Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hirsche and others v. *Sims and another, from the Supreme Court of the Cape of Good Hope; delivered 28th July* 1894.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by the Earl of Selborne.*]

The action in this case was brought in December 1891 by the Respondents as Trustees for the "Orange River Asbestos and Land Company, Limited," (a Company established at Kimberley in South Africa, and registered under that name on the 16th of December 1889), against the Appellants and two others, Voelklein and Haarhoff, who had been Directors of the "Griqualand West Copper and Mineral Mining "Syndicate, Limited," under which name the business of the Plaintiffs' Company was carried on from the 5th of February 1889 to the end of that year. The principal ground on which relief was sought against the Appellants, is set forth in paragraphs 9 to 12 of the Plaintiffs' Declaration, which are as follows:—

"9. The Plaintiffs further say that on or about the 8th day "of August 1889, when the said Company carried on business "as the Griqualand West Copper and Mineral Mining Syndicate

82403. 100.—7/94. A

" (Limited), the Defendants as such directors as aforesaid " engaged the services of one Francis Oats to report on the " farm Zoetvlei, the property of the said Syndicate, for which " report the Defendants promised to give the said Oats the " option of purchasing at par ten thousand reserved shares of " the said Syndicate of the nominal value of 1*l.* each, such " option to expire on the 23rd August 1889; and further " promised that in the event of the said Oats purchasing the " said 10,000 shares the Defendants would pay him 1,000*l.*

" 10. The said Oats inspected the said farm Zoetvlei, and " reported favourably but incorrectly thereon to the Defendants " on the 19th August 1889, and on the 23rd August in pur- " suance of the aforesaid agreement the Defendants delivered " to the said Oats 10,000 shares of the said Syndicate which " were then of the value of 48*s.* 6*d.* per share, and paid him the " sum of 1,000*l.*

" 11. The aforesaid contract between the Defendants and the " said Oats under which the said shares were delivered to the " said Oats was wrongful, unlawful and fraudulent, and was " made by the Defendants not in the interests of the said " Syndicate, but to induce the said Oats to make a favourable " report on the said farm, so that the shares of the said " Syndicate might rise in value and enable the Defendants who " were large shareholders in the said Syndicate to benefit " themselves thereby.

" 12. The Plaintiffs submit that the delivery of the said " 10,000 shares, the property of the said Syndicate, by the " Defendants to the said Oats, was wrongful, unlawful and " fraudulent, and that the Plaintiff Company is entitled to " recover from the Defendants the difference between the value " of the said shares on the 23rd August 1889, to wit, 24,250*l.*, " and the amount received for them from the said Oats, to wit, " 10,000*l.*, such difference being 14,250*l.* The Plaintiffs " further submit that they are also entitled to recover the sum " of 1,000*l.* from the Defendants."

There were some other matters, in respect of which relief was not obtained; of these no notice need be taken. The High Court of Griqualand, on the 15th December 1892, gave relief, to the extent of holding the Appellants liable for 1,000*l.*, the difference between the par value of the shares taken by Francis Oats, and the sum of 9,000*l.* paid by him to the Company; Mr. Justice Laurence, President of that Court, thinking that there was no " clear proof either of fraud as " against the Company in the agreement with " Oats, or of resulting damage to the Company." Mr. Justice Solomon, the other Judge, also held

that the charge of fraud was not proved; but, thinking that the Defendants, as Directors, were not justified in the delivery of the shares to Oats on the 23rd August 1889, and that the proper measure of damages was the price of the Company's shares on that day, as quoted in the Kimberley share market, he would have given judgment against the Appellants for 11,875*l.* In the Court of Appeal (the Supreme Court of the Cape of Good Hope), a case of fraud was held to be established, and judgment was given against the Appellants, on the 2nd March 1893, for 10,875*l.*, which sum the Plaintiffs declared their willingness to accept, although (but for that concession) the Court would have given them 14,250*l.*, the amount claimed in their Declaration.

Their Lordships are of opinion, that the Appellants were properly held liable, in the High Court of Griqualand, for the difference between 9,000*l.* and the par value of the shares; and that the real question upon the present appeal is, whether they ought to be held liable for more.

The bargain with Francis Oats is admitted to have been, that he should have the option for a fortnight, in consideration of the service he was to render, of taking the 10,000 shares in question at a discount of 10 per cent.; though the lawyers who drew up the agreement of the 8th August thought it prudent to give it the form which it there assumes. It was not, in their Lordships' opinion, competent for the Directors to issue those shares at a discount, so as to make the holder liable for less than their full amount. Oats received certificates for the 10,000 shares, as fully paid up; and, on the faith of those certificates, all those shares afterwards passed into the names of *bonâ fide* purchasers from him, (or from his agent and partner Hinrichsen) as against whom the Company is estopped from saying that they were not fully paid up. Under these cir-

cumstances (unless the larger claim has been made out), the Appellants, as Directors who issued those shares, are, in their Lordships' opinion, answerable for the difference between the 9,000*l.* paid and the par value.

The question, whether the Company is entitled to the larger relief given by the Court of Appeal, depends on particular facts, and the inferences proper to be drawn from them. The Plaintiffs have been content to rely on the statements (chiefly on cross-examination) of the Defendants themselves and of Oats and Hinrichsen, and on the documents filed in the cause. They have sought no relief against Oats or Hinrichsen, in this action, or otherwise.

The Company, under its original name, was registered on the 1st February 1889, and had, before July in that year, acquired certain properties, which do not appear to have been profitable. Its nominal capital was 80,000 shares of 1*l.* each; of which all but 15,000 were either taken by the promoters, or issued to the public; 15,000 being reserved for future allotment. No dividend was ever paid; and the only market for the shares (now valueless) appears to have been at Kimberley, a small place, which, in consequence chiefly of the neighbourhood of diamond fields and gold fields, was the centre of various speculative undertakings. One of the Exhibits in the cause, much relied upon by the Respondents, is a certified extract (Record p. 215) from the books of the "Kimberley Share Dealers "and Brokers Association;" showing "all the "official stock exchange quotations relating to "the dealings in the shares of the Griqualand "West Copper and Mineral Company (Limited) "between the 1st July and the 30th October "1889"; by which it appears, that in that market there were no actual sales of those shares during July, except at a discount of

50 per cent., or more; and that the August quotations, down to the 8th, were very little higher, without any actual sale at more than 12*s.* per share. On the 8th of August, the morning quotation was 14*s.*; that in the afternoon 18*s.*; at which prices there were some actual sales. The rise went on, by rapid steps, till the 22nd of August, when the price of 50*s.* 6*d.* was reached; afterwards there was a gradual decline, beginning with 48*s.* 6*d.* on the 23rd August; but the shares continued above par till the end of October.

There is some danger, even in a Court of Justice, of the mind being too much affected by the unfavourable impression produced by an atmosphere of speculation, such as that which prevailed at Kimberley in 1889; of which the influence, upon all the parties to the transaction called in question by this suit (unless Mr. Weingarten be an exception), is sufficiently manifest. For this, as well as other reasons, their Lordships have thought it their duty to examine closely the evidence, on which their judgment ought to depend.

The purchase of the Zoetvlei farm, between 120 and 150 miles from Kimberley, by the Company from two of the Defendants, Hirsche and Weingarten, and certain other persons, was the cause which gave occasion for the agreement with Oats of the 8th August 1889. It was made about the middle of July 1889, and was ratified, at the same time with that agreement, by the Board of Directors, on the 21st of August. Its good faith and validity have not been impeached, except by questions addressed to some of the Defendants in this suit, on cross-examination. Their Lordships see no reason to doubt, that this purchase was made under a *bonâ fide* belief that it would be profitable to the Company. The farm had been acquired by the vendors in 1888, from an Insurance Com-

pany at the Cape, for 4,500*l.*; and something more was afterwards spent by them on it. The Griqualand Company took it over as at cost price, with a stipulation for a further payment to the vendors out of profits, if made. It contained a large deposit of the mineral called asbestos, which, if suitable in quality to the English or European markets, might have proved very valuable. Some samples, obtained near the surface, had been sent in 1888 to Hamburg and to London, and had been condemned as too brittle for those markets. But to the London opinions upon them it was added, that it was consistent with experience, that the quality might improve as the workings got deeper; and of other samples, which were sent to Cardiff in May 1889, a very favourable opinion was given.

Mr. Francis Oats was a mining engineer, well known at Kimberley, who had held important appointments, and stood high in his profession; a man of substance, and in all respects of good reputation; not indeed qualified as an expert to pronounce upon the commercial value of the mineral, but whose report upon it, as a mining engineer, might be trustworthy and valuable. The agreement with him was, that he should go to Zoetvlei, and report upon it; and that, for that consideration, he should have, for a fortnight reckoned from the 9th of August 1889, the option of taking 10,000 of the Company's reserved shares, at 2*s.* less than the par value; being 4*s.* more than the highest price at which they had, until then, been quoted. To allow that time, was not, in the opinion of their Lordships, unreasonable or beyond the power of the Directors, if acting in good faith. If, on the other hand, the intention was (as alleged by the Plaintiffs) to bribe Oats to make a favourable report, the givers and the receiver of such a bribe would be equally culpable, and a remedy might have been sought

against Oats as well as the Directors. But, although Oats was a man of substance, and had made a large profit by selling the shares, no proceeding has been taken against him. The *bona fides* of his report, as made on the 19th of August, has not been seriously (if at all) called in question. Under these circumstances, their Lordships cannot presume bad faith, without cogent proof, against a man not called upon to defend himself; and they think that the onus of proving it against the Directors, who made or who ratified the agreement, must be satisfied in some other way, than by mere inference from the terms of the agreement itself; though they do not approve of the form which it was made to assume.

The Plaintiffs' case is, that, in making that agreement on the 8th of August, the Defendants acted with a view only to their own interest as shareholders desirous of making a profit out of their shares; and not with any view to the interest of the Company. Of that case there is no direct evidence; it is denied positively on oath by all the Defendants who took part in negotiating the agreement; and the question is, whether facts have been proved, from which, notwithstanding that denial, it ought to be inferred. If the true effect of the whole evidence is, that the Defendants truly and reasonably believed at the time that what they did was for the interest of the Company, they are not chargeable with *dolus malus* or breach of trust, merely because, in promoting the interest of the Company they were also promoting their own; or because they afterwards sold shares at prices which gave them large profits.

Mr. Oats, and his attorney (and partner in the profit derived from this transaction) Mr. Hinrichsen, though not Defendants, are witnesses in the cause, and they were not cross-examined as

if their credit was meant to be called in question. To their evidence their Lordships will first refer; premising, that the negotiation with Oats was throughout conducted and concluded by the Defendant Hirsche, on behalf of himself and his co-directors, King and Voelklein. They were consenting parties to the agreement; and all three afterwards concurred with Weingarten (who lived at some distance) in ratifying it at the Board meeting of the 21st August, and in authorising the delivery of the 10,000 shares. That the Company, after completing the purchase of Zoetvlei, had not more than 2,000*l.* or 3,000*l.* left, available for working the asbestos, or for their other operations, is a fact not in controversy.

Oats' account of the matter is, that, when it was first proposed to him that he should visit Zoetvlei and report on the mineral deposit, he said, "It was an awkward place to go to, and, "having no interest in the Company, I should "expect to be well paid"; to which the reply was, that "they were short of funds"; and that he then himself made the suggestion, that "they "might compensate me, by giving me the refusal "of an interest." "I suggested" (he says) the "refusal of a small interest at market rates. "They insisted on my taking a refusal of not less "than 10,000, if any." And, on cross-examination, "I did not think it a very good bargain "when I made it. Thought the odds were "against my exercising the option." He denied, that any inducement was held out to him to report favourably; and said, that his report "was simply "based on what he saw, and made for no ulterior "motive."

As to the state of the market, and the sales made for him by Hinrichsen during his absence from Kimberley, he said that, "when the dis-"cussion began, the shares were at 11*s.* or 12*s.* "They had begun to rise and went on rising during

" discussion." Hinrichsen sold about 7,000 of them; he thought, mostly to King; they were not " worth keeping at the price they went to "; ". . . . the rest of my shares were then " placed in the pool." . . . " Think I " arranged with Hinrichsen to sell at 25*s*." Hinrichsen says, that Oats did not consult him about the arrangement with the Company, but only told him about it afterwards. While Oats was away, no communication between them took place, or was possible. " He told me I should do " the best for his interest in his absence; it was " at my suggestion that he gave me these instruc- " tions. The shares went up rapidly. I signified " to the Directors he would exercise the option, " while he was absent, about a week after his " departure. I sold most of the shares, these " very shares, about this time, at 35*s*. The shares " rose from the 8th to say the 16th; and by that " time I had sold pretty well half of the 10,000 " shares. I sold subsequently about 1,500 more; " and the rest I pooled with Mr. King. . . I " sold the shares openly in the market; everyone " knew it was Oats' shares. It did not strike me " that his selling would create suspicion in the " minds of the public. . . I should say, Mr. " Oats made between 6,000*l*. and 7,000*l*. profit " out of the sale transaction of the shares. This " would be including the 1,000*l*."

This estimate must represent the whole profit made by the sale of the 10,000 shares, and not merely Oats' portion of it, as between himself and Hinrichsen; about half of them (according to the same evidence) having been sold at 35*s*., and 3,000 or more having been " pooled " after the market began to decline. If the " pooled " shares were sold after the 16th of September, (as may be inferred from Weingarten's statement, at p. 65, that he received what was due to him from the produce of the "pool" in October), they realized less than 35*s*. per share. It would not be

safe to draw conclusions from Oats' impression, (which is not corroborated by other evidence), that most of the shares sold by Hinrichsen before "pooling" the rest were purchased by the Defendant King. Nor do their Lordships think that any inference, unfavourable to the parties concerned, ought to be drawn from the fact, that the certificates for the 10,000 shares, which were originally prepared in the name of Oats, were issued in that of Hinrichsen. It seems obvious, that the relations between Oats and Hinrichsen, and the frequent and necessary absence of Oats from Kimberley, (he says, he was there only for a day or two after his return from Zoetvlei), may have made this convenient, and, if Hinrichsen speaks truth, there was no disguise about the fact, that the shares sold by Hinrichsen belonged to Oats.

The evidence of these witnesses does not appear to their Lordships to be wanting in candour; and they see no reason to disbelieve it. It is confirmed, in all the material points which must have been matter of common knowledge to Oats and the Defendants, by what the Defendants say. It might at first sight seem that the instructions given by Oats to Hinrichsen as to selling, if the market price should reach 25*s*., ought to discredit his statement, that he thought "the odds were against" his "exercising "the option." But such a contingency might be provided for, without an expectation that it would happen. The Defendants King and Hirsche both say, in effect, that such a rise as took place after the 8th of August could not at that time reasonably have been anticipated, and they refer to their own acts, as showing that they did not expect it (pp. 43, 47, 58). King says, that he sold some thousands of shares at about 15*s*.; and Hirsche, that he accompanied Oats to Zoetvlei, without leaving any instructions as to his shares (pp. 43, 49). It was with Hirsche alone that Oats had any direct com-

munication; and, whatever profit Hirsche may have made out of the shares which he sold, he was at all events in no haste to sell; and both he, and King, and Weingarten, retained to the last a large number of shares unsold. Hirsche had in his name, from the commencement of the Company's operations, a great many shares, of which he says, that the chief part belonged to, or were distributed by him amongst other persons, and that he retained at his own disposal about 8,900, of which only one-fourth were his own; and that, of those 8,900, he still held about four-fifths when his evidence was given. His share accounts, extracted from the Company's registers, are in evidence (pp. 190–195): they show, that between the end of July and the end of September 1889 he sold only 2,050 shares, and of these only 325 in August; and that at the end of that year 20,528 shares remained in his name, out of which (about 850 having been acquired by purchase in December) 6,198 remained when the Company was reconstituted under its new name, and he then increased his interest; and in April 1892 held 11,819 shares.

As to the *bona fides* of the agreement with Oats, Hirsche says:—"I decidedly considered "that this arrangement with Oats was for the "interest of the Company. I thought that, if "he reported favourably, he would exercise his "option, and the Company would get 9,000*l.*, "which would materially strengthen its financial "position, and enable it to work on a larger "scale; while, if he reported unfavourably, the "Company would be no loser. . . . I had no "conversation with Oats during the journey, "either to or from the farm, as to his report on "the prospecting, and did not influence him in any "way" (pp. 53, 54) . . . "Apart from the special "agreement with Oats, I should have considered "the bargain with him good business in the

" financial position of the Company;" (meaning, as he explained in answer to a question by the Court, " in connection with getting this report, " and not independently of it") . . . " I do " not now consider this was a most imprudent " contract; would make a similar one again "— (pp. 59, 60).

These statements of Hirsche are corroborated by those of the Defendants King (pp. 34, line 6; 41, line 26; 43, line 30; and 47, line 28), and Voelklein (pp. 48, 49); which are equally strong and distinct. Hirsche was in frequent communication with King; Voelklein was ill at the time, but was kept informed by King of what was going on. These witnesses were severely cross-examined as to their own speculations, and as to certain combinations or syndicates to " protect the market," begun very soon after the Company was formed, and continued till it changed its name, or later; to which, as to " pooling," when the market fell in September 1889, Oats and Weingarten became parties. King, though he sold most of his shares, retained to the end a great many; not less (as appears from the extracts from the share registers, at pp. 195, 196 of the Record) than 4,780. Voelklein was a dealer in shares and had a large interest in this Company; and admits that he " jobbed, bought, and sold." The particulars of his dealings, and how many shares he retained unsold, do not appear: nor do the particulars of the operations, in August or September 1889, of the " protecting " Syndicate or of King; they do not seem to have been asked for. Whatever suspicion these dealings might have justified, if the evidence of those two Defendants had stood alone, it does not stand alone; and there is no counter evidence on the main point, as to the good faith of the agreement with Oats. Weingarten stands in a more favourable position. He was one of the vendors

of Zoetvlei, of the minerals on which he had formed a hopeful opinion. He lived and carried on business in Griquatown, at some distance from Kimberley, and says he had nothing to do with the share market. Of the arrangement with Oats he knew nothing, till after it was concluded; he was first informed of it when Oats and Hirsche passed through Griquatown on their way back from Zoetvlei. He approved of it, and was afterwards present at the meeting of the 21st August, when it was confirmed. He was not a director of any other Company "besides these Syndicates;" he "pooled" some of his shares, and in October 1889, received from Hirsche, as his *quota* of the produce of the "pool," 3,000*l*. When examined, he still held about 5,000 shares.

So far as probabilities go, their Lordships cannot say, that they are opposed to the statements of the Defendants, that, in making the agreement with Oats, they acted in good faith, and believed they were doing the best for the Company's interest. Their Lordships think that, as things stood on the 8th of August, they might reasonably entertain that belief; and that, if they did so, no *dolus malus* ought to be imputed to them, because they afterwards confirmed and acted upon that agreement, the market for shares having in the meantime risen. The Company, beyond question, wanted money; and it does not appear to their Lordships, that there was any probability, on the 8th of August, of its being obtained by any attempt to dispose of the reserved shares in any other manner, on better terms, or with more prospect of advantage to the undertaking. It is impossible, on the evidence, to say that there was not, at that time, reasonable ground for believing the asbestos to be valuable. The character and reputed means of Oats might well be thought likely, if he took the shares, to add strength

to the Company; even the knowledge that such a man was consulted, and had agreed to view the property and report upon it, stipulating for a fortnight's option to take 10,000 shares, might create confidence in and add to the credit of the undertaking, (as it would appear by some passages in the evidence to have actually done,) though the rapidity with which that effect would be produced may not have been foreseen. On the other hand, if these 10,000 shares had been at that time thrown upon the market by the Directors themselves, (and whatever was done was sure to be known in the share-market of such a place as Kimberley,) without anything else being done to strengthen the Company's position, the effect might very probably have been to depress, instead of raising the market; and no purchasers might have been found for so large a number of shares at 18*s.*, much less above par value. Nor is this a mere speculative opinion; the weight of evidence appears to their Lordships to be in favour of the conclusion, that the price of those shares would never have gone up as it did, if the agreement with Oats had not been made; though the upward tendency of the general share-market at Kimberley, and the operations of some speculators, may have contributed to it, as the Defendant King (p. 34, lines 18—23) says they did. But King had said, just before (*ibid*, lines 1—6), "To the best of my "memory, when the negotiations with Oats "first commenced, the shares of the Griqualand "Syndicate were somewhere between 9*s.* 6*d.* and "11*s.* per pound share, fully paid; and from "that time till the negotiations were concluded "there was a constant improvement in the "shares; it having become known that there "was a possibility of Oats going out to report." Hirsche says, (p. 53) "As I was seen talking "to Oats by brokers and others, (the con-

" versation being in the street), the shares rose." And it is proved, by the quotations which are in evidence, that this Company's shares were quoted and sold at 14*s*. in the morning, and at 18*s*. in the afternoon, of the 8th August. The opinion of Oats himself (who did not believe that " the talk " with him, or his " going out " led to, or had anything to do with the rise in the shares,) is not, in their Lordships' judgment, of equal weight with that of his attorney Hinrichsen, who lived at Kimberley, and was likely to know more of the ways of the market there. Hinrichsen sold the shares which Oats took openly, " every one " (he says) " knew it was Oats' shares; it " did not strike me that his selling would create " suspicion in the minds of the public." And, as to the cause of the rise:—" I have had " considerable experience in share dealing in " Kimberley. My opinion is, the shares went " up on the strength of such a man as Mr. Oats " interesting himself in the property and going " out to [it]; the shares having been neglected " for so long. The share market generally " at Kimberley about that time was of an " improving state."

Their Lordships, upon the whole evidence, are unable to differ from the judgment of the learned President of the High Court of Griqualand, as to the absence of any sufficient proof, either of fraud against the Company in the agreement with Oats, or of resulting damage to the Company, beyond the 1,000*l*. As to the measure of damage, they do not think that the authorities cited by the Respondents, of which *McKay's Case* (2 L. R. Ch. Div. p. 1), and *Weston's Case* (10 L. R. Ch. Div. 579), are typical examples, are applicable to this case, when reduced to one of an agreement made *bonâ fide*, but partially *ultra vires*. Those were cases in which Directors, or

fiduciary agents of Companies, had appropriated to themselves and for their own benefit, by means of secret bargains with promoters or vendors, shares represented as paid up for which no consideration had been given; or other property, of which they were trustees for their Companies. In all of them, the actual or presumable value was treated as a proper subject for evidence; and the principle applicable was (in *McKay's Case*) thus explained by Lord Justice Mellish: "I think he is only liable for "what was the fair value of the shares when the "allotment was made, or at any subsequent time. "But *McKay* is a wrong-doer; and therefore, in "estimating the damages, a presumption may be "made against him, which could not be made "against a person who was not a wrong-doer."

In the present case, unless fraud or bad faith in making the agreement of the 8th August 1889 has been brought home to the Defendants, they are not wrong-doers, in the sense in which Lord Justice Mellish used the word. They speculated, indeed; but only with their own shares, their title to which was unquestionable, and has not been questioned. They made no condition or stipulation with Oats for their own benefit, and had no interest in the 10,000 shares which he took, or any of them. If the agreement itself of the 8th August was not fraudulent, none of the consequential steps, taken upon the footing of it either by Oats or by the Directors, were so.

If a case of fraud or bad faith had been made out, it might follow that the 23rd August, when the shares were delivered, and not the day on which the agreement was made, ought to be regarded in the estimation of damages. Even in that case, their Lordships would have been unable to agree with the

learned Judges who thought that the price quoted for the Company's shares in the Kimberley market on the 23rd August was the necessary or proper measure of damages. The case of premiums fluctuating from day to day, in a suddenly inflated local market, was not one which, in any of the authorities to which reference has been made, the Courts had to consider: the facts in those cases did not raise the question, whether more than par value should be charged. It is, no doubt, true, that in the Kimberley market all the 10,000 shares taken by Oats were, (at different times,) actually sold; as were a large number of other shares in the Company, some belonging to the Defendants; and some of them (it does not appear whose or how many) were sold at 48*s.* 6*d.* on the 23rd August. But the inference, that 10,000 shares, if brought into the market on that day, would or might have been all sold for that price, does not appear to their Lordships to be warranted, or reasonable. The profits actually made by the sale of those 10,000 shares (which might have been recovered from Oats if a case of fraud could be made out against him, in a suit properly instituted), were only about 7,000*l.*; less than half the amount claimed by the declaration in this case, and which the Supreme Court of the Cape of Good Hope would have awarded, if no concession had been made by the Plaintiffs; and less, by more than 3,000*l.*, than the 10,875*l.* to which the claim was reduced by their concession, and which has been awarded by the judgment under appeal. Their Lordships express no opinion upon the question, whether, if fraud had been proved, the amount of the profits made by Oats would have been a just measure of damages, as against the Directors; but they have no difficulty in saying, that it would have

been much more consonant with their ideas of justice, than that adopted by the Supreme Court of the Cape of Good Hope.

Not thinking fraud proved, and looking upon the confirmation of the agreement of the 8th August at the Board meeting of the 21st, and the subsequent delivery of the shares, as only the performance in good faith of that agreement by the Directors after Oats had done the stipulated service to the Company in reliance upon it, their Lordships have come to the conclusion that the damages in this case ought not to exceed what would have been the fairly presumable value of the 10,000 shares to the Company, if the agreement of the 8th August had never been made. That is the utmost that the Company can have lost by the transaction, and they ought not to recover more than they may reasonably be presumed to have lost. A subsequent market price, due wholly, or to an extent which cannot now be distinguished, to the influence upon the market of that transaction itself, cannot be a just or reasonable measure of what might have been realized from the shares, if no such agreement had been made; and their Lordships are led by the evidence to conclude, that the transaction did, in fact, so influence the market. Under these circumstances, they think that the 8th of August, and not the 23rd, is the date to which they ought to look, for the purpose of estimating the loss to the Company by the transaction; the shares were not, before that date, quoted at a price equal to that which Oats agreed to give; and there are no materials from which their Lordships can infer, that the Company would have been able to issue them above par, if there had been no agreement giving Oats the option to take them.

Their Lordships will therefore humbly advise

Her Majesty to reverse the judgment of the Supreme Court of the Cape of Good Hope, and to restore that of the High Court of Griqualand. The Appellants will have the costs of this appeal; but there will be no costs, on either side, of the appeals to the Supreme Court of the Cape of Good Hope.