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COMMENTS

AGENCY—FRAUD—NO LIABILITY OF PRINCIPAL IN DECEIT FOR INNOCENT MISREPRESENTATIONS OF AGENT

Plaintiffs relied upon certain statements made by defendant's agents as to the value of the property in the purchase of a bungalow. The statements were made innocently but were false because of defects in the property not known to the agents. The principal knew of the defects but did not authorize the misrepresentations, or intentionally keep the agents in ignorance of the defects in order that they might make false representations to the purchaser, or even know that such misrepresentations had been made. Plaintiffs' claim against the principal and his agents for damages for fraudulent misrepresentations was dismissed. On appeal to the Court of Appeal, held: appeal dismissed. The principal's knowledge of defects in his property, in the absence of any intent to deceive, does not make him liable in an action for fraudulent misrepresentation for the innocent misrepresentation of his agent.¹

This case may settle the controversy created in 1840 by the case of *Cornfoot v. Fowke*,² in which the court held that the knowledge of the principal together with the innocent representation of the agent, in the absence of an intent to deceive on the part of either, did not constitute fraud. The justices, however, made it clear in their opinions that the defense would have been good if the principal had expressly authorized the misrepresentation or had purposely kept the agents in ignorance with the intention of deceiving the defendant. Then in 1842 the Queen's Bench held on similar facts that the principal was liable in an action of deceit.³ Although there was no moral fraud, the knowledge of the principal together with the representation of the agent was held to constitute legal fraud. On appeal to the Exchequer Division, the decision of the Queen's Bench was set aside on the grounds that the agent's misrepresentation had not been relied on by the plaintiff in making the purchase.⁴ Tindal,

1. *Armstrong v. Strain*, [1952] 1 All E.R. 139 (C.A. 1951).

2. 6 M. & W. 358, 151 Eng. Rep. 450 (1840).

3. *Fuller v. Wilson*, 3 Q.B. 58, 114 Eng. Rep. 429 (1842).

4. *Wilson v. Fuller*, 3 Q.B. 68, 1009, 114 Eng. Rep. 432, 796 (1843).

C. J., expressly stated, however, that the court had not gone into the question discussed in *Cornfoot v. Fowke*, so in this respect the decision of the Queen's Bench was allowed to stand.

Thus since 1842 there have been two conflicting views in the English law, with *Cornfoot v. Fowke*, although considered the leading case, receiving especially severe criticism. Not until 1889 was it conclusively decided, in the House of Lords, in *Derry v. Peek*,⁵ that "moral turpitude" was an essential ingredient of fraud and that there was no such thing as legal fraud. This should have strengthened the decision in *Cornfoot v. Fowke* but the point was still considered unsettled in 1936, when a principal was held liable for misrepresentations made by one agent, who knew they were false, to a second agent, who innocently related the misrepresentations to the plaintiff.⁶ It was not made very clear in that case whether the first agent was or was not guilty of fraud as defined by *Derry v. Peek*. If he was not guilty of fraud, then the decision was contrary to *Cornfoot v. Fowke*. The Court of Appeal, in deciding the principal case, determined, and it would appear rightly so, that the decision was based on a finding of fraud in the first agent. With this decision thus distinguished, the court was free to decide the principal case in accordance with the principal established by *Derry v. Peek* that there must be proof of moral fraud to sustain an action of deceit.

The holding of *Cornfoot v. Fowke* has been criticized in the United States,⁷ and it has been said that knowledge possessed by the principal or the agent is imputable to either of the two,⁸ but extensive research has failed to reveal an American case in point. Although many jurisdictions in the United States have rejected the doctrine of *Derry v. Peek* requiring "scienter" in an action of deceit, the majority of the states still follow it.⁹

5. 14 A.C. 337 (1889).

6. London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd., [1936] 2 All E.R. 1039.

7. Fitzsimmons v. Joslin, 21 Vt. 129 (1849).

8. Mayer v. Dean, 115 N.Y. 556, 22 N.E. 261 (1889).

9. The jurisdictions following *Derry v. Peek* have construed the doctrine of that case to include representations made by one who is conscious of the fact that he has insufficient knowledge on which to base his representations. This is well illustrated in *Jos. Greenspon's Son Pipe Corp. v. Hyman-Michaels Co.*, 133 S.W.2d 426 (Mo. App. 1939), in which the court said:

It is, of course, not necessary, in order to make out a case of fraudulent representations, that the defendant shall have had actual knowledge that the facts stated by him were false, but instead it will suffice if it

The states which have rejected this doctrine can be divided into at least two groups. In the first group, a defendant is liable in an action of deceit for an honest misrepresentation on which the plaintiff has relied and thereby suffered economic loss, if the defendant has failed to use reasonable care to discover the truth, or made the representation without reasonable grounds on which to base a belief in its truth.¹⁰ The second group has gone further than this and has imposed liability in an action of deceit not only in the absence of "scienter" but also substantially in the absence of fault.¹¹ This is in practical effect treating the defendant's statement that the fact exists to his knowledge as a warranty that the fact exists. In addition to these two groups, several American courts have recognized the difference in an action of deceit between allowing recovery when the defendant has a conscious guilty knowledge, and allowing recovery when he makes a misrepresentation negligently, and have allowed recovery in the latter case not in deceit but in negligence.¹²

What a court in the United States would decide on the facts of the principal case is of course a matter of conjecture. Whether the particular jurisdiction followed or rejected the doctrine of *Derry v. Peek* would certainly be an important if not controlling factor. Both Tiffany¹³ and Mechem¹⁴ feel that there should be liability on the part of the principal on facts like those of the principal case. Tiffany believes there could be liability in an action of fraud and deceit.¹⁵ He admits this would be somewhat of a departure from the requirement of "scienter" but states that this has been justified on the theory of the "com-

be shown that he made the particular representations with consciousness that he was without knowledge as to their truth or falsity, when, in fact, they were untrue.

10. *Prestwood v. Carlton*, 162 Ala. 327, 50 So. 254 (1909); *Whitehurst Life Ins. Co. of Va.*, 149 N.C. 273, 62 S.E. 1067 (1908); *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827 (1898). See Bohlen, *Misrepresentation As Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929).

11. *National Bank of Pawnee v. Hamilton*, 202 Ill. App. 516 (1916); *Chatham Furnace Co. v. Moffath*, 147 Mass. 403, 18 N.E. 168 (1888); *Seale v. Baker*, 70 Tex. 283, 7 S.W. 742 (1888); *Palmer v. Goldberg*, 128 Wis. 103, 107 N.W. 478 (1906).

12. *Cunningham v. Pease House Furnishing Co.*, 74 N.H. 435, 69 Atl. 120 (1908); *Glanzer v. Shepard*, 223 N.Y. 236, 135 N.E. 275 (1922). See Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184 (1909).

13. TIFFANY, AGENCY § 40 (2d ed. 1924).

14. 2 MECHEM, AGENCY § 1996 (2d ed. 1914).

15. TIFFANY, AGENCY § 40 (2d ed. 1924).

posite mind."¹⁶ Pollock, as quoted by Mechem, states that the principal should be liable either in an action for deceit or, as he says, in a somewhat similar action on the case.¹⁷ The *Restatement of Agency*¹⁸ would also impose liability on the principal, but it is not made clear whether the liability should be in deceit or in negligence.

It is submitted that a jurisdiction strictly adhering to the requirement of "scienter" as defined by *Derry v. Peek* would arrive at the same conclusion as the English Court of Appeal on the facts of the principal case. On the other hand, in the American jurisdictions which have rejected *Derry v. Peek* and which find fraud on the basis of negligence or warranty, it is very likely that the principal would have been held liable in an action of deceit or, in a few jurisdictions, in an action for negligence.¹⁹

DOMESTIC RELATIONS—NO PENAL LIABILITY OF FATHER FOR NON-SUPPORT OF ILLEGITIMATE CHILD

Defendant was charged with being the father of prosecutrix's illegitimate child. Evidence as to the time of the alleged illicit relations was conflicting, and defendant disclaimed paternity. The state failed to establish that defendant ever had had legal care or custody of the child. In the trial court defendant was convicted of non-support of said illegitimate child under section 559.350 of the Missouri Revised Statutes of 1949.¹ On appeal²

16. *Ibid.*, citing *Mayer v. Dean*, 115 N.Y. 556, 22 N.E. 261 (1889).

17. 2 MECHEM, AGENCY § 1996 (2d ed. 1914).

18. RESTATEMENT, AGENCY § 256(1) (1933):

A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently.

19. See text supported by note 12 *supra*.

1. MO. REV. STAT. § 559.350 (1949) provides as follows:

If any man or woman shall without good cause, fail, neglect, or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse, or neglect to provide adequate food, clothing, medical or surgical attention for such child . . . he or she shall, upon conviction be punished by imprisonment in the county jail for not more than one year, or by fine not exceeding one thousand dollars or by both such fine and imprisonment.

2. *State v. White*, 243 S.W.2d 818 (Mo. App. 1951).