties as to the consignment justified the defendants' sale of the pearls, and disallowed the plaintiff's claim on that ground, and also found on the facts that the plaintiff had not proved that he had sustained any damages.

The plaintiff appealed from this decision.

The following are the grounds of appeal material to this report:—

(1) The learned Judge should have held that the plaintiff was entitled to be credited with the sum of £ 550, the limit placed by him upon the parcel of pearls No. 183.

* Suit No. 692 of 1891. Appeal No. 811.

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(2) The said learned Judge should in any case have held that the plaintiff was entitled to a larger sum than the said parcel of pearls had realized when sold by the defendants.

(3) The said learned Judge should have held that the defendants were not entitled to sell the said parcel of pearls at the time when they sold the same.

(4) That the defendants committed a breach of their contract with the plaintiff by selling the said parcel when they did, and that the plaintiff sustained damages by such sale, and the said Judge should have assessed such damages.

The appeal came on for hearing before Sir Charles Sargent, Chief Justice, and Farran, J.

B. Tyabji and *Lowndes* for appellant.

Lang (Advocate General) and *Scott* for respondents.

B. Tyabji:—We are entitled to the difference between the price at which the parcel was sold and our limit price. We put our own value upon the pearls, as we were entitled to do, and if defendant thought that value wrong, he should have returned them to us. There is no question of market value here; where the goods are fancy goods. This case resembles that of a picture. In such cases there is no market value. The test is what is its worth to the owner.

Scott, contra:—There is no evidence of damages here. They must be proved to be recovered—Mayne, p. 537-8; *Cassaboglou* v. *Gibb*[1]. If there has been any breach of duty here, it has been a mere technical one, and has caused no loss to the plaintiff. The only damages recoverable in such a case would be the difference between the price realized and the price the plaintiff would have to pay to repurchase similar goods.

FARRAN, J., (after finding on the facts that the defendants were not justified under the circumstances in selling the parcel at a price lower than the limit placed on it by the plaintiff, and were, therefore, liable to the plaintiff for any damages which he could show resulted to him from the improper sale,) continued:—The form of the action is not one actually sounding in damages,

(1) 11 Q. B. D., 797.

but as the suit was brought for the express purpose of raising this question, counsel for the respondents took no objection on that ground and expressly invited us to determine the case upon the merits. The appeal, therefore, raises the interesting question what the measure of damages is when an agent sells goods, such as pearls, consigned to him for sale, below the limits placed upon them by his principal and without being able to justify the sale by the terms of his contract. Counsel for the appellant contended that the measure of damages in such a case was the difference between the price fixed by the limit and the price which the pearls actually realized. It must be taken, he said, that the agent as between him and the principal sold the pearls at the fixed limit and should be debited with their price ascertained in accordance with it. He argued it was the same in principle as the case of a purchaser in a shop taking away an article such as a picture and insisting on paying for it a lower price than that placed upon it by the shopkeeper. The latter, he said, would be entitled to recover the price he fixed upon his picture irrespective of its real value.

That case, however, sounding in contract rather than in tort or on the case, is not the one with which we have to deal. What we have to determine is what is the measure of damages where an agent in breach of his duty sells the goods of his principal. The answer appears to me to be that the measure of damages in such a case is the loss which the principal sustains by the sale, and if he has suffered no loss he can only ask for nominal damages. Mr. B. Tyabji cited no authority in support of his argument, but on the other hand the general principle, as I have stated it, is laid down in Mayne on Damages (2nd Ed.), p. 411, and Sedgwick on Damages, p. 693, and that principle is the one which, under different circumstances it is true, was adopted in *Cassaboglou* v. *Gibb*[1]. Where a unique article like a picture is sold, theoretically the most correct measure of damages would be not the fancy price which the owner placed upon it, but the price which he would have to pay in order to repurchase it. In the case of articles of common merchandise, the state of the market subsequent to the sale would afford the criterion by which to fix the loss. If the market rose, the principal would sustain, and could

(1) 11 Q. B. D., 797.

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prove a loss; if it fell, he could not, as he could without loss put himself in his original position by purchasing merchandize of the same quality. In the case of an intermediate article like pearls, unless there were a rise in the market, he could purchase similar pearls at the same rate. The damages would be the expenses of the sale and of the repurchase. In all cases alike, however, the principal must prove his damages, and if he can show none they can be no more than nominal. On this point the Court below has, in my opinion, come to a correct conclusion. If Mr. Tyabji's argument were adopted, his measure of damages must, I think, logically be applied to all classes of goods alike; and applied to ordinary merchandize, it would amount almost to an absurdity. In my judgment it cannot be applied to any.

Attorneys for plaintiff (appellant):—Messrs. *Tyabji and Dayabhai.*

Attorneys for defendants (respondents):—Messrs. *Brown and Moir.*

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Before Mr. Justice Parsons and Mr. Justice Strachey.

1896. *February* 14, 27.

NAOROJI NUSSERWA'NJI THOONTHI, PLAINTIFF, v. KA'ZI SIDICK MIRZA, DEFENDANT.*

Insolvent—Debt incurred before insolvency—Bond given after personal discharge in respect of—Private settlement with creditor, validity of—Absence of notice to Official Assignee and creditors—Position of insolvent with respect to property acquired after personal discharge—Agreement by creditor not to oppose final discharge—Validity of—Evidence—Untrue recital in bond—Contradiction by obligor allowed.

An agreement, by which an insolvent who has obtained his personal but not his final discharge, without notice to the Official Assignee or his other creditors, settles the claim of one creditor, and by which that creditor agrees not to oppose his final discharge, is void as in fraud of the creditors and as inconsistent with the policy of the Insolvent Debtors' Act.

In a suit on a bond containing such an agreement, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors had been settled with, was untrue.

* Small Cause Court Reference, No. $\frac{256}{17772}$ of 1895.