ARMITAGE *et al. v.* BROWN.

D. C., Colombo, 3,819.

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Innocent misrepresentation—Principal and agent—Absence of authority to act for principal—Liability of agent for damages.

If A is induced to contract with B on the footing of an innocent misrepresentation, he would have a restitutive remedy against B, restoring to him what he had actually lost in consequence of entering into such contract.

If A is under a legal duty to tell the truth to B, he would be liable for the consequence of an innocent misrepresentation made by him under the belief of which B acted.

Where A, without being armed with formal authority, professed to act as agent of B, and bade for at a public auction, and agreed to buy a house as such agent, and B repudiated the sale, and C, the vendor, sued A for damages,—

Held, per WITHERS, J., and BROWNE, A.J. (*dissentiente* LAWRIE, A.C.J.), that, in the absence of fraudulent intent or recklessness, A was not personally liable in damages ; and that he had not entered into a valid contract with C, nor was he under a legal duty to him to state the truth.

PLAINTIFFS claimed Rs. 2,850 as damages from the defendant on the basis of the following allegations : that they caused to be put up for sale by public auction a house in the Fort of Colombo ; that defendant, pretending to have full authority to act for the Bank of Madras, and upon his warranty that he was authorized by the said bank to be such agent, and to bid for and purchase the said house, and do such other acts as may be necessary therefor, induced the plaintiffs to accept his bids and to conclude the sale with him ; that defendant, professing to act as such agent, induced the plaintiffs to accept his signature for and on behalf of the said bank to the notarially attested conditions of sale, and to enter into the contract therein embodied ; that the plaintiffs, having entered into the said contract with the defendant, were always ready and willing to fulfil their part of the obligation under the said conditions ; that the said bank has repudiated the said conditions and contract ; and that defendant was not in fact authorized to bid at the sale or to subscribe its name to the conditions.

The defendant pleaded that the plaint was bad in that, *inter alia*, it did not allege that defendant made false representations knowing them to be false, or that he knew that he had no authority to act for the bank. He denied the several allegations of fact made in the plaint, and stated that the bank, having discovered after the day of the sale by auction that the description of the property contained in the conditions was erroneous, justly refused

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to purchase it; that he was authorized to buy the whole of the said house, as the conditions purported to sell, but that what was attempted to be sold was only four-fifths thereof.

At the trial it appeared that, upon the conclusion of the sale by auction, the following memorandum attested by a notary public was signed by the defendant and the auctioneers :—

> At the sale by auction made this day of the property described in the annexed particulars (viz., the conditions of sale), the Bank of Madras, by R. L. M. Brown, was the highest bidder for, and was declared the purchaser of, the said property at the price of Rs. 25,050.
>
> As witness our hand at Colombo this 16th day of November, 1891.
>
> For the Bank of Madras, R. LEWIS M. BROWN.
> FORBES & WALKER, Auctioneers.

The defendant admitted that he had no notarial deed from the bank authorizing him to bid for the premises.

On the 17th November the auctioneers called upon the Bank of Madras to pay them Rs. 6,563·99 in terms of the conditions of sale on account of the price, but the bank replied that it "did not "purchase any property at public auction on the 16th November, "and therefore cannot send you a cheque as requested."

Thereupon, in pursuance of the conditions of sale, the house was put up for sale again, after notice to the bank, and sold to a third party for Rs. 22,200.

The damages claimed by the plaintiffs represented the difference between the original price, Rs. 25,050, and the price recovered at the second sale, Rs. 22,200.

The Additional District Judge (Mr. Conolly) dismissed plaintiffs' case on the ground that they had not discharged the onus of proving that defendant had no authority from the bank to bid for and buy the premises.

They appealed.

Dornhorst, for appellants.

Dumbleton, for respondent.

8th February, 1895. WITHERS, J.—

This is an action to recover damages from the defendant on the ground that he induced the plaintiffs to contract for the sale of certain premises in Colombo with a local bank by a representation that he was the agent of the bank to conclude the said contract, when in fact he was not so.

I understand the defendant's answer to be that it is true that he was not authorized by the bank to purchase the premises referred to, but that he signed the contract in the belief as to a particular state of facts into which the plaintiffs had misled him.

I assume, for the purpose of my judgment, that the plaintiffs have made out a *primâ facie* case of innocent misrepresentation of authority, by which they were induced to sign a contract of purchase and sale, which the defendant's principal, for some reason or another, refused to ratify.

Two facts with regard to this action are important to notice. In the first place, the action itself is one for damages. In the second place, the plaint does not pretend to suggest that the defendant's misrepresentation was made either with fraudulent intention or recklessly, and without care whether it was true or not. It merely says that he had not the authority which by his conduct he professed to have.

In these circumstances, is the defendant personally liable to the plaintiffs in damages?

Mr. Dornhorst argues that he is, and he cites the case which seems to me to be exactly in point, in support of his argument, namely, *Smout v. Ilbery*, reported in *10 M. and W., p. 1.* Baron Alderson, delivering the judgment of the Court of Exchequer, observed as follows:—"There is a third class in which the "Courts have held that, where a party making the contract as agent "*bonâ fide* believes that such authority is vested in him, but has in "fact no such authority, he is still personally liable. In these cases "it is true the agent is not actuated by any fraudulent motives; "nor has he made any statement which he knows to be untrue. "But still his liability depends on the same principles as before. "It is a wrong, different only in degree, but not in its essence, from "the former case, to state as true what the individual making such "statement does not know to be true, even though he does not "know it to be false, but believes, without sufficient grounds, that "the statement will ultimately turn out to be correct. And if that "wrong produces injury to a third person, who is wholly ignorant "of the grounds on which such belief of the supposed agent is "founded, and who has relied on the correctness of his assertion, "it is equally just that he who makes such assertion should be "personally liable for its consequences."

I venture to think that that statement of the law is no longer accurate in view of the opinions of the House of Lords in the well-known case of *Derry v. Peek.* In *Bishop v. Balkis Consold. Company* (*59 L. J., Q. B. 565*), where the plaintiff had lost the price of the shares which he sought to recover from the company, by reason of a merely careless misrepresentation, it was held that no action would lie. Lord Justice Lindley delivered the judgment of the Court of Appeal in that case, and he made this observation:—"The plaintiff was induced, however, by the

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"'certification' to part with his money, and he has lost it; and if "an action would lie for a careless misrepresentation, I should be "of opinion that the plaintiff could recover the money thus lost "from defendant, but no action lies for such a misrepresentation; "this was finally decided in *Derry v. Peek*, which it is not for "me to criticise."

In *Law v. Bouverie*, which was an action by an intending encumbrance against the trustee of a fund for loss sustained by his negligent misrepresentation with regard to certain encumbrances, the same Lord Justice in his judgment observed "that "until the case of *Derry v. Peek* was decided, it was generally "supposed to be settled in equity that liability was incurred by a "person who carelessly, although honestly, made a false represen-"tation to another about to deal in a matter of business upon the "fact of such representation. This general proposition is, however, "quite inconsistent with *Derry v. Peek*."

There are, I dare say, exceptions to this doctrine. I take it that if A is induced to contract with B on the face of an innocent misrepresentation, he would have some restitutive remedy against B, which would restore him what he had actually lost in consequence of entering into a contractual relation with B. So, I take it a person who is under a legal duty to tell the truth to another would have to answer for the consequence of an innocent misrepresentation under the belief of which that other acted. This defendant, however, entered into no contract with the plaintiffs, and was under no legal duty to them when he signed the conditions of sale as the agent of a local bank.

The conclusion I come to is that the plaint discloses no cause of action for damages against the defendant. If I am wrong in this view of the law, I certainly think defendant ought to have an opportunity given him to make good his defence.

Mr. Dumbleton urged that the representation complained of related to a matter of law, and was on that ground not actionable. That may be so where the representation relates to a pure matter of law, but that cannot be said, in my opinion, of the defendant's representation. For these reasons I would affirm the judgment of the Court below with costs.

BROWNE, J.—

I venture to concur entirely in the views expressed by my brother Withers. In effect the case of the defendant, in the view taken of his position by the rest of the Court, appears to be that contemplated as possible by Lord Herschell in *Derry v. Peek*: that of a man who may be blameworthy, as from having formed his

belief carelessly or been unreasonably credulous—a position in which he would be in nowise liable for an action of deceit—and that, as my brother has pointed out, it might be open to the plaintiffs to obtain on some ground such relief as was necessary to them against the consequences of his act, but that (albeit this is not an action of deceit) it is not open to them to obtain the remedy of damages for which they here prayed.

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At the same time, and with deference to the opinions expressed by the rest of the Court as to the position actually occupied or in his pleading assumed by the defendant, I would say I am not inclined to dissent from the views held by the learned District Judge, but would rather affirm his judgment from his own point of view. Granting that the signature of the agent amounted to an affirmative, that he had authority to do the particular act, have the plaintiffs discharged the onus on them and disproved that he had such authority? They submit as their proofs (1) repudiation by the bank, his principals; (2) his own statement in his answer; and (3) the fact that he held no power of attorney under which he could alone act as agent of a corporation, a ground which was not at all suggested in the plaint. I concur in the holding that the repudiation in the letter by the proctors for the bank, who merely wrote that "the bank did not purchase any property at "public auction on the 16th instant," is not conclusive proof that defendant had no authority to make the one bid there, the only bid made on their behalf. Behind, and as ground for, such a denial, there may have been intended in any possible action a defence of such want of *consensus ad idem* as was argued before us, or misrepresentation as pleaded, or other matter apart altogether from a denial that defendant acted without their authority in what he did do and sign in their name. As to the second proof, we know nothing of the facts of any authorization, however imperfect. The plaintiffs abstained from an investigation thereof by examination of the defendant's principals or their manager in Colombo. I conceive it to be possible that the corporation, by their authorized manager, seeing an advertisement of intended sale of "all that house No. 5, Baillie street, occupied by S," either satisfied themselves by inspection of deeds, &c., as to the subject-matter of sale, or else were content from the names of the vendors and brokers subscribed to the advertisement to believe what would be sold, and so simply sent the defendant to be their mouth-piece in bidding at the sale of this single lot without casting on him any duty of inspection of deeds or verification of parcels, and that they were prepared to acknowledge and ratify all his acts for them until, as he has pleaded, *they* (and not he), subsequent to the

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sale, discovered material error of description. In any action against them, I would be quite prepared to find them acknowledging the agency and defending themselves upon that misdescription alone. The defendant's plea, which has been read in evidence against himself, is not happily framed, and in the want of averment of the plaintiffs' responsibility for the advertisement might even fail as ground of defence. But in it he has asserted he had the authority of his principals to bid for the house advertized, and that he *bonâ fide* did so; and if his pleader has gone beyond those assertions and, taking into consideration quite unnecessarily the subsequent discovery and its relation back to his own acts at the sale, has indicated what would be the defence of his principals in any contest between the vendors and them, I would not wrest the statements made for such purpose into an admission of neglect in or carelessness of inquiry by defendant himself, which I consider would be necessary to constitute an admission that he had done an act which he was not authorized to do. I would regard this defence as one that under the mistake averred the authority was given, accepted, and acted upon, and that it continued of force until the mistake was discovered, and so that the defendant always had authority. And in the absence of acknowledgment or proof of special duty of inquiring, &c., imposed on him, I would also regard this defence as possibly sustained.

As to the third proof, that defendant had no power of attorney under the seal of the corporation, it may be, as Mr. Dumbleton has contended, that this was the sole proof on which plaintiffs at the trial relied. The record does not read so to me, seeing that it was advanced at the trial only after the learned District Judge had, at least, doubted the sufficiency of the other proofs. But if it were so, I am not at all clear how far the plaintiffs would be entitled to rely thereon when they offer as proof only that defendant signed the conditions of sale, and not that their notary or they then inquired as to whether defendant was so authorized, or that defendant made any representation thereof. It has not been proved by the plaintiffs what powers this corporation under any charter from which it may derive its existence may or may not have, as to the appointment of an agent to bid at a land sale or conduct preliminary negotiations for any transaction such as this outside the lines of its banking business proper. The matter may be open to discussion (*Story on Agency, section 52*).

In this view, that the plaintiffs have not established that in all he did the defendant had not the authority of his principals, the conclusion expressed by my brother is the more acceptable to me.

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LAWRIE,

The plaintiffs aver that the defendant, Mr. Brown, assumed to be the agent of the Bank of Madras ; that he pretended to have full authority to act for the bank ; that he did by his acts assert and warrant to the plaintiffs that he was authorized by the bank to be such agent to bid, &c. ; but that the defendant was not authorized by the bank to bid at the sale, nor to subscribe its name to the conditions of sale, &c.

There is in the plaint no averment of fraud or deceit. The action seems to me to be one founded on the doctrine "that a "person professing to contract as agent for another, impliedly, "if not expressly, warrants or promises to the person who enters "into such contract upon the faith of such profession, that the "authority which he professes to have does in fact exist." I venture to doubt whether the law applicable to such a case has been affected by the judgment of the House of Lords in *Derry v. Peek*, and by the later cases *Bishop v. Balkis Consol. Company* and *Law v. Bouverie*.

In the leading case, *Derry v. Peek*, the plaintiff laid his action on deceit ; he averred fraud. Here, the cause of action is not fraud, but the breach of a warranty ; and in my humble opinion, the plaintiffs need not aver nor prove deceit or fraud, and the defendant is liable in the damages caused by his representation that he was agent, if that representation was not correct.

As I read the answer, the defendant admits that he had no authority from the bank to bid for the house described in the conditions of sale ; he had no authority from the bank to subscribe its name on these conditions of sale.

The plaintiffs thus, in my opinion, made a good *primâ facie* case for damages against the defendant. I cannot say that I am satisfied that the plaintiffs, either in the plaint or at the trial, showed that they had sustained damage beyond the expenses of the day of sale, expenses which were useless and which had to be incurred anew in consequence of the sale to the plaintiff falling through.

While the plaintiffs made out a *primâ facie* case against the defendant, there are in the answer averments which, if proved, would exonerate the defendant. He avers, as I understand, that he acted as the agent of the bank in this matter, induced by a mistake in fact caused partly, if not wholly, by the acts of the plaintiffs themselves ; that he had read in the local newspapers a description of the extent of the premises which the plaintiff said they were about to sell ; that that advertisement did not describe the premises correctly : the house which the plaintiffs owned and

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which they described in the conditions of sale was a smaller and less valuable house than the advertisement had described. The bank had authorized the defendant to buy the larger house, it had not authorized him to buy the smaller house, and his mistake in bidding for the latter was caused by the advertisement for which the plaintiffs were responsible.

The rest of the Court are against this view. I can only say that as the trial in the District Court was hasty and incomplete, and as the judge who presided is no longer in the Colony, I would have liked to have set aside this decree and to have sent the action to the District Court for new trial on issues to be carefully framed, and I would have left the costs to depend on the final result.