

on the ground that the judge should have told the jury that the delay by the plaintiff from Monday until Tuesday was an acquiescence, and should not have left the question of acquiescence to the jury, but have directed a verdict for the defendants on the admitted facts; and that he should have told the jury that the defendants acting as agents should have exercised a discretion, and that if they had acted *bonâ fide* in the exercise of their discretion they were not liable for an error in judgment; and for misdirection as to damages the judge should have told the jury that if there was a breach it was on Monday, and the difference in the value of stock on that day was the measure of damages; and on the ground that the verdict was contrary to law and evidence, or for a non-suit or to enter a verdict for the defendants.

During the same sittings, November 29, 1882, *McMichael*, Q.C., supported the order. The first question is whether the plaintiff acquiesced in the defendants' using their discretion in the matter. The plaintiff by not answering the defendants' telegram of Monday until the following day, and the telegram and letter sent by the plaintiff on that day, clearly shew such acquiescence. If the plaintiff desired to hold the defendants to the order given he should have so telegraphed them. The construction of the correspondence was a matter for the court, and, as the correspondence itself shewed acquiescence, the question should not have been left to the jury. The plaintiff avails himself of the defendants' discretion, and when he finds that it has not turned out to his advantage he endeavours to enforce the original instructions. The law is clearly laid down in *Story* on Agency, 9th ed., secs. 478-9; *Wharton* on Agency and Agents, sec. 107. Then as to damages, no damage was proved. On the Monday when the breach, if any, occurred, the stock was still at 114, the value of the stock when the contract was made: *Powell v. Jessopp*, 18 C.B. 336; *Tempest v. Kilner*, 3 C. B. 249..

*Falconbridge*, contra. The plaintiff gave the defendants a direct and positive order to buy the stock, and the defendants