

CASE AND COMMENT

CONTRACT—MUTUAL ASSENT—CONSENSUS AD IDEM—ESTOPPEL.—The problem before the Court of Appeal in *London Holeproof Hosiery Company, Limited v. Padmore*¹ is familiar to the members of the profession who, as students, struggled with the Dresden china examples in Anson on Contracts.² The defendant demised a piece of land with a factory on it to the plaintiffs who covenanted to keep the inside of the factory in repair. The lease gave the plaintiffs an option of purchase. The factory was almost completely destroyed by fire, but the plaintiffs, believing that the defendant was promising to re-erect it, exercised the option of purchase. The defendant refused to reinstate the walls and the roof, and the plaintiffs brought this action asking for a declaration that they were not bound to proceed with the purchase. The defendant counter-claimed for specific performance. The Court of Appeal gave judgment for the plaintiffs and dismissed the counter-claim.

The general rule with respect to the formation of contracts is clearly stated in *Lindsey v. Heron & Co.*^{3a} by Middleton, J., who said: "The apparent mutual assent of the parties essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his acts or words, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but the unexpressed state of his mind on the subject." The expression *consensus ad idem*, so often quoted in contract cases, does not necessarily mean that both parties to the contract are actually of the same mind with respect to the subject-matter and import of its terms. There need not be a coincidence of mental images; it is sufficient that there be an expressed or objective mutual assent. Therefore a mere mistaken idea of one or both parties in regard to the meaning of an offer or acceptance will not prevent the formation of a contract.³ If a party, having entered into an agreement, were permitted to give evidence to prove

¹ (1928), 44 T.L.R. 499.

² 17th ed., pp. 161-2.

^{3a} (1921), 50 O.L.R. 1 at p. 8; 64 D.L.R. 92 at pp. 98-9. See also *Hobbs v. The Esquimalt and Nanaimo Railway Company* (1899), 29 Can. S.C.R. 450; *Watson v. Manitoba Free Press Co.* (1908), 18 Man. R. 309 at p. 312.

³ See Williston on Contracts, § 94.

that he did not mean what he said there would be little security of obligation. A man's intention must be gathered from his words or conduct, or as Brian, C.J., in the fifteenth century said: "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man."⁴

It would appear that there was a contract formed in the *Padmore* case when the plaintiffs accepted the offer of the defendant to sell the land. The fact that the plaintiffs thought that the defendant was promising to convey the land and to rebuild the factory was the dominant motive for their acceptance. It is well established that, as a general rule, one contracting party is in no way concerned with the inducements or reasons which lead the other party to enter into the contract.⁵

The Court of Appeal, however, were of the opinion that the defendant knew that the plaintiffs believed that he was promising to rebuild the factory and to convey the land, and decided that the parties were not *ad idem* and therefore that there was no contract between them. In *Smith v. Hughes*,⁶ which the Court of Appeal purported to apply in the *Padmore* case, Blackburn, J., said: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."⁷ It appears to follow from this principle that the defendant in the *Padmore* case, knowing of the plaintiffs' belief as to the nature of his promise, was estopped from asserting that he did not make a promise to reinstate the factory as well as to convey the land. It, therefore, is proper to hold that there was an objective mutual assent to the undertaking on the part of the defendant to rebuild the factory and to convey the premises. Because of the failure of consideration the plaintiffs would be entitled to the declaration which they asked for, and the defendant would not be entitled to specific performance in the face of his refusal to rebuild.⁸

S. E. S.

* * *

CONTRACT—RESTRAINT OF TRADE.—Two recent cases are reported from western provinces dealing with contracts in restraint of trade.

⁴ (1477). Anonymous, Year Book 17 Edw. IV., Pasch. pl. 2.

⁵ See *Williams v. Cowardine* (1833), 4 B. & Ad. 621; Salmond and Winfield: Law of Contracts, p. 190.

⁶ (1871), L.R. 6 Q.B. 597 at p. 607.

⁷ See *Freeman v. Cooke* (1848), 2 Ex. 654.

⁸ Cf. Anson. Law of Contracts, 17th ed., p. 162.

In *Fong v. Boehler*¹ an agreement by the vendor of a restaurant business that she would "neither directly nor indirectly have any interest or share or part in any other restaurant or similar place," for five years, in the Town of Broadview, was held not to have been broken by the fact that she became a paid cook for Pearson, a restaurant proprietor who at the time of the sale was employed by her as a cook, and that she also lent Pearson money which was to be employed in payment of the amount owing on Pearson's purchase of the building in which the business was carried on. The vendor might be said, in a sense, to have acquired an interest in the business but this was not a proprietary interest, and Turgeon, J.A., held that the agreement had not been broken. He cited *Smith v. Hancock*² as an authority for holding that the language of such an agreement must not be given a wider interpretation than that language properly bears.

The sale of a restaurant with a restrictive covenant by the vendor was also in question in *Lerik v. Zaferis et al.*³ The plaintiff and Zaferis had been partners in the business. Zaferis sold out his interest to the plaintiff and agreed that he would not, during the next three years, "carry on or engage in, either directly or indirectly and whether as a principal, agent, director of a company, servant or otherwise, or take part in, the business of a restaurant or cafe or store," within the City of Victoria. One Paul, also a party defendant, opened a combined cafe and candy shop and employed Zaferis to manage the latter.

The plaintiff sued Zaferis for damages for breach of the covenant and for an injunction to restrain further breaches. The action was dismissed by Murphy, J., but in the Court of Appeal his judgment was reversed by a decision of three judges to two, and the plaintiff was granted both damages and an injunction. McPhillips and M. A. Macdonald, J.J.A., dissented. McPhillips, J.A., thought that the covenant, in so far as it restricted Zaferis from being a servant in a restaurant or cafe, was unreasonable and therefore void, since it in effect destroyed his opportunity of gaining a livelihood. However, the opinion of the majority was otherwise.

The general rule that agreements in restraint of trade, without more, are bad, was founded upon the dislike of the law for monopolies, these being, in the language of Lord Macclesfield, "against the policy of the common law and contrary to Magna Charta."

¹ [1929] 3 W.W.R. 273.

²[1894] 2 Ch. 377.

³ [1929] 3 W.W.R. 422.

In the *Ipswich Tailors Case*⁴ it was laid down that "the common law abhors all monopolies which prohibit any from working in any lawful trade." It was considered to be for the general good of the community, as well as for necessary protection of the individual, that a man should remain free to ply his trade, but as commerce advanced it was found necessary to graft exceptions upon the general rule. The sale of goodwill called for such an exception, for in the language of Lord Macnaghten, "a fetter is placed on trade, and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labour to the best advantage."

The questions involved were exhaustively discussed by Lord Macclesfield in the leading case of *Mitchel v. Reynolds*,⁵ and the principles which he deduced from the authorities have been followed substantially through the intervening centuries, although improved means of communication, the development of the machinery of trade, and the enlarged areas over which business operations now extend, have changed the conditions under which these principles are to be applied. In the case mentioned, the defendant, having assigned to the plaintiff a lease of a messuage and bakehouse in the parish of St. Andrews, Holborn, for the term of five years, bound himself not to engage in the trade of a baker in that parish during the period mentioned.

"We are all of opinion," said the Lord Chief Justice, "that, a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz., where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive as shall be shown by-and-by."

The main requisite, as found by his Lordship, is that the restraint shall be, under all the circumstances, reasonable. Consequently, if the restraint be only particular in respect of the time and place, and there be a good consideration given to the party restrained, a con-

⁴ (1614), 11 Co. Rep. 53a.

⁵ (1711), 1 P. Wms. 181.

tract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, (that restraints in trade are bad).⁶

All the cases from 1711 onwards were reviewed in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*,⁷ where the conclusion was, as stated by Lord Macnaghten, that "the only true test in all cases whether of partial or general restraint, is the test proposed by Tindal, C.J.: What is a reasonable restraint with reference to the particular case?" In other words, each case is to be decided upon its own merits. The contract must neither be unreasonable as between the parties nor inconsistent with the interests of the public.⁸

In *Mitchel v. Reynolds*⁹ the Lord Chief Justice had stated that a general restraint throughout England was void, "for what does it signify to a tradesman in London what another does at Newcastle?" But the question, which was pertinent to the local concerns of a London baker two centuries ago, has very little meaning when applied to a great modern manufacturing business, and so, in the *Nordenfelt* case, it was held that a covenant not to engage in the manufacture of guns and ammunition for a period of twenty-five years, except on behalf of the company, was good although unlimited in space.

The principles by which contracts in restraint of trade are to be tested have been discussed in such recent cases as *Mason v. Provident Clothing and Supply Co.*,¹⁰ *Herbert Morris Ltd. v. Saxelby*,¹¹ and *Attwood v. Lamont C.A.*¹² An interesting reference to the development of this branch of the law is made in an article on "Judicial Caution and Valour" in the *Law Quarterly Review* for July, 1929.¹³

R. W. SHANNON.

Regina, Sask.

⁶ Per Willes, C.J., in *Gunmakers v. Fell* (1742), Willes, 384 at p. 388.

⁷ [1894] A.C. 535.

⁸ *McEllistrim v. Ballymacelligott Co-op. &c. Soc.*, [1919] A.C. 548.

⁹ *Supra*.

¹⁰ [1913] A.C. 724.

¹¹ [1916] 1 A.C. 688.

¹² [1920] 3 K.B. 571.

¹³ 45 *Law Q. Rev.* 291. The cases will be found digested in volume 43 of the *English and Empire Digest*. Some recent western Canadian cases are *Totem Mfg. Co. v. Le Drew*, [1924] 2 W.W.R. 640; *Associated Grocers of B. C. v. B. C. Fruit Land Ltd.*, [1925] 1 W.W.R. 505; *Saskatchewan Co-operative Wheat Producers Ltd., v. Zurovski*, [1926] 2 W.W.R. 604; *Anderson v. Moran*, [1928] 2 W.W.R. 307, 23 *Alta. L.R.* 474; *Hall v. More*, [1928] 1 W.W.R. 400, 39 *B.C.R.* 346; and *Gerlach-Barklow Co. v. MacPherson*, [1928] 3 W.W.R. 150.

COVENANTS RUNNING WITH CHATTELS—RESTRICTIONS ON USER.—The prominence given to the case of *Lord Strathcona Steamship Company v. Dominion Coal Company*¹ in the last edition of Anson on Contracts,² and in Smith's Leading Cases,³ places it in the category of Leading Cases. When the decision was delivered, the Law Quarterly Review gave editorial prominence to the comment of a correspondent, and has since also published articles on the equitable doctrines laid down in Lord Shaw's judgment,⁴ and the fuller article, "Restrictions on User."⁵ The Law Reviews in the United States also gave the decision full space. As the case originated in Nova Scotia, a note on the principles laid down in the judgment of the Privy Council may be timely.

The steamship "Lord Strathcona" was chartered to the Dominion Coal Company before the war. She was requisitioned by the British Government and passed through the hands of several owners, who each had notice of and covenanted to carry out the terms of the charter. The Coal Company was not a party to any of these changes in title. In 1920 the Strathcona Company became the owners and it refused to carry out the charter party on the ground that there had been a frustration by reason of the requisition. The Coal Company thereupon brought an action against the Strathcona Company and the Lord Curzon Company, the original charterers, for an injunction to restrain the owners of the ship from employing her in any way inconsistent with the charter party. The other relief claimed is not material to this note.

The action was framed on the dictum of Knight Bruce, L.J., in *DeMattos v. Gibson*,⁶ also a shipping case, which laid down the principle that the purchaser of a chattel is bound by a contract as to its user made by the vendor if he had notice of that contract. The case, both at *nisi prius* and in the Court of Appeal in Nova Scotia, was fought on the overworked doctrine of frustration of the contract by reason of the requisition.⁷ The application of the principle laid down in *DeMattos v. Gibson*, that a purchaser of personal property was bound by a covenant of a vendor, as to its user, of which he had previous notice, does not seem to have been seriously questioned until the case reached the Privy Council. The follow-

¹ [1926] A.C. 108.

² (1929), 17th ed.

³ (1929), 13th ed.

⁴ (1926), 42 Law Q. Rev. 139.

⁵ (1928), 44 Law Q. Rev. 51.

⁶ (1858), 4 De G. & J. 276.

⁷ (1924), 57 N.S.R. 113.

ing dictum of Knight Bruce, L.J., in that case was, however, given by Chisholm, J., as the reasons for judgment of the Appeal Court of Nova Scotia:

Reason and justice seem to prescribe that at least as a general rule, where a man by a gift or purchase acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a special manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

This principle, however, had been disapproved of by the Court of Appeal in *London County Council v. Allen*.⁸ Buckley, L.J., who, as Lord Wrenbury, was one of the Lords who sat in the *Strathcona* case in the Privy Council, said in the *Allen* case: "Notwithstanding what was said by Knight Bruce, L.J., in *DeMattos v. Gibson*, it is not true as a general proposition, that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant."⁹ Reference is also had to the judgment of Scrutton, J., sitting as a member of the Court of Appeal in the *Allen* case.¹⁰ In *Barker v. Stickney*,¹¹ Scrutton, L.J., said: "First, it was said that the defendant has bought a copyright with notice of a contract affecting it, and, using the copyright, must perform the contract. Up to the year 1880 that argument might have prevailed. In *DeMattos v. Gibson*, Knight Bruce, L.J., laid down the following rule. The extract above quoted is then cited, and the decisions refusing to follow that principle are quoted, including *London County Council v. Allen* (*supra*). Further on Scrutton, L.J., said: "But as to personal property it was found that the general rule of Knight Bruce, L.J., was quite impracticable, and *Taddy & Co. v. Sterious & Co.*,¹² *McGruther v. Pitcher*,¹³ and *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*¹⁴ have settled the law that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he was himself a party to the contract in which the stipulations were made."¹⁵ The reasons continue at length in the same emphatic strain.

⁸ [1914] 3 K.B. 642.

⁹ [1914] 3 K.B. 642 at p. 658.

¹⁰ [1914] 3 K.B. 642 at p. 665.

¹¹ [1919] 1 K.B. 121 at p. 131.

¹² [1904] 1 Ch. 354.

¹³ [1904] 2 Ch. 306.

¹⁴ [1915] A.C. 847.

¹⁵ [1919] 1 K.B. 121 at p. 132.

The decisions refusing to follow *DeMattos v. Gibson* are quoted at perhaps too great length, but this is for the purpose of putting in distinct contrast the opposite principles contended for before the Privy Council. Was the law as to the restrictive user of personal property that stated by Knight Bruce, L.J., or would the law be as laid down in the Court of Appeal "that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he himself was a party to the contract in which the stipulations were made," or was there any exception to the rule that a contract was only enforceable by a party from whom consideration for the contract moves against another party to the contract? Lord Shaw, however, in the Privy Council associated with these Lords trained as equity lawyers, Viscount Haldane, Lords Wrenbury and Blanesburgh, together with Lord Carson, approves of the discarded doctrine of Knight Bruce, L.J. It was held that the judgments of Mellish, J., at the trial, and of Chisholm, J., in the Court of Appeal, were right and that an injunction would lie to restrain the purchasing company in employing the vessel in any way inconsistent with the employment and use provided for in the charter party during its existence.

Probably, the recommendation given to the Supreme Court of Canada has been forgotten, that it should follow the judgment of the Court of Appeal in England, *Trimble v. Hill*,¹⁶ and *Stuart v. Bank of Montreal*.¹⁷ Here we have a case where the Privy Council refuses to follow a series of judgments of the Court of Appeal. By the way, Scrutton, L.J., quite recently reserved the question whether the English Courts should adopt the principle of the judgment of the Privy Council in the case of the *British Columbia Electric Railway Co., Ltd. v. Loach*,¹⁸ or not.¹⁹

However, this case will be a stepping-stone to the next development of equity forecast by students of that subject that specific performance of contracts relating to personal property will be decreed. "The general opinion now is that equity will seldom grant an injunction to restrain the breach of an agreement, for the keeping of which it would not decree specific performance."²⁰

HECTOR McINNIS

Halifax.

¹⁶ (1879), 5 App. Cas. 342 at p. 344.

¹⁷ (1909), 41 Can. S.C.R. 516, Anglin, J., at p. 549.

¹⁸ [1916] 1 A.C. 719.

¹⁹ See *Cooper v. Swadling* (1929), 46 T.L.R. 73 at p. 76.

²⁰ See (1929), 45 Law Q. Rev. 208.

TORTS—CAUSATION—ACTING IN AN EMERGENCY.—In *Harding v. Edwards and Tatisich* defendant Tatisich was travelling westerly in her motor car, preceded and followed by many other cars. Defendant Edwards was proceeding in the opposite direction and he also had a great number of cars in front of and behind him. Mrs. Tatisich swung her car out of the line and Edwards, in order to avoid what seemed to him an imminent collision, swerved his car to the right and off the paved portion of the highway. After getting over to the side of the highway, Edwards observed a ditch on that part of road directly in front of him, the ditch being estimated by the trial judge as from 30 to 90 feet in front of him, and by Hodgins, J.A., in the Appellate Division, as 45 feet in front of him. Edwards was travelling at the rate of 35 miles per hour. To avoid the ditch, he swerved his car back again to the left, and in so doing collided with the cars of Harding and Gall who were proceeding in the opposite (westerly) direction. Edwards, Harding and Gall sued Mrs. Tatisich for personal injuries. The trial judge found that Edwards had not acted negligently in the circumstances and he gave judgment against Mrs. Tatisich in all three actions. An appeal from this judgment was dismissed.¹

Once the trial judge found as a fact that Edwards had not been negligent, and her counsel having admitted that Mrs. Tatisich was negligent, the conclusion seems inevitable that Mrs. Tatisich should be liable to all three plaintiffs. She had forced Edwards into a position of emergency. In extricating himself from that position Edwards used reasonable skill, though not the highest degree of skill. He might have stopped or slowed down but in an emergency one is not to be judged by "standards involving deliberation and opportunity for conscious decision." The case is not unlike the well known *Scott v. Shepherd*,² though the danger in the instant case may not have been so imminent as the danger in *Scott v. Shepherd*. Cases of this sort all resolve themselves into a question of fact, viz., whether the conduct of the person placed in the emergency was reasonable in the circumstances.

The *Polemis* case³ which was much discussed in the instant case, seems distinguishable in one feature and that perhaps a vital feature. In the *Polemis* case, the injury, which resulted, was of a most unusual kind. But the injury which followed from the negligence of Mrs. Tatisich was the very sort of injury which she ought to

¹ [1929] 4 D.L.R. 598.

² (1772), 2 Wm. Black 892.

³ *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560.

have anticipated. She should have realized that her action might cause a collision, or an injury to some motorist in the vicinity. The fact that Harding and Gall were not directly and instantaneously imperilled by her negligence would seem to be immaterial when the intervening actor (Edwards) was not an independent actor (in the sense of having sufficient time for reflection and deliberation).

A. L. MACDONALD.

Dalhousie Law School.

* * *

INSURANCE LAW—VEXED QUESTION OF KNOWLEDGE OF AGENT SETTLED.—When an insurance company objects to a false statement made by the assured in the application, it is often alleged that the company's agent knew the true facts and the maxim "the knowledge of the agent is the knowledge of the company" brought forward. This has created much difficulty which has now been largely cleared away by two recent cases, *Newsbolme Brothers v. Road Transport, etc., Ins. Co.*¹ and *Rocco v. Northwestern National Insurance Company*,² where the *Newsbolme* case is cited. In both these cases it was unequivocally held that the knowledge of an agent that the answer of the assured to a question in the application on a material point was untrue did not prevent the insurance company from successfully contending that the contract of insurance was void for misrepresentation. The manner in which this difficulty, on account of the knowledge of the agent, was overcome is of great importance.

The scope of the agent's authority was discussed in both cases under review, and although in the *Rocco* case the agent had the right to deliver a policy, this authority, it was held, "did not include the right to deliver a policy containing a misstatement which, to the knowledge of the agent himself, would make it void . . . the agent's act in actually issuing the policy, knowing of the untruth, was a fraudulent act as against the defendants, not covered by any authority possessed by him." It is pointed out by one of the judges "that notice to or knowledge of an agent is not notice to or knowledge by the company unless the circumstances are such as to justify the opinion that the agent would be likely to communicate the information to those in charge of the affairs of the company. Where the agent is engaged in a fraudulent trans-

¹ [1929] 2 K.B. 356.

² (1929), 64 O.L.R. 559.

action and the party seeking to estop the company, by reason of the knowledge of the agent, is aware of his misconduct, he cannot set up the agent's knowledge as being knowledge of the company for he must know that it is unlikely that the agent would in fact inform his superior officers of his own delinquency." Therefore the court will not find that the company had notice. The question of notice is all-important because, of course, if the company had notice and issued the policy, a case of estoppel would arise.

As stated, *Newsbolme Brothers v. Road Transport, etc., Ins. Co.* (*supra*) was cited in the *Rocco* case; but, as far as the present report goes, it is not specifically followed, although it might well have been, and in any event its perusal will well repay those interested in the question. Everyone knows that applications are usually filled in by, or with, the assistance of the agent, and the question as to whether the agent is the agent of the assured or of the company for that purpose is constantly arising.

The *Newsbolme* judgment is also important in that it endeavours to reconcile the case of *Bawden v. London, Edinburgh, and Glasgow Insurance Co.*,³ where it was held that the knowledge of the agent precluded the company from setting up the fact that the application contained a statement that the assured had no physical infirmity, whereas in fact, to the knowledge of the agent, he had only one eye. There was no reference to the *Bawden* case in the judgment in the *Rocco* case. It will not be attempted here to deal with the task of distinguishing the *Bawden* case or to review fully the reasons which induced the Court of Appeal in England to follow *Biggar v. Rock Life Insurance Co.*⁴ and *Holdsworth v. Lancashire and Yorkshire Insurance Co.*⁵ in preference to the *Bawden* case, because that is very ably done by Scrutton, L.J., and occupies several pages. However, in the interest of busy readers, it might be advisable to mention some of the points. One difference is that in the *Bawden* case the assured was illiterate, and therefore the principle that an applicant adopts what he signs, which was applied in the *Newsbolme* case and in the *Rocco* case, was not applicable; another distinction was that in the *Newsbolme* case, the agent, at the request of the assured, filled in the answers otherwise than as stated to him and inserted untrue answers, whereas, in the *Bawden* case, no untrue answers were filled in by the agent, but the assured had signed a statement saying: "I have no physical infirmity." The Court said in the *Newsbolme* case that if the answer is untrue, and

³ [1892] 2 Q.B. 534.

⁴ [1902] 1 K.B. 516.

⁵ (1907), 23 T.L.R. 521.

the agent knows it is, he is guilty of fraud, and that if he does not know, he has no knowledge which can be imputed to the company.

The *Bawden* case has been the great difficulty in the way of companies relying on the untrue statements of the insurer when the agents knew that they were untrue. It has now been pointed out in the *Newsbolme* case that it seems to have been assumed in the *Bawden* case ("on little or no evidence") that the agent was responsible to the company for seeing the application properly completed. Scrutton, L.J., who has had great experience in insurance cases, said he finds "considerable difficulty in seeing how a person who fills up the proposal can be the agent of the person to whom the proposal is made. A man cannot contract with himself." Scrutton, L.J., holds "with Wright, J., in *Biggar v. Rock Life Insurance Co.* (*supra*), that although 'he may have been an agent to put the answers in form,' the agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form, and that if he is allowed by the proposer to invent the answers, . . . the agent is . . . the agent of . . . the proposer." He then adds: "If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract."

What the effect would have been if the agent in the *Newsbolme* case had had authority to issue a policy and had done so, instead of being limited to receiving and forwarding applications merely, is mentioned, and Scrutton, L.J., was apparently of the opinion that it would make no difference; but, that point was unnecessary to the decision of the case. In the *Rocco* case, where the agent did have power to issue the policy, this was met by holding that the agent had no authority to issue a policy containing a misstatement sufficient to make it void.

The *Rocco* and *Newsbolme* cases dispose of a difficulty which has been standing in the way of insurance companies by reason of the decision in the *Bawden* case and the widespread inclination of the courts to agree with the contention that the knowledge of the agent is the knowledge of the company. All insurance lawyers and companies are greatly indebted to the judges in these cases for so clearly defining the principles applicable to a question which has caused a great deal of difficulty.

SUCCESSION DUTY—SITUS OF SHARES IN ONTARIO COMPANY—BUSINESS CONDUCTED IN UNITED STATES.—The question of the situs of shares of a company for the purposes of a decision as to liability to, or immunity from, local taxation seems now to have been settled by the Privy Council in *Erie Beach Company Limited v. Attorney-General for Ontario*,¹ an appeal from the Appellate Division of the Supreme Court of Ontario. The relevant facts of this case were as follows:

The company was incorporated under the Ontario Companies Act, and its head office was situate within the Province of Ontario; in consideration of the transfer of certain assets to the company, preferred and common shares were agreed to be issued to one Bardol, who was domiciled in the State of New York; during his lifetime only a part of these shares were actually issued to him or his nominees, and the balance to which he was entitled were unissued at the time of his death; after Bardol's death and subsequent to the granting of probate of his will in the State of New York, the company issued to the executors and trustees of Bardol's will certificates for the balance of the shares, and it was notified on behalf of the Attorney-General of Ontario that it would be held liable for succession duty if it should permit any transfer of the shares on its books before succession duty had been paid or secured. The Ontario Succession Duty Act² provided in effect that no property in Ontario belonging to a deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, should be transferred to the person entitled thereto until the duty was paid or security given for it, and any corporation or person allowing such property to be so transferred was made liable for such duty.

When the company was notified that it would be held liable for the succession duty, it brought an action against the Attorney-General for Ontario asking *inter alia* for a declaration that the shares were not subject to succession duty under the Ontario Succession Duty Act. In the court of first instance,³ Logie, J., held that the shares were taxable where the domicile of the deceased was, pursuant to the doctrine of *mobilia sequuntur personam*, on the ground that the Succession Duty Act of Ontario is an Act taxing the succession and not property. He, therefore, found it

¹ [1930] A.C. 161.

² R.S.O. 1914, c. 24, s. 10, as amended by 1925, c. 13, s. 7, now R.S.O. 1927, c. 26, s. 11.

³ (1927), 61 O.L.R. 507.

unnecessary to deal with the question of the situs of the shares. The Attorney-General for Ontario appealed to the Appellate Division of the Supreme Court of Ontario.⁴ The authorities were fully reviewed by Mulock, C.J.O., and Hodgins, J.A., and the Appellate Division were unanimously of the opinion that the shares were subject to succession duty in Ontario—Mulock, C.J.O. (with whom Magee and Grant, J.J.A., agreed)—plainly on the ground that Ontario was the only place where the shares in question could be effectively dealt with by reason of sections 58, 62, 121 and 122 of the Ontario Companies Act, which provide in effect that the shares of a company incorporated under that Act are transferable only on the books of the company and an entry of each transfer must be made on the books which are required to be kept at the head office of the company in the province unless permission is granted to keep them outside the province. From this decision of the Appellate Division the company appealed to the Privy Council. Their Lordships decided that the test laid down by Lord Dunedin, in delivering the judgment of the Privy Council in *Brassard v. Smith*,⁵ was the correct one, namely, "Where could the shares be effectually dealt with?" and, applying this test to the facts in the case under appeal, the shares could be effectually dealt with only in Ontario, and therefore they were property situate in Ontario and subject to succession duty in that province.

It should also be noted that the company claimed that subsection (2) of section 10 of the Succession Duty Act (Ontario) was *ultra vires* in that it imposed indirect taxation, but their Lordships disposed of this point by quoting from the judgment of Mulock, C.J.O., where he said, "the sub-section penalizes a company which permits any property of a deceased person to be transferred to the beneficiary until the duty payable in respect thereof is paid, and a company so penalized is not entitled to recover the penalty from the beneficiary."

The decision of the Privy Council seems in accord with the general trend of the judgments for a number of years. In 1929 the Supreme Court of Canada in *Untermeyer Estate v. The Attorney-General for British Columbia*,⁶ held that the situs of the shares in question, viz., those of a mining company incorporated in British Columbia, was where they could be effectively dealt with. The Privy Council has by its decision given a severe blow to that battle-scarred doctrine *mobilia sequuntur personam*, and in a case

⁴ (1929), 63 O.L.R. 469.

⁵ [1925] A.C. 371.

⁶ [1929] S.C.R. 84.

which did not involve bank shares, such as did *Smith v. The Provincial Treasurers of Nova Scotia and of Quebec*⁷ and *Brassard v. Smith (supra)*. In those cases the fact of the shares being registered on the register of shares in the province of the domicile of the deceased complicated the question and there was room for argument that the bank shares were subject to succession duty, not because of their situs as the result of being registered in the province in which they were so subject to succession duty, but because of their situs under the maxim *mobilia sequuntur personam*. For an example of this reasoning, see the judgment of Anglin, J., in *Smith v. The Provincial Treasurers of Nova Scotia and of Quebec (supra)*.

It should be noted that in the case under review the company had taken the power in its letters patent or in supplementary letters patent to hold meetings of its directors or shareholders outside the Province of Ontario, but had never been granted relief from the provisions of section 122 of the Ontario Companies Act, requiring it to keep its books in the province. It is submitted that the result of the decision might have been quite different had the company been entitled to keep its books outside the province.

HENRY BORDEN.

Toronto.

* * *

SIGNATURE—FRAUD—HOLDER IN DUE COURSE.—The position of a holder in due course is generally regarded as being quite secure so long as any previous party to the instrument is able to respond for the amount thereof. However, after reading the report of a recent case, one realizes, if the decision arrived at is correct, that in what seems to be a very simple transaction, a holder in due course may be left with little but the instrument transferred to him and a bill of costs incurred in an unsuccessful action thereon.

In *Royal Bank v. Wannamaker*,¹ the plaintiff held a note whereon was the name of the defendant as maker and the endorsement of one Raynor as payee, the latter having become bankrupt after delivery of the note to the plaintiff. The Court found "that the defendant, being illiterate, unknowingly signed the note to Raynor, relying upon the latter's false representation that it was a document of a different nature and having no reason to suppose it was anything but what Raynor represented it to be." Accordingly,

⁷ (1919), 58 Can. S.C.R. 570.

¹ [1929] 4 D.L.R. 999.

it was held, that on account of the nature of the fraud and the fact that the defendant was not negligent in signing the note, there was no contract respecting it on which the defendant could be bound.

If a negotiable instrument is obtained by fraud, it may or may not be enforceable against the maker or acceptor, according to the nature of the fraud. Now, what is the dividing line respecting fraud which makes it on one side an effective and on the other not an effective defence against a holder in due course? The answer seems to be found in the effect of the fraud on the intention of the person who is led to sign the instrument as a result of the fraud. If, in his mind, there was the intention to execute an instrument of a different character to that signed by him and the instrument was signed without any negligence on his part, the case is to one side of the line and he is not liable on the instrument to any party.²

"His mind never went with such a transaction; for all that appears he had never heard of the plaintiff, and his mind was fraudulently directed into a different channel by the statement that he was merely witnessing a deed or other document."³

If the instrument, however, is of such a character as the maker or acceptor did intend to sign but is led to do so by a fraudulent representation respecting a term or terms of the instrument, the case falls to the other side of the line, and the signer is liable to a holder in due course but not to the person exercising the fraud. If the signer is forced to pay on such an instrument, he is entitled to recover his loss from the person through whose fraud the loss was caused. Fraud on this side of the line is merely a personal defence, not being good against a holder in due course.

"If a misrepresentation is made to you as to the purport or effect of the deed which you execute, intending to execute it though for a different purpose, that does not affect the deed; the fraud of the person who applies it to another purpose does not make it less your deed."⁴

"If a man knows that the deed is one purporting to deal with his property, and he executes it, it will not be sufficient for him in order to support a plea of *non est factum* to show that a misrepresentation was made to him as to the contents of the deed."⁵

It seems as if the facts of the *Wannamaker* case should place it on the side of the line last referred to. The instrument signed by the defendant and on which he was sued was of the type or

² *Foster v. Mackinnon* (1869), L.R. 4 C.P. 74.

³ *Lewis v. Clay* (1897), 67 L.J.Q.B. 224 at p. 227.

⁴ Lord Hatherley in *Hunter v. Walters* (1871), 41 L.J. Ch. 175 at p. 182.

⁵ *Howatson v. Webb* (1907), 77 L.J. Ch. 32 at p. 34.

character which he intended to sign. This being so, it would then come within the scope of the authorities last noted, and the maker should be liable to a holder in due course.

R. E. INGLIS.

Dalhousie Law School.

INSTRUCTIONS TO JURY IN NEGLIGENCE ACTION.—The judgment of the Court of Appeal in the case of *Cooper v. Swadling*, [1900] 1 K.B. 403; 99 L.J.K.B. 118, is of more than usual interest in view of the fact that some of our trial Judges do not hesitate to say that they find quite a little difficulty in clearly instructing a jury in a complicated motor car negligence action such as is so frequent nowadays. Lord Justice Scrutton suggests that the trial Judge say to the jury that if they think that the plaintiff was negligent, but that the defendant, after the plaintiff was negligent, could by taking reasonable care have avoided him, then the plaintiff's negligence is not as a matter of law negligence which contributes to the accident so as to prevent the plaintiff from recovering. This very simple way of putting the matter in a nutshell has been criticized because of the suggestion that the phrase "after the plaintiff was negligent," leaves one in doubt as to the precise point at which the plaintiff's negligence becomes negligence and when it ceases to be negligence because of the fact that the responsibility has been transferred to the defendant. Even this difficulty seems to be fairly well met by the well considered judgment in this case, and a very careful reading of it is recommended.