CASE NOTES

CONTRACT—FRAUD—WHETHER BOTH ELEMENTS OF FRAUD MUST BE IN THE SAME PERSON

CAN a representation innocently made by an agent on behalf of a principal be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows the facts which make it untrue? The Court of Appeal in *Armstrong v. Strain*[1] answered the question in the negative.

Strain instructed his partner in an estate agency business to sell a bungalow which he (Strain) owned. With Strain's approval, the partner suggested to another firm of estate agents that they should co-operate in the sale, and this they agreed to do. The plaintiffs obtained an order to view from this firm, and subsequently made an offer of £2,400 which Strain accepted. The plaintiffs wished £1,200 of that amount to remain on mortgage with a building society, and Skinner, a partner in the latter firm, told them that any building society would lend £1,200 as that represented a sufficiently small percentage of the total value. Soon after the purchase was completed the bungalow became beyond repair. The plaintiffs sued Strain,[2] alleging that they had been deceived into buying the property.

Devlin J., at first instance, held that Skinner's statement was a false and material representation of fact, but that he had not been fraudulent, as he had not made the representation knowing its falsity, or without belief in its truth, or recklessly, careless whether it was true or false.[3] Strain, he held, neither authorized the statement to be made nor knew that it was made, but did know the facts which made it false. The Court of Appeal accepted these findings of fact.

It was arged for the plaintiffs that, as the representation of the agent (Skinner) was a false and material statement of fact, and as the facts which falsified it were known to the principal (Strain), principal and agent being one in law, fraud was established. Reliance was placed on the judgment of Romer L.J. in *London County &c. Properties v. Berkeley Property &c. Co. Ltd.*[4]

The argument was unanimously rejected. Clearly Skinner was

[1][1952] T.L.R. 82.

[2]There were other defendants, including Skinner, but with regard to them the decision turned only on the facts.

[3]*Derry v. Peek* (1889) 14 App. Cas. 337, 374, per Lord Herschell.

[4][1946] 2 All E.R. 1039.

innocent of fraud. So also, putting aside any question of agency, was Strain. The Court accepted the opinion of Devlin J. that "you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind".[5]

Romer L.J. in the *London County Properties* case[6] had relied on a statement by Lord Loreburn L.C. in *Pearson (S.) and Son Ltd. v. Dublin Corporation*[7] that "the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge". In that case the House of Lords had held a principal liable for the fraudulent representations of his agent, although these representations reached the injured plaintiff through the innocent principal. The principal was held vicariously liable for the fraud of his agent just as he would have been had the representations been made directly to the plaintiff.[8] In the *London County Properties* case[9] itself Addis, an agent of the defendant company, was guilty of fraud because he knew that the statement in question was to be made, that it was untrue, and that it was untrue because of wrong information. This was the interpretation of the case adopted by the Court of Appeal, and such being the facts the company was clearly liable on ordinary principles for Addis' fraud. The *London County Properties* case,[9] therefore, was no authority for the argument of the plaintiffs.

The Court of Appeal approved the analysis of the judgment of Romer L.J. made by Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ltd. v. Spalding U.D.C.*[10] Atkinson J. there pointed out that Lord Loreburn L.C. used the words "guilty knowledge", and declared that mere knowledge of facts could never in itself be "guilty". The knowledge, to be "guilty", must involve something further. The knowledge thus referred to "was clearly the knowledge *that the statement was being made* and was untrue".[11] If such knowledge existed, there was fraud for which the principal was vicariously liable. Otherwise he was not.

The Court of Appeal in the present case refused to add up the elements of fraud as between two innocent persons. In the absence of a contrary decision by the House of Lords the law is now settled that before an action based on fraud will lie there must exist some person who has been himself guilty of fraud. Fraud involves dis-

[5]Quoted by Birkett L.J. [1952] 1 T.L.R. 82, 89.
[6]*supra.*
[7][1907] A.C. 351, 354.
[8]*Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259.
[9]*supra.*
[10][1937] 3 All E.R. 335.
[11][1937] 3 All E.R. 335, 343. Italics supplied.

honesty[12] and "there is no way of combining an innocent principal and agent so as to produce dishonesty".[13]

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[12]*Derry v. Peek* (1889) 14 App. Cas. 337, 374, per Lord Herschell.
[13]Devlin J., quoted by Birkett L.J. [1952] 1 T.L.R. 82, 89. "It is difficult to see how two whites can make one black": Salmond on *Torts* (10th edn. 1945), 584.

CONTRACT—MISTAKE—NON-EXISTENT SUBJECT-MATTER

MISTAKE is one of the most difficult branches of the law of Contract, and mutual mistakes as to the existence of subject-matter is one of the least explored. Facts grounding such a case are likely to be rare, and the recent decision of the High Court in *McRae and Anor. v. Commonwealth Disposals Commission and Ors.* [1951] A.L.R. 771 is a welcome addition to the scanty law on the subject.

Most of the text writers baldly state that mutual mistake as to the existence of subject-matter avoids a contract, citing *Couturier v. Hastie.*[1] There A sold to B a cargo of Indian corn which both supposed to be on its way from Salonica to England; it had in fact, before the date of sale, become so heated and fermented that it had to be unloaded and sold at Tunis. In an action by A for the price, the trial Judge (Martin B.) directed a verdict for the defendant. The Court of Exchequer (Parke B. and Alderson B., Pollock C.B. dissenting) found for the plaintiff, the Court of Exchequer Chamber and the House of Lords, for the defendant. The decision has usually been regarded as based on the view that the contract was void.

In the instant case, the Disposals Commission invited tenders for the purchase of "an oil tanker lying on Jourmaund Reef . . . said to contain oil". A tender was accepted, and the purchaser incurred considerable expense in preparing to locate and salvage the vessel. It was afterwards discovered that no such tanker existed. This was an action for breach of a contract to sell a tanker lying at a particular place, for a fraudulent representation that there was a tanker at that place, and for a negligent failure to disclose that there was no tanker at that place after that fact became known to the Commission.

Webb J. considered that *Couturier v. Hastie* compelled him to hold the contract void on the ground of mistake. But he held the defendants liable in deceit.

On appeal to the Full Court, Dixon and Fullagar JJ., in a joint

[1](1852) 8 Ex. 40, (1853) 9 Ex. 102, (1856) 5 H.L.C. 673.