1941 *Present :* **Howard C.J. and Keuneman J.**

DANIEL *v.* COORAY.

*184—D. C. Colombo, 6,291.*

*Notary Public—Action for damages—Negligence in describing mortgaged property—Purchase of property in execution by mortgagee—Loss in consequence—Loss too remotely connected with negligence—Contributory negligence of plaintiff.*

The appellant, a Notary Public, was employed by the respondent to invest Rs. 1,000 on the mortgage of the northern block of a certain land belonging to one P. By an error in the appellant's office, the southern block which was not owned by P was mortgaged instead of the northern block. The mortgagor having failed to pay interest, the bond was put in suit and at the execution sale the respondent purchased the land. At the sale the respondent was represented by another Proctor, who was authorised by the respondent to bid on his behalf. The Proctor attended the sale when the conditions of sale and a description of the property sold were read out by the auctioneer.

After his purchase the respondent discovered the mistake and claimed damages.

*Held,* that the damage sustained by the respondent was too remotely connected to the negligence of the appellant in wrongly describing the property mortgaged to entitle the respondent to succeed in his claim.

*Held, further,* that the respondent was guilty of contributory negligence in failing to exercise proper diligence before he purchased the property.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the head-note.

*H. V. Perera, K.C.* (with him *N. Nadarajah, E. B. Wikremanayake* and *H. W. Thambiah*), for the defendant, appellant.—That there was negligence on the part of the defendant in the legal sense is admitted, but

defendant's case is that the plaintiff being well aware, at the time of the sale, that the mistake had been made wanted to exploit the situation resulting from it. In any event plaintiff is not entitled to succeed because, if he had exercised due diligence, he could have avoided the result of the negligence of the defendant. The District Judge has misapplied *Fernando v. Menikrala Aracci* [1] and *Re Polemis* [2]. See the comments on *Re Polemis* in Winfield's *Law of Torts (1937)*, pages 78-9. A purchase of property is a voluntary contract based on offer and acceptance. The plaintiff was negligent in his duty of informing himself of the terms of the offer which he accepted. The proximate cause of the loss which plaintiff incurred was his own negligence. See *Perlman v. Zoutendyk* [3].

The rule of contributory negligence is applicable—Beven on *Negligence (1908)*, page 155; Winfield's *Law of Torts (1937)*, page 438 *et seq.*

*C. Thiagalingam* (with him *T. K. Curtis*), for the plaintiff, respondent.—On a question of fact, the plaintiff was not lacking in reasonable care at any stage. The District Judge's finding is definitely to that effect.

Assuming there was negligence on the part of the plaintiff, it was induced by the appellant's negligence. Plaintiff was thrown off his guard by the conduct of the defendant and was induced to believe that there was no danger in purchasing the mortgaged property. In such a case the plaintiff's omission to take ordinary care does not amount to negligence. See *Scott v. Shepherd* [4]; *Pressly v. Burnett* [5]; Beven on *Negligence (1928)*, pages 172-4.

The question of contributory negligence would not arise if plaintiff was under no duty to defendant to know what was in the conditions of sale. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them—*Le Lievre v. Gould* [6].

Where a solicitor invests his client's money on an unauthorised security, he must repay it as if it remained uninvested in his hands—*Cordery on Solicitors (1888)*, page 126. See also *Whiteman v. Hawkins* [7]; *Sawyer v. Goodwin* [8].

*H. V. Perera, K.C.*, in reply.—This was an action of tort. The cases cited from *Cordery on Solicitors* deal with actions for breach of contract. The compensation claimed in this case is for the loss of principal and interest due on the decree. The proximate cause of that loss was the negligence of the plaintiff in signing the conditions of sale. The plaintiff had the last opportunity of avoiding the loss and his negligence cannot be said to have been a direct consequence of defendant's negligence in the preparation of the mortgage bond.

*Cur. adv. vult.*

February 21, 1941. HOWARD C.J.—

This is an appeal by the defendant from a judgment of the District Judge, Colombo, in favour of the plaintiff's claim for damages for negligence in respect of the preparation of a mortgage bond undertaken on behalf of the plaintiff. The facts were as follows:—The appellant, a

[1] *(1909) 5 A. C. R. 54.*
[2] *(1921) 3 K. B. 560.*
[3] *(1934) Cape P. D. 328.*
[4] *(1773) 3 Wils. 403.*
[5] *(1914) S. C. 874.*
[6] *L. R. (1893) 1 Q. B. 491.*
[7] *L. R. (1878) 4 C. P. D. 13.*
[8] *(1875–6) 1 Ch. D. 351.*

Notary Public, was employed by the respondent in September, 1930, to invest Rs. 1,000 on a mortgage of the northern block of certain land called Ambagahawatta belonging to one Peter Perera. By an error in the appellant's office the southern block of Ambagahawatta which was in the ownership not of Peter Perera, but of his brother Marshal Perera, was mortgaged instead of the northern block. The mortgage bond was executed on September 1, 1930, part of the money being employed to pay off a prior mortgage of Peter Perera's. The mortgagor having failed to pay his interest the respondent instructed Mr. Oliver Fernando, another Proctor, to put the bond in suit. On the defendant consenting to judgment, decree in favour of the respondent was entered on August 16, 1935. The property after advertisement was fixed for sale on November 22, 1935. Mr. Fernando on instructions from the respondent obtained an order for leave to bid at the sale provided he purchased at or above the amount of the claim and costs. Mr. Fernando was authorised by the respondent to attend the sale and bid on his behalf. According to Mr. Fernando's evidence, he, but not the respondent, attended the sale when the conditions of sale and a description of the property sold were read out by the auctioneer. The outsiders at the sale did not bid up to the amount of the claim and therefore, on behalf of the respondent, Mr. Fernando purchased the property. Mr. Fernando states that the conditions of sale were signed by the respondent in his presence about 6 P.M. in his office at Hulftsdorp and up to that point neither were aware of any difficulty regarding the *corpus* purchased. Before, however, an auctioneer's conveyance was issued the error was discovered as the result of prospective buyers leading to an examination of the title deeds by Mr. Fernando. The latter states that he discovered the error towards the end of December, 1935. In the period between the sale by the auctioneer and the discovery of the error, the northern portion was by deed of November 29, 1935, mortgaged by Peter Perera. The registration of this deed appears from P 9 to have been made on December 5, 1935. According to the evidence of Mr. Fernando and the respondent, the former on the latter's instructions brought the error to the notice of the appellant in the middle of January, 1936. After consulting Counsel, Mr. Fernando wrote a letter P 6 to the appellant claiming by reason of the latter's negligence a sum of Rs. 1,930 and threatening legal proceedings if compliance was not made therewith. On February 7, 1936, the appellant replied admitting that he drafted the mortgage bond, but denying that the loss suffered by the respondent was caused by his negligence and maintaining that it was due to the respondent's own negligence. Subsequently on December 15, 1936, the respondent instituted these proceedings.

In finding for the respondent the learned District Judge held that the damage suffered and claimed by him was the natural and probable consequence of the appellant's negligence. In coming to this conclusion he followed the case of *Fernando v. Menikrala Aracci*[1]. The learned Judge further held that if the damage was not the natural and probable consequences of the defendant's negligence, he would nevertheless be liable under the rule as laid down in *Re Polemis*[2] if the direct

[1] *5 A. C. R. 54.*

[2] *(1921) 3 K. B. 560.*

consequence of the defendant's negligence caused the damage or if it is directly traceable to it. These two decisions, one of the English Courts and the other of the Ceylon Courts, in the opinion of the learned Judge demolished the contention of the appellant that the damages were too remote. The facts in *re Polemis* (*supra*) were as follows :—The defendants were the charterers of a vessel from the plaintiffs to carry a cargo to Casablanca. The cargo included a number of cases of benzene and petrol. Whilst discharging at Casablanca a heavy plank fell into the hold in which the petrol was stored and caused an explosion which set fire to the vessel and completely destroyed her. In an action for the loss of the vessel the plaintiffs, the owners, contended that such loss was due to the negligence of the charterers' servants in dropping the plank. The charterers contended that the damages were too remote. In finding for the plaintiffs Lord Justice Scrutton formulated the principle that should be applied as follows :—

> "To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it, in fact, causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial."

The learned Lord Justice also stated that to say the damage must be the natural and probable result was not useful. Moreover he implied that it was misleading inasmuch as it gave rise to the impression that to constitute negligence the exact form of damage which was caused must have been expected or anticipated. Lord Justice Bankes in the same case also stated that the fire was directly caused by the falling of the plank and that in such circumstances it was immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The same Judge also cited with approval the dictum of Lord Sumner in *Weld-Blundell v. Stephens*[1], that "direct cause is the best expression . . . . Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result". In *Re Polemis* (*supra*) is, therefore, an authority for the proposition that in an action for negligence the test is not whether the damage is the natural and probable result of the act, but whether any reasonable person would foresee that such act would cause damage. Neither in *Re Polemis* nor in *Fernando v. Menikrala Aracci* (*supra*) did any question arise as to the negligence of the plaintiffs nor as to what Scrutton L.J. has referred to as the "operation of independent causes having no connection with the negligent act".

[1] *(1920) A. C. 983.*

This question, however, does arise in this case. Moreover there remains the consideration as to whether, to use the words of Lord Sumner, the negligent act was the "direct cause". I am, therefore, of opinion that the two authorities on which the learned Judge has based his decision have not the decisive effect with regard to the conclusions at which he has arrived.

The liability of a Proctor or Solicitor to his client arises both from contract and tort. In this case it is conceded by Counsel for the respondent that the claim is made in tort. The law with regard to such liability is laid down in the 4th Edition of Beven on *Negligence*, Vol. II., p. 1384, as follows :—

> "A Solicitor is liable for negligence both in contract and in tort. He is liable in contract when he fails to do some specific act to which he has bound himself. He is liable in tort where, having accepted a retainer, he fails in the performance of any duty which the relation of Solicitor and client as defined by the retainer imposes on him. Where the liability is based on tort in order to enable the client to recover, damage has to be shown : further the damage must result from the negligent act, and not be merely collateral to it."

The liability of a Solicitor in an action for negligence based on tort is fully discussed in the note to *Hill v. Finney*[1]. In this note it is clearly laid down that the injury or damage must be shown to have resulted from the wrongful act. Mr. Perera for the appellant contends that the direct loss suffered by the respondent was caused by his purchase of the southern portion at the Auctioneer's sale and that purchase was brought about by his negligence or that of his proctor, Mr. Oliver Fernando. In the alternative he maintains the respondent cannot recover because he has been guilty of contributory negligence in purchasing the southern portion. Mr. Thiagalingam on the other hand contends that, if the respondent was negligent in purchasing the southern portion at the sale, such negligence was induced by the appellant's negligence. He maintains further that the respondent has not been guilty of contributory negligence. Moreover he contends that the appellant cannot rely on the contributory negligence of the respondent inasmuch as the latter was under no duty as regards the appellant. In support of this proposition we were referred to *Le Lievre and Dennes v. Gould*[2]. In this case it was held that a surveyor not appointed by the mortgagees of the interest of a builder who advanced money on the certificate of such surveyor owed no duty to the mortgagees to exercise care in giving his certificates and they could not maintain an action against him by reason of negligence. This decision was made on the ground that there was no contractual relationship between the surveyor and the mortgagees and hence a claim for damages based on the former's negligence would not lie. This, however, cannot be regarded as an authority for the proposition that in an action for negligence the defendant is disentitled to rely on the negligence of the plaintiff when the latter owed no particular duty towards the defendant. The contention of Counsel for the respondent is moreover, contrary to

[1] *176 E. R. 724–727.*

[2] *(1893) 1 Q. B. 491.*

the dicta of English Judges. Thus in *Ellerman Lines, Ltd. v. Grayson Ltd.*[1], the difference in the meaning of "negligence" as applied to a plaintiff and defendant is pointed out by Atkin L.J., when he says :

> "The doctrine of contributory negligence cannot I think be based upon a breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own property. He may not recover if he could reasonably have avoided the consequences of the defendant's negligence."

The decision of the Court of Appeal in this case was affirmed by the House of Lords (*1920 ; A.C. 466*) where Lord Parmoor, in his judgment, states as follows :—

> "I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and a negligent defendant ; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence."

In cases where the defendant pleads contributory negligence the inquiry resolves itself in an elucidation of the question as to which party, by the exercise of ordinary care, had the last opportunity of preventing the occurrence.

With regard to the contention of the respondent that his negligence, if any, was induced by the negligence of the appellant, we were referred by his Counsel to the case of *Scott v. Shepherd*[2]. In this case, however, the act of the plaintiff was held to be involuntary and so he was not disentitled to succeed. So also in the case of persons who choose in a sudden emergency the wrong course. In all these cases the very state of incapacity to judge calmly is produced by the negligent act of the defendant. I do not think these cases have any application to the circumstances of the present case.

The questions, therefore, that require elucidation are whether the respondent (1) has established that the error in the deed was the cause of this loss, (2) is disentitled to succeed because of his own negligence. We have to apply the principles to which I have referred in the earlier part of this judgment. In this connection I may observe that the case of *Perlman v. Zoutendyk*[3] indicates that Roman-Dutch law is the same as English law in regard to actions for negligence. With regard to (1) are the damages which the respondent claims too remote, or to put the problem in another way, has the respondent proved that the appellant's misdescription of the property mortgaged caused in the legal sense the damage which the respondent seeks to recover ? The damage is the loss of the money expended by the respondent in the purchase of the property at the auction sale. That purchase was made because the respondent thought he was purchasing the northern and not the southern portion of Ambagawatta. Can it be said that when he purchased at the auctioneer's sale he had in mind the mortgage deed and relied on an implied representation of the appellant that the northern part had been mortgaged ? Is

[1] *(1919) 2 K. B. 514.* [2] *3 Wils. 403.* [3] *(1934) Cape P. Div. 328.*

the relation between cause and effect, that is to say between the alleged wrongful act and the damage, sufficient in law to entitle the respondent to recover? In my opinion that relation is not sufficient and the damage is too remote to enable the respondent to succeed.

I do not, however, base my judgment entirely upon the view that the damage is too remote because it seems to me that the respondent's case must fail in any event on the ground of contributory negligence. His Proctor was present at the auctioneer's sale when the conditions of sale containing a description of the property with its boundaries was read out. Moreover the respondent himself signed those conditions after the sale was concluded. Scrutiny of the description would at once have brought the mistake to light. An examination of the entries made in the Deeds Registry with regard to the property would have also put the respondent on his guard. He and his Proctor seemed to have assumed that everything was in order and proceeded to bid at the auction and sign the conditions of sale without making any inquiry. How can the respondent in the circumstances be said to have exercised due diligence? The respondent could reasonably have avoided the consequences of the appellant's negligence and had the last opportunity of preventing the loss. In these circumstances the respondent is disentitled to recover. The appeal is allowed with costs in this Court and the Court below.

KEUNEMAN J.—I agree.

*Appeal allowed.*