IRVINE & CO. *vs.* BERG.

Broker.—Bill of Lading.—Agency.

A broker may have such instructions from one of the parties to a contract effected by the broker, as to render him the special agent of such party, and authorize him to bring his principal to terms beyond those specified in the broker's note.

A purchaser of goods is entitled, in an action ex emto, to recover damages where there has been no delivery at all of the goods sold; or where the goods have been delivered and are defective, by the actio redhibitoria he may claim a concellation of the contract, or by the actio quanti minoris to have the purchase-price reduced to the actual worth of the goods sold. [*Per* DE VILLIERS, C.J. *Sed vide judgment of* DWYER, J.]

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This was an action instituted by Irvine & Co., of King William's Town, against William Berg of Cape Town, for damages for breach of contract.

Plaintiffs alleged that on the 15th January, 1879, they entered into a contract of purchase of certain mealies from the defendant, through the brokers, Messrs. Bolus Brothers, of Cape Town, when a broker's note was passed in the following terms:—

"Cape Town, 15th January.

"Bought on account of Messrs. J. J. Irvine & Co. from Mr. William Berg:—

"3000 sacks (or whatever quantity may be on board a vessel from Monte Video or elsewhere) good mealies, in sound condition, at 27*s.* per 200 lbs. gross, including bags, delivered alongside a coasting vessel or landed in Table Bay Docks, duty and all charges paid. Vessel expected about 31st March, but buyers to take whichever cargo arrives first, seller to endeavour to induce ship to go direct to East London, buyers paying extra freight. No arrival no sale, &c."

That afterwards, in the month of March, in alleged performance of this contract, the defendant delivered certain mealies which had then lately arrived by the steamer *Dunrobin Castle*, and made out an account for £3016 13*s.* 11*d.*, and drew upon the plaintiffs for the amount, which draft the

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plaintiffs, in order to get possession of the mealies, accepted and subsequently paid at maturity. That the mealies so delivered were not good mealies in sound condition, but were bad and unsound, in consequence whereof the plaintiffs were unable to sell and dispose of them as they otherwise could have done, whereby they suffered great loss. That after the mealies were delivered it was found they were short weight, whereby the plaintiffs lost £32 7*s*. That the defendant, in breach of the said contract, did not endeavour to induce the said ship to go direct to East London; and that the sum of £428 6*s*. 3*d*., charged by the defendant for freight from Cape Town to East London at the rate of 35*s*. per ton, was improper and excessive, and more than should have been paid, by the sum of ten shillings per ton, whereby the plaintiffs further suffered loss. Wherefore they prayed judgment for £900 as damages and costs. There was an alternative count in the declaration founded on a contract laid as having been made in March for the sale of 2000 bags of mealies, good and in sound condition, with the same allegations of loss and claim for damages.

The defendant admitted the contract in the terms set forth in the broker's note, and pleaded the general issue to the remainder of the declaration. Then specially, as to the allegation of breach of contract that the defendant did not endeavour to induce the ship *Dunrobin Castle* to go direct to East London, that on the 14th of March, while the said ship was still in Table Bay, the plaintiffs specially instructed the defendant to ship 500 bags of the mealies by the ship *Melrose*, to secure freight for the remainder in the ship *Stettin;* and that, acting nearly as possible in accordance with such instructions, the defendant forwarded the whole of the mealies to East London by the ship *Stettin*. And as to the allegation of excessive and improper charge for freight, the defendant pleaded that it was specially agreed by and between him and Bolus, acting as the duly authorized agent of the plaintiffs, that the defendant should be allowed and should charge the sum of 35*s*. per ton for the said freight, and that such agreement was afterwards ratified and approved of by the plaintiffs.

The plaintiffs replied as to the defendant's second plea, that the defendant of his own wrong, and without the cause by him in the said plea alleged, broke his said contract in

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manner and form as in the declaration alleged. The replication was otherwise general.

Considerable evidence was taken on commission to shew that the mealies were unsound when landed at East London. The plaintiffs were under contract to supply mealies to the commissariat, and tendered delivery of 1000 bags of these mealies, but after inspection they were rejected. They were afterwards sold to other parties at the same price as the commissariat would have paid. As there was a great scarcity of mealies in the King William's Town market at the time, the plaintiffs managed to dispose of the whole shipment, making a small profit on the lot. About six hundred bags had been sold by the plaintiffs to arrive, and after the mealies had been delivered to the purchasers, their unsound condition was discovered, and the plaintiffs had to allow £331 14*s.* 3*d.* of the price for which they had been sold, to induce the purchasers to retain the mealies. Owing to the way the mealies had been sent away, on arrival at East London it was found impossible to prove short delivery with exactness. The plaintiffs had employed Bolus Brothers as brokers in a number of transactions, and a number of letters had passed between them. At the time of the sale the defendant stated he expected a cargo of mealies by sailing vessel from America. On the 6th of February, plaintiffs wrote to Bolus Brothers :—"It is of course understood we are to have the first cargo of sound mealies, to insure which you must send a thoroughly competent man to examine them on arrival." To this Bolus Brothers replied :—"We shall have mealies carefully inspected on arrival, and wire you condition if not sound." On the 13th of March defendant telegraphed :—"Have 2000 mealies for you. Shall I ship *Melrose?* No sailing vessel loadiug." To which plaintiffs replied :—"Ship 500 bags in *Melrose*, secure freight from Murison in *Stettin* for balance. Is 2000 the entire cargo? Grain to be good, in sound condition." On the same day :—"If Murison can't guarantee freight for all mealies, secure for balance per *Anglian* or first steamer." Plaintiffs telegraphed to Bolus :—"See my telegram to *Berg re* Mealies. See our instructions carried out. Wire what is being done." On the 14th of March Bolus telegraphed to plaintiffs :—"Berg 2000 mealies aboard *Dunrobin*. Freight engaged *Stettin*." And on the 19th :—"Mealies

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excellent order now shipping *Stettin*. Only charges freight 35*s*. and primage." Letters passed between the parties at the same time, and on the 30th of March, plaintiffs wrote to Bolus:—"We are glad to hear that you have been able to secure freight by *Stettin* for Berg's mealies at 35*s*. It is very satisfactory." Defendant drew on the plaintiffs through the Standard Bank, and they were obliged to accept the draft before receiving the bill of lading and other papers which would entitle them to receive delivery of the mealies. On receiving the bill of lading they discovered that the defendant had a through bill of lading from England to East London, with the option of landing the mealies at Cape Town and receiving a rebate of 25*s*. per ton, consequently the defendant could compel the delivery of the mealies to be made at East London. The defendant stated he had shewn the bill of lading to Bolus, and that thereafter it was mutually agreed that defendant should charge 35*s*. a ton for freight between Cape Town and East London. The ruling freight at the time per steamer was stated to be from 40*s*. to 50*s*. per ton between these ports. Bolus stated he read extracts from all letters and telegrams received by him from plaintiffs to the defendant; and while the mealies were being transhipped at Cape Town Bolus inspected the shipment and found them in good order. Several witnesses were called by the defendant to prove the mealies were in sound condition when transhipped at Cape Town.

Buchanan (with him *Innes*), for the plaintiffs, submitted that the evidence clearly proved the allegation that the mealies were unsound and not according to the warranty in the contract. The plaintiffs, having paid for the goods, were entitled to keep them, and sue the defendant for the damages sustained by their not being equal to warranty. The measure of damages was the price sound mealies would have realized at the time in the King William's Town market. The claim for short delivery could not be pressed. As to the freight, the defendant had acted either as principal, and by the broker's note had bound himself to do his best to send the mealies on to East London, the plaintiffs paying only the amount actually expended for freight, or the defendant acted as plaintiffs' agent. In either case he was not justified in making a profit out of the freight between

Cape Town and East London. Bolus was plaintiffs' agent only in so far as related to the making of the contract, and he could not bind the plaintiffs to any fresh arrangement without their authority, which had not been given. The plaintiffs' so-called ratification had been done in ignorance of the real circumstances. (*Grot.*, 3, 15, 7; *Addison on Contracts*, 7th ed. pp. 503, 513, 441; *Bridge* vs. *Wain*, 1 Stark. 504.)

Stockenström (with him *Leonard*), for the defendant, contended that the defendant had done all that was required of him by his contract. By the broker's note delivery was to be taken at Cape Town, and Bolus as plaintiffs' agent had inspected and accepted the mealies here. But even if this was not so, plaintiffs were estopped by the way in which they had dealt with the mealies after they had reached East London. The plaintiffs ought to have held a proper survey and refused to receive the mealies, so that the defendant might have had an opportunity to protect himself. There was no such course of action open to the plaintiffs as they had followed in this instance. By our law the only actions they could bring on a contract of sale were the *actio ex emto*, the *actio redhibitoria*, or the *actio quanti minoris*. The original contract had not been adhered to by the parties, but another was substituted for it by consent in March. The agreement made between defendant and Bolus Brothers as to the freight, was binding on plaintiffs, for it was clear they had sufficiently authorized Bolus to act for them as to warrant his entering into such a contract. (*Chapman* vs. *Morton*, 11 M. & W. 539; *Carter* vs. *Crick*, 4 H. & N. p. 412; 2 *Burge*, p. 500; *Dig.*, 21, 1, 6; 21, 1, 48, 3; 21, 1, 61; *Voet*, 21, 1, 3.)

Buchanan, for the plaintiffs, replied.

Cur. adv. vult.

Postea (September 1),—

De Villiers, C.J., in giving judgment, said:—This action arises out of the sale of certain mealies by the defendant to the plaintiffs. This sale was negotiated through Messrs. Bolus Brothers, who are brokers carrying on business in Cape Town. This action is brought, first, for a breach of warranty,

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on the ground that the mealies delivered were not sound, as contracted for; secondly, there is a claim for short delivery; and thirdly, the plaintiffs seek to recover a certain sum which they allege has been overcharged them for freight. Now in regard to the first of these claims, my brethren are not satisfied on the evidence that it has been proved that the mealies were unsound when they were delivered. Nor am I prepared to differ from them, though I do not hold so strongly upon this point as they do. But as a question of law I am satisfied that the plaintiffs in this case are not entitled to recover. They have themselves admitted in their evidence that after disposing of the whole of the mealies there was a clear profit remaining to them of about £300. They say they ought to have made a greater profit, as they could have sold the mealies at a higher price had they been sound. Now the authorities I have consulted all come to this conclusion, that where a purchaser buys a quantity of produce—or anything of that kind—in the way in which these mealies were bought, the whole quantity must be taken together; he is not justified in taking one portion and making all he can out of it, and then claiming damages for the other portion. There is no doubt that under the Roman-Dutch law a purchaser of goods is entitled, in an *actio ex empto*, to recover damages where there has been no delivery at all of the goods; but all the authorities draw a distinction between the case where there has been a delivery and where there has been no delivery at all. In the present case there was delivery, and a payment of the purchase-price. The only remedy open to the purchaser in such a case is by the *actio redhibitoria*, or the *actio quanti minoris*. As to the remedy by the *actio redhibitoria*, the plaintiffs have not availed themselves of it. Under that action they would be entitled to claim that the defendant take back the mealies and repay them the purchase-price. Instead of that they have treated the mealies as their own property and sold them. With regard to the other remedy, the very words "*quanti minoris*" shew that a purchaser can only claim a reduction of the price where he has sustained damage by having sold the goods under the purchase-price. I admit that the English authorities are different to our own, but the Roman-Dutch law is the law of this Colony. I have consulted *Pothier* on this subject, and he lays down the same rules very clearly. It is on these

grounds that I base the conclusion I have come to in favour of the defendant on this point. As to the second claim, no evidence has been given, and it has not been relied on in argument. This only leaves to be considered the third point, viz., the claim for excess of freight. This claim will in a great measure depend on the question, what was the position of Bolus Brothers in the transaction? Now it is quite clear to me that Bolus Brothers were not merely acting as brokers, but that they were expressly instructed by the plaintiffs to do a number of other acts beyond the mere negotiation of the sale. The correspondence between the parties proves this beyond all doubt. [His Lordship referred to the various letters which had passed between Bolus Brothers and the plaintiffs to shew that Bolus Brothers had ample authority to bind plaintiffs to the agreement to pay 35*s.* a ton for freight from Cape Town to East London. His Lordship continued:—] I think the clause in the broker's note ought to be construed in the way contended for on behalf of the plaintiffs, namely, that they should be charged only the actual amount paid by the defendant. But this original contract on the broker's note was not adhered to, for the parties subsequently entered into a special arrangement with regard to this very charge. Bolus, having full authority from the plaintiffs, made the arrangement with Berg that 35*s.* a ton should be charged. Bolus in his evidence is not clear whether the bill of lading was shewn to him or not, but Berg distinctly swears it was; but Bolus admits that he would have agreed to the charge, even if he had been aware of the terms of the bill of lading. There is no charge of fraud or collusion between Bolus and the defendant, nor do I presume that the plaintiffs would for a moment accuse Bolus of collusion with Berg. It may be there was sharp practice, but there was nothing like collusion. I can see nothing fraudulent in the arrangement. The rate of freight to East London ruled as high as 40*s.* or 45*s.* a ton, and the plaintiffs themselves expressed themselves satisfied at the charge of 35*s.* Berg says he told Bolus the terms of the bill of lading. Bolus says he does not remember whether he did, but Berg swears positively he did so, and the Court is therefore bound to presume he did. If this be correct, there was nothing fraudulent in making the fresh agreement fixing the rate of freight to be charged at 35*s.* Under these

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circumstances there can be no doubt that the defendant is entitled to be allowed this item also. On all points therefore, the judgment of the Court must be for the defendant, with costs.

FITZPATRICK, J., said:—I concur in the judgment just delivered by the Chief Justice. I am relieved of the necessity of giving an opinion on the law, through having come to a distinct conclusion on the merits in favour of the defendant. I have no doubt in my own mind there was a delivery of the mealies in Cape Town, and an acceptance of them by Bolus, who acted in compliance with a distinct request from the plaintiffs; and at the time of that delivery, the mealies having been examined, I hold that the delivery was good and binding on the parties. I am further fortified in my opinion by the conduct of the plaintiffs on the arrival of the mealies at East London. Even supposing that the mealies were musty, they did not object to receive them. They might have called on Berg to take them back, or they might have given him notice that they would sell them on open market at his risk. The plaintiffs did not adopt either of these courses, but they took the mealies and sold them as their own property, and the result was a profit of £300 on the transaction. As to the freight, I think it a monstrous allegation that Berg was not entitled to make some profit out of his through bill of lading. Having this bill of lading, Berg was enabled to save the plaintiffs some money, and he was fairly entitled to make a profit also, as the result of his foresight. I quite concur in judgment being given for the defendant with costs.

DWYER, J., said:—In this case the plaintiffs sue the defendant for damages sustained by reason of 2000 bags of mealies sold by the defendant to the plaintiffs, not being "sound and good" according to the warranty contained in the sold note. There are also counts for deficiency of weight and overcharges for freight. As to the breach of warranty, according to the views I take of the case, the question we have to decide lies in the narrowest compass, viz., whether the plaintiffs, on whom the burden of proof lies, have satisfactorily proved that the mealies, when delivered on board the *Stettin* from the *Dunrobin Castle*, did not answer the warranty. It has been proved that as to the 1000 bags of mealies examined on arrival at East London, they were

found to be musty; but it seems clear that imported mealies are always somewhat musty. The plaintiffs have altogether failed to satisfy me that the mealies were unsound within the meaning of the warranty when delivered at Cape Town; and the evidence given on their behalf is quite consistent with the possibility, if not probability, that they were not only according to warranty when delivered at Cape Town, but, except as to the 1000 bags, may have been also according to warranty when landed from the *Stettin* at East London. The 1000 bags were examined by a commissariat officer on behalf of the Imperial Government, and were rejected by him, but it has been stated that the Imperial Commissariat Department are more particular than other purchasers, and I place little confidence in this rejection as affecting the defendant. As to the other bags, they were sold to various parties, and no defect appears to have been noticed until the purchasers complained that the mealies sent were of a bad quality and utterly unmerchantable. But we have it in evidence that the weather was very bad, heavy rains had set in, and it is quite possible that the mealies got wet while being carried on wagons from East London to Alice and other places, and it is somewhat remarkable that plaintiffs sold some of the mealies by sample to Messrs. Laurence & Co. at Alice. If those samples were fairly obtained, the plaintiffs ought to have known that the mealies were not according to warranty, if such were the case, and should have at once informed the defendant, instead of which the mealies are invoiced to the purchasers on the 27th March, and no complaint is made to the defendant until the letter of the 8th April. Several witnesses have spoken as to the bags in which the mealies were contained having been in good order, and unusually clean when landed, in order to shew that no damage had been sustained by them in their transmission from Cape Town to East London; but it has also been sworn that some of the bags in Irvine's store were subsequently in a very dirty state. Is it not therefore quite consistent with the evidence on both sides that the damaged state of the mealies was owing to exposure to the inclement weather that then prevailed after the goods were landed, and during their transport to King William's Town and Alice? On behalf of the defendant the evidence is that the goods were sound

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when transhipped and so delivered on board the *Stettin*. Mr. Bolus, a respectable broker, of considerable experience, and who was clearly the agent and broker of the plaintiffs, telegraphed to the plaintiffs that the mealies "were excellent." He has also given evidence to the same effect, and although it is not necessary, in my opinion, to decide that the plaintiffs were bound by the approval of their agent, his testimony should have great weight. In their letter of January the plaintiffs desire that the mealies should be carefully inspected, as for want of such a precaution on the part of their agent at Natal they lost considerably. It is very strange that the plaintiffs did not profit by their former experience, and examine the mealies carefully at the earliest opportunity, instead of which they disposed of them to several persons who subsequently returned them, and who are the principal witnesses to sustain the plaintiffs' case. And although mealies were at a high price when the consignment arrived, a sale which might have been, and I believe was anticipated, very soon after it took place. For these reasons I am of opinion that on this part of the case our judgment should be for the defendant. As to the charge for freight, I am of opinion that the defendant was justified in making it. He made arrangements that the cargo should be carried on at a small additional freight, if he so required it, but he was not bound to give the plaintiffs the advantage of it. The defendant had a right to land the mealies at Cape Town, and let the plaintiffs make what terms they could. As it was, the plaintiffs had the advantage of freight at 35*s*. instead of 50*s*., and the arrangement appears to me to have been just and reasonable. Upon this count also I think our judgment should be for defendant. As to the deficiency in weight the plaintiffs' own witnesses have admitted that it is a common thing to lose mealies in transporting them from place to place by the bursting or loosening of the tying of the bags. But if I were of opinion as to the facts that the goods were not sound I think our judgment should be for the plaintiffs. All the Dutch commentators, *Voet* amongst the rest, lay down the rule that a person who has failed in performing his contracts shall compensate the other party to it for the loss he has sustained. The question then arises—what is the loss and what is the true measure of damages? In my opinion, that is the real question, whether we are considering it as

governed by the Dutch Law, or the law of America, France, England, and I believe every other civilized state. In England for a long period it was doubted whether the loss arising from a contract of resale could be considered as a measure of damages, but now all doubt about it has been set at rest, and in America, France, and England, and by all countries governed by the *Code Napoléon*, the true measure of damages is not only the actual loss which has been sustained, but also the gain of which the party suing has been deprived. I do not think it would be at all inconsistent with the principles of the Roman Law, which Mr. *Leonard* has so ingeniously exhumed and resuscitated, to hold that the loss of gain upon a sub-contract is a proper measure of damages, so long as we do not act in a manner opposed to the principles of the decisions of the Dutch Courts. I think we are at liberty to go with the times, and recognise those modifications, rather of practice than of principle, that have been made in the Mercantile Code by all civilized nations of late years. In England, and I believe in America, these modifications were the result of more careful investigation by the Judges, and not of legislative interference. I cannot see that the *Actio quanti minoris*, even if the old Roman forms of pleading were in use with us, would be applicable to this case. I am of opinion that to decide this case upon such principles will establish a most dangerous precedent, and be subversive of the most ordinary principles of justice, as well as put a stop to commercial enterprise and open the door to the greatest frauds. During the eleven years that I have been on the Bench in the Colony this question has, as far as I can learn, never been raised. If it was the law, it would appear to have become obsolete; and the Law Merchant, which seems by common usage and the comity of nations to have been adopted in all mercantile countries, to have been tacitly adopted here as well. If such be not the case, I think it will be most unfortunate for the trade of this Colony. I think the very raising of this question will have a most pernicious effect. Take the case of a London merchant purchasing at Cape Town 5000 bales of wool upon warranty. He sells at an advance of £2 per bale. The wool, when delivered, does not answer the warranty, is re-sold, and an action is brought in this Court for the loss, but the plaintiff is told, "It is true you, by your

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contract of re-sale, would have realised £10,000. You have realized however a sum which gives you 1s. more than you gave for the wool, and therefore according to the old Dutch Law, which is the law of the Colony, you have not sustained any loss, and instead of getting a verdict for £10,000, or any less amount, you must pay the defendant's costs." I cannot agree that such a decision would be in accordance with justice, or within the principles of the law as administered in this Colony. I have gone at some length into this question, for it might be supposed that in passing it over in silence I either acceded to the proposition contended for by the Counsel for the defendant, or was unwilling to grapple with the difficulties of it.

DE VILLIERS, C.J., said:—As my brethren had come to the conclusion they did on the questions of fact, I was not prepared for the remarks of my brother DWYER on the law of the case, or I should have gone more fully into the authorities. I am quite alive to the desirability of having all mercantile transactions regulated by the law of England, or rather by what is the law prevailing among mercantile nations, but until the Legislature enact that this shall be done, I must be bound by what is actually the law of this Colony.

Judgment accordingly for defendant, with costs.

[Plaintiffs' Attorneys, TREDGOLD & HULL.
Defendant's Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.]