University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES.

CARRIERS—STATE REGULATION OF RAILROAD RATES—SEGREGATION—It is universally conceded today that a State has the power to regulate intrastate railroad rates, although the exact nature of the power is not so well recognized. It is thought by some to be a branch of the power of eminent domain,[1] on the theory that the service is taken for the public use, and that the just compensation made by the State is the allowance of a reasonable rate. On the other hand, it has been considered a branch of the police power, and indeed the recent opinions of the Supreme Court of the United States would seem to show that it is so considered by that body.[2] Whatever the nature of the power may be, it is not unlimited in extent, but is sub-

[1] In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 (1893), at p. 410, Mr. Justice Brewer said that if a state took the actual railroad property under its power of eminent domain it would have to pay compensation. He then asks, "Is there less a departure from the obligation of justice to seek to take not the title but the use for public benefit . . . ?"

[2] German Alliance Ins. Co. v. Kansas, 233 U. S. 389 (1914).

ject at least to the Fourteenth Amendment to the Federal Constitution,[3] thus differing from the ordinary police power exercised by a State for the health, morals and safety of its people.[4]

These two principles, then, are well established: *first*, that a State may regulate rates of public service companies, and *second*, that such regulation will not be constitutional if the rates fixed are so low as to deprive the company of "a fair return on the value of that which it employs for the public convenience". These principles, so simple to state, become extremely difficult to apply to the complicated situations which arise when a rate or schedule of rates established by a State are contested as confiscatory. What is a fair return? How is the property devoted to the public use to be valued? Does the rule mean that a railroad is entitled to earn a return on every act performed by it, or merely on its business as a whole? Such questions as these cannot be settled by one or two decisions, but the lines must be "pricked out by the gradual approach and contact of decisions on the opposing sides".[5] Thus it was settled in *Smyth* v. *Ames* that interstate and intrastate business could be segregated in determining confiscation, *i. e.*, that the reasonableness of a schedule of intrastate rates could be attacked without showing that the whole of the carrier's business was carried on at a loss.

Two cases decided recently by the Supreme Court of the United States are most important, not only as pricking the line a little further, but as expressing rather more definitely than usual the general attitude of the court towards State regulation. In *Norfolk & Western Ry. Co.* v. *Conley*[6] the railroad attempted to set aside the two-cent passenger rate act of West Virginia. The evidence showed that the rate compelled the company to carry on its intrastate passenger business at or below cost. The State contended that if the company's entire intrastate business showed a fair return, it could not object to the passenger rate in question, but the court held that "the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal." In *Northern Pacific*

---

[3] Smyth v. Ames, 119 U. S. 466 (1898).

[4] A State acting *bona fide* under its police power is not subject to the Fourteenth Amendment. Barbier v. Connolly, 113 U. S. 27 (1885); Powell v. Pa., 127 U. S. 678 (1888). It is only when the act of the state is so arbitrary that the court cannot consider it as a *bona fide* exercise of the police power that the amendment does apply. Smith v. Texas, 233 U. S. 630 (1914).

[5] Noble State Bank v. Haskell, 219 U. S. 104, 112 (1911).

[6] No. 197, Oct. Term, 1914, decided Mar. 8, 1915. Opinion by Mr. Justice Hughes, U. S. .

[7] Nos. 420 & 421, Oct. Term, 1914, decided Mar. 8, 1915. Opinion by Mr. Justice Hughes, U. S. .

Ry. Co. v. *North Dakota* objection was made to the State rates on lignite coal, on the ground that they were confiscatory. The trial court found that the rate was slightly remunerative, but in fact non-compensatory, but there was no evidence that the net intrastate earnings failed to yield a fair return. The court held, as it did in the Norfolk & Western case that a State may not "segregate a commodity or class of traffic and compel the carrier to transport it at a loss or without substantial compensation".

These two cases are of primary importance as being flat decisions on the question of segregation, the one holding that intrastate passenger rates may be segregated, the other that intrastate freight rates on one commodity may be segregated. But in the latter decision, lest it should be misunderstood and its words extended too far, the court is careful to say that "with respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review". This decision must be considered in connection with the facts of the case, and due emphasis must be laid upon the words just quoted. The rates in question were rates established by a special act of the North Dakota[8] legislature, and applying only to shipments of coal. Had the coal rates been some of a number of other rates adopted by the legislature at the same time, it is submitted that under this decision unless the result of all such rates would be confiscation the court would not have interfered. The decision must be confined to the case where the legislature or a commission has singled out one rate or commodity and has acted with reference to that alone.

The Supreme Court has never given a definite decision on what is the "fair return" to which a carrier is entitled. But in these two recent cases in three places the words "substantial compensation" are used to indicate that which the carrier may demand. The phrase is significant as showing to the railroads that if they can ever satisfactorily prove to the court the real value of the property devoted to the public use, the return thereon to which they will be entitled will at least not be illusory.

In the Northern Pacific case the avowed purpose of the legislature was to reduce the coal rates so as to create a market for its coal and thereby give employment to local workers and develop local industry. It was urged that this was a declaration of public policy, which alone would support the rate, but the court refused to accept this argument and held that no public policy could require less than reasonable rates. This is in effect an assertion by the court that if the rate regulating power is a part of the police power, it may not be exercised in an arbitrary fashion, and as such is quite consistent with

[8] Laws 1907, chap. 51.

the previous decisions of the court on the limitations on the exercise of the police power of a State.[9]

These cases are also interesting in that in the background of the decisions runs the thought that the regulation of a carrier by the State is founded upon the public profession or holding out by the carrier and the regulation may not be extended beyond that to which the carrier has by his public profession impliedly agreed to submit. For example, in the Northern Pacific case, it is said, "The fact that property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed." And in the Norfolk & Western case it was said, "The devotion of the property of the carrier to public use is qualified by the condition of the carriers' undertaking that its services are to be performed for reasonable reward." The argument of the court thus seems to be that the State can regulate property devoted to a public use, but that the property of the carrier has been devoted to public use on the condition that it receive not less than a reasonable return, and that therefore the State in regulating is subject to the same condition, and may not regulate rates so that they do not yield a reasonable return.

T. R., Jr.

CONSTITUTIONAL LAW—INCRIMINATION—TESTIMONY BEFORE GRAND JURY—Article Five of the Amendments to the Constitution of the United States provides, among other things, that no person "shall be compelled in any criminal case to be a witness against himself". This provision was lately interpreted by the United States District Court for the Western District of Pennsylvania in a very interesting case.[1] The United States attorney instigated an investigation by the grand jury of an alleged fraud claimed to have been perpetrated upon the government by the Carbon Steel Company in furnishing certain steel for the construction of the Panama Canal. Three of the men summoned before the grand jury by subpoena, and not informed by the district attorney that they were the subjects of inquiry in the investigation then proceeding were subsequently indicted. They immediately moved to quash the indictment, assigning as their reason therefor that a conviction would be in violation of the Fifth Amendment. The question presented to the court was whether the fact that these defendants had been called as witnesses in the preceding investigation rendered an indictment against them invalid. The defendants' motion was overruled.

---

[9] Norwood v. Baker, 172 U. S. 269 (1898); Smith v. Texas, 233 U. S. 630 (1914).

[1] United States v. Wetmore *et al.*, 218 Fed. Rep. 227 (1914).

We find in this case a balancing of two important considerations in the eyes of the law, the first being that no person should be convicted of a criminal offense upon his own testimony, and the second that the administration of public justice should be given broad latitude and investigation into suspicious transactions be freely carried on. It has been settled that the preponderance of weight shall be attributed to the latter. To hold otherwise would restrict the grand jury to such a point that it would be compelled, before issuing its process, to ascertain whether there might be any chance of disclosing the culpability of a witness. Should one be subpoenaed for the purpose of acquiring information concerning the doings of others, and it be revealed during the inquiry that the witness himself was involved, all chance to prosecute this guilty man would be at an end.[2] Thus, one of the most useful functions of the grand jury would be greatly curtailed by this limitation upon its power to inquire into crimes generally.

The principal case turned upon the fact that the defendants had not been compelled to testify, having made no objection nor claimed immunity on the ground that their testimony might tend to incriminate them. Had they done so, they would doubtless have been able to avoid testifying.[3] The words "criminal case" have received different constructions in different courts, but the better view seems to hold that the preliminary investigation before the grand jury is part of such "case" to which the Fifth Amendment and similar provisions in State constitutions and statutes apply.[4] In accordance therewith, the majority of courts have held that one cannot be compelled to testify before the grand jury even where a statute has been passed to the effect that evidence obtained in such manner could not be used against him or his property in any criminal proceeding in any court of the United States.[5] The reason upon which such decisions are based is the fact that there was nothing to prevent the use of the witness's testimony to search out other testimony which in turn might be used against him after indictment.

If, however, the criminality is taken away absolutely, and a statute is in force granting entire immunity from prosecution as to matters sworn to by the witness, it has been held that he cannot re-

---

[2] See the court's citation of the district attorney's analysis of the results which would follow from a contrary decision, in the very similar case of United States v. Kimball, 117 Fed. Rep. 156 (1902), at p. 162.

[3] State v. Nowell, 58 N. H. 314 (1878); Counselman v. Hitchcock, 142 U. S. 547 (1891); Emery's Case, 107 Mass. 172 (1871); Cullen v. Commonwealth, 24 Gratt. 624 (Va. 1873); United States v. Kimball, *supra;* Boyd v. United States, 116 U. S. 616 (1886).

[4] *Cf.* People v. Kelly, 24 N. Y. 74 (1861), and Emery's Case, *supra.* For a thorough discussion of these conflicting views, see Counselman v. Hitchcock, *supra.*

[5] See cases cited in note 3, *supra.*

fuse to testify in spite of the Fifth Amendment.[6] This rule has been carried one step further in requiring a witness to testify before the federal grand jury, although the immunity extended to him by the federal statute did not extend to prosecutions in a State court;[7] and, conversely, the fact that an immunity granted to a witness under a State statute would not prevent a prosecution against him under a federal statute was held not to render the State legislation unconstitutional.[8]

J. N. E.

EVIDENCE—ADMISSIBILITY IN A CIVIL SUIT OF TESTIMONY GIVEN AT A PREVIOUS CRIMINAL TRIAL—The question as to the admissibility of testimony given at a criminal trial by a witness since deceased, in a subsequent civil action, involving substantially the same issue, between parties who had been prosecuting witness and defendant in the former proceeding, has given rise to conflicting opinions. Such evidence was admitted in two recent cases, the courts proceeding, however, upon different theories.

In the case of *Ray v. Henderson*,[1] one of these recent decisions, the following facts were involved. A civil action for damages for assault and battery was brought by a person who had already prosecuted the defendant criminally for a felonious assault based upon the same injury. The plaintiff sought to introduce testimony, given at the preliminary hearing before a magistrate by a witness who had subsequently died. The court said: "We have examined a number of articles in different text-books on this question, and believe that the rule relative to this class of evidence is fairly well stated . . . thus: 'Facts may be established by evidence thereof given on a former trial provided the court is satisfied: (1) That the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced.'" The court concluded that the necessary elements of this rule were satisfied by the facts of the case at bar with the possible exception of the requirement of identity of parties—a requisite

---

[6] Brown v. Walker, 161 U. S. 591 (1895). Mr. Justice Brown, speaking for the Supreme Court, here said, "When examined, the cases will all be found to be based upon the idea that if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else and much less that it shall be made use of as a pretext for securing immunity to others."

[7] Hale v. Henkel, 201 U. S. 43 (1906), where Mr. Justice Brown further said that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty".

[8] Jack v. Kansas, 199 U. S. 372 (1905).

[1] 144 Pac. Rep. 175 (Okla. 1914).

troublesome to other courts which, when confronted with the same problem, sought to apply an "orthodox" rule, similarly framed. In what appears to be the earliest case[2] in which the subject was considered by an appellate court, evidence given at a criminal trial for the forgery of a promissory note was held to be inadmissible in a subsequent civil action brought against the maker by the payee, who had been convicted of the forgery. The reason for this conclusion was set forth as follows: "A criminal prosecution, although instituted by an individual, is not in any sense an action between the persons instituting it and the prisoner. . . . The issue is between the government and the prisoner on a question of the guilt or innocence of the latter. It is not a question of property. Very different is the issue, as also the parties in a civil suit to recover on the forged instrument. Then the defendant is clear of the obligation, let the forgery be by whom it may, and the guilt or innocence of the plaintiff is not necessarily involved." However, in another early case,[3] in which the facts were identical with those in *Ray* v. *Henderson*,[4] similar evidence was admitted on the more logical ground that "the parties were for this purpose, substantially the same. The defendant was there *in propria persona* and the plaintiff, the injured party, represented by his protector, the State".

In the case of *North River Insurance Company* v. *Walker*,[5] another recent case, the question under discussion arose in the following manner. An action was brought on a fire insurance policy by the administratrix of the insured. The insurance company defended on the ground that the insured had set fire to the property, and sought to introduce testimony, tending to prove this fact, which had been given at a preliminary hearing of the latter upon a criminal charge of arson. The court admitted this evidence primarily upon the authority of Professor Wigmore's discussion of this subject. According to him, "There is no privity between the parties to a criminal prosecution and a civil action for the same injury, yet testimony given at the former ought to be admitted in the latter."[6] "The requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It then ought to suffice to inquire whether the former testimony was given upon such an issue that the party opponent had the same interest and motive in his cross-examination that the present opponent has."[7]

It seems obvious that Professor Wigmore's test, by which the admissibility of evidence given at a former trial depends essentially

---

[2] Harger v. Thomas, 44 Pa. 128 (1862).

[3] Gavan v. Ellsworth, 45 Ga. 283 (1872). *Accord:* Charlesworth v. Tinker, 18 Wis. 633 (1864); Krueger v. Sylvester, 100 Ia. 647 (1897); Heatley v. Long, 135 Ga. 153 (1910).

[4] *Supra*, n. 1.

[5] 170 S. W. Rep. 983 (Ky. 1914).

[6] Wigmore on Evidence, vol. 2, p. 1735.

[7] *Id.*, p. 1733.

upon an adequate opportunity for cross-examination, is far more logical and satisfactory than the arbitrary "orthodox" test which has previously been set forth. The application of the latter is apparently the cause of the conflict in the cases, some of which, as already noted, are strict in requiring a precise identity of parties, while others strain to prove that there is an identity of parties between the prosecuting witness and the defendant of a criminal action, and the plaintiff and defendant of a civil action involving the same issue. The case of *Ray* v. *Henderson*[8] recognized "a growing tendency to make the test as to the admissibility of such evidence, depend upon the right and opportunity to cross-examine. We think this test, most assuredly, should be applied, but not to the exclusion or even to the diminution in value, of the other essentials, such as reasonable identity of issues and parties". Such a view is not essentially different from Professor Wigmore's. However, as late as 1911, the Supreme Court of Illinois,[9] though the latter's test was pressed upon it, applied the reactionary doctrine that there must be a precise identity of parties and issues. The Illinois court said: "If the rule contended for were good law, then in an action by a passenger for a personal injury the testimony of a witness since deceased would be admissible against the same carrier for an injury sustained in the same accident by another passenger, an employee, a licensee, or a trespasser, simply because the carrier against whom the testimony was offered had on a former trial an opportunity to cross-examine the witness. This rule would carry us far afield and we cannot sanction it." It seems, however, that an application of Professor Wigmore's rule would not lead to any such conclusion.

The converse of the situation under discussion, namely, whether testimony given in a civil suit should be admitted in a subsequent criminal action relating to the same, has been presented in a few cases. The Supreme Court of Oklahoma[10] refused to admit testimony so given, although the same court, as has been already indicated,[11] reached a contrary conclusion where the former trial was criminal, and the latter, civil. The great weight of authority holds that the constitutional right of confrontation is not violated by the admission in a criminal trial of the former testimony of a deceased

---

[8] *Supra*, n. 1.

[9] McInturff v. Ins. Co. of N. Amer., 248 Ill. 92 (1911). The facts of this case are identical with those in North River Ins. Co. v. Walker, *supra*, n. 5, with the single additional fact that in the former case the witness, whose testimony, given at the former trial, was sought to be introduced in the subsequent civil suit, had been murdered for so testifying by the defendant in the criminal action. For a criticism of the Illinois case, see 6 ILL. LAW REV. 136.

[10] Watkins v. U. S., 5 Okla. 729 (1897). In this case, the defendant offered in evidence the testimony given at the former civil action. In Luckie v. State, 33 Tex. Cr. 562 (1894), the state attempted to introduce similar evidence, which was also excluded. *Contra:* Tichborne Case, charge of Cockburn, C. J., II, p. 305; State v. N. O. Waterworks, 107 La. 1 (1901).

[11] *Supra*, n. 1.

witness.[12] The same considerations should apply whether the first trial was criminal and the second, civil, or *vice versa*, for apparently there are no material differences between the two situations.

A. L. L.

FRAUD AND DECEIT—FIDUCIARY RELATIONSHIP—*Derry* v. *Peek* CRITICIZED—A recent decision of the House of Lords is interesting for its definite limitation and implied disapproval of the English rule that requires proof of actual fraud, with knowledge of the falsity of the representations, to support an action of deceit. This rule is laid down in the leading case of *Derry* v. *Peek*[1] and is followed by many American jurisdictions.[2]

The case in question involves the peculiar relationship of solicitor and client, and it is this circumstance that induces the court to distinguish the case and place it beyond the scope of the well-established doctrine that generally prevails. Lord Ashburton, the plaintiff, upon the advice of his solicitor, the defendant, had advanced a large sum of money to another of the latter's clients, with a mortgage as security. The defendant later acquired a second mortgage on part of the property and by his representations induced the plaintiff to release that part, to his ultimate damage in a large amount. There was gross negligence on the part of the solicitor and his conduct was reprehensible to a degree, but there was no evidence of actual knowledge on his part that his statements were untrue nor no proof of an intent to cheat, so as to support a conviction under the English rule. The trial court so found and dismissed the action, after pointing out that, though it had been clearly established that the defendant had advised the plaintiff badly and had fallen short of his duty as a solicitor to his client, a case based on fraud could not be turned into an action on the case for damages. The Court of Appeals, however, reversed the lower court's decision on the ground that there was evidence enough of actual fraud, but the House of Lords has taken the position that this can not be supported by the testimony, and that the plaintiff should be allowed to recover notwithstanding, on the ground that the relationship was one of a fiduciary character, to which the strict rule of *Derry* v. *Peek* should not apply.[3]

It is instructive and interesting to trace the process of reasoning by which the Lord Chancellor, Viscount Haldane, arrived at his conclusion and justified his decision. He realizes that the position

---

[12] Barnett v. People, 64 Ill. 325 (1870); Owens v. State, 63 Miss. 450 (1886); U. S. v. Macomb, 5 McLean, 286 (1851). *Contra:* Cline v. State, 36 Tex. Cr. 320 (1896).

[1] Peek v. Derry, 14 App. Cases, 337 (Eng. 1889).

[2] Dilworth v. Bradner, 85 Pa. 238 (1877); Wimple v. Patterson, 117 S. W. Rep. 1034 (Texas, 1909); Kreutz v. Kennedy, 147 N. Y. 124 (1895).

[3] Nocton v. Lord Ashburton, 111 Law Times, 641 (Eng. 1914).

he assumes at first blush might seem a startling one and takes pains to pick his way carefully along what he seems to regard as well known, though seldom trodden, paths of legal precedent. He first points out that Lord Herschell himself in his opinion in *Derry* v. *Peek* recognized the fact that the rule there laid down should not be applied to cases where there is some special duty to give correct information.[4] He declares also that this distinction has been overlooked by subsequent authorities, which, in his words, "show a tendency to assume that the case was intended to mean more than it did".[5] He then goes into the cases since 1889 in an effort to discover some recognition of this distinction and finds that the doctrine was indorsed by Lord Justice Lindley in a later case,[6] which, however, was distinguished on different grounds, thereby giving to that part of the opinion the weight of *obiter dicta* only. He next points out that from the earliest times the Courts of Chancery and of the common law exercised a concurrent jurisdiction in cases of fraud in the real sense, but that in addition the former always exercised an exclusive jurisdiction in cases that involved some special duty or peculiar relationship of trust or confidence. In this class of case, he declares that the term "fraud" was not used in the same sense as in the courts of law. In such cases, equity would "prevent a man from acting against the dictates of conscience as defined by the court" and to such cases the doctrine of *Derry* v. *Peek* never was intended to apply. He characterizes this use of the word "fraud" as unfortunate and calls it a "*nomen generalissimum*",[7] meaning in Chancery which falls short of deceit, but imports a breach of some fiduciary duty to which equity has attached its sanction. He thus arrives at the conclusion that nothing short of actual fraudulent intention in the strict sense must be proved in an action of deceit, no matter whether a court of law or a court of equity, in the exercise of its concurrent jurisdiction, is dealing with the claim, but not so where "fraud" is referred to in the wider sense used in Chancery to describe cases within its exclusive jurisdiction. There the fault is that the defendant has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and in that sense, his conduct has been "fraudulent".

---

[4] The words of the learned lord were as follows: "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurances he has given."

[5] Even before Lord Herschell's remarks, it had been pointed out by Lord Selborne in Brauntie v. Campbell, 5 App. Cas. 425 (Eng. 1880), that honest belief should be no defence in such cases. See also Burrowes v. Lock, 10 Vesey, 470 (Eng. 1805), where honest belief was no defence to a trustee who had made false statements as to the encumbrance upon the trust fund.

[6] Low v. Bonnerie, 65 L. T. Rep. 533 (Eng. 1891).

[7] See Lord Justice James in Torrance v. Bolton, 27 L. T. Rep. 738, L. Rep. 8 Ch. 118 (Eng. 1872).

Lord Haldane then turns his attention toward the facts of the case in question and shows there exists the peculiar relationship which is necessary. He explains that the special duty may arise from the circumstances and may give rise to an implied contract at law or a fiduciary obligation in equity, and finds that in the principal case, the client would have had a right of action at law for breach of the implied contract to be skillful and careful or in tort for negligence, as a remedy in equity because of the nature of the relationship.

Having thus found both an adequate remedy and the necessary prerequisites, Lord Haldane experiences no difficulty in arriving at a conclusion. Notwithstanding the fact that the declaration expressly set forth fraud and that both the lower courts had held that the action was one of deceit, he finds that it is really "an action based on the old exclusive jurisdiction of a court of equity over a defendant in a fiduciary position" and after some remarks as to the effect of the Judicature Act, affirms the award of damages granted by the Court of Appeals. The rest of the court realizes that this is not strictly the proper remedy but agrees with it nevertheless,[8] and the Lord Chancellor himself admits that the proper form of granting relief would be to order the defendant to restore to the mortgage security what he had procured to be taken out of it.[9]

It is submitted that this case must be taken to be an acknowledgement on the part of the House of Lords that the English doctrine which requires proof of actual fraud in an action of deceit, is too harsh a rule to be applied in all cases. Supported by innumerable decisions which have crowded the reports ever since the rule was announced, the doctrine of *Derry* v. *Peek* had become crystalized into a hard and fast principle by the time this case arose, yet here when the court was confronted with the problem as to whether or not it should apply the rule to a case involving the special duties of a fiduciary relationship, the very tribunal which is responsible for the rule refused to carry it to the limits which all courts up to this time had considered inevitable. Nor can the court be justly criticized for its position. The case was clearly one that demanded reparation for harm done and it is not surprising that the court could not bring itself to apply a principle which would have clearly defeated the ends of justice.

Rather should not the rule itself be open to attack? It proceeds upon the principle that a man should not be branded as a fraud-

---

[8] See the opinion of Lord Dunedin, who remarks, *inter alia*, as follows: "For the reasons given by the Lord Chancellor, I think there was here a remedy in equity for breach of duty. I agree that the form which that remedy would have taken would not have been damages, but looking to the course which the case has taken, I do not think it incumbent on us to alter the remedy to another which would practically come to much the same."

[9] This would have been possible in this case, for the defendant had a lien on the same property.

feasor, even though he has actually a fraudulent intent and the desire to cheat, if indeed, he does not actually know that the representations he makes are false and the inducements he holds out are pitfalls. A premium is put upon the honest blunderer. No matter how negligent a man may be in obtaining the information he gives, no matter if every other reasonable man would have realized that such information must necessarily be false, if it cannot be proved that there was actual knowledge of the falsity of the statements on the part of the defendant, there can be no conviction in England for deceit. Theoretically there may be grounds to support such a doctrine. Practically, however, it is inconceivable that it should be applied religiously to every case and it is therefore gratifying to note the refusal to do so in this recent decision of the House of Lords.

In America the rule has never been uniformly adopted.[10] Especially in the West is there a tendency to repudiate the English doctrine and to hold the defendant in actions for deceit to a strict liability under all circumstances. It is also of interest to note that Parliament itself was dissatisfied with the rule and shortly after it was announced enacted legislation which made it effectual thereafter with respect to situations similar to the facts of *Derry* v. *Peek*.[11] This recent decision of the House of Lords puts a still further limitation upon the rule. There is some doubt as to whether it was ever intended to be so wide in its application,[12] but however that may be, its scope in this respect is now determined.

L. B. S.

SALES—APPROPRIATIONS—Where there is an executory contract of sale, requiring the seller to appropriate certain goods to the contract, the seller cannot, even though the contract bind the buyer to accept the seller's appropriation, appropriate to the contract goods which are no longer in existence or have been destroyed. B contracted to buy from A, a dealer in oil seed, six thousand tons of soya beans, and a clause in the contract recited that: "In case of resales, a copy of original appropriation shall be accepted by buyers." The shipper of a cargo of soya beans sold it to A while it was still afloat and delivered to A a formal appropriation of the cargo. A intended to re-appropriate the cargo to B's purchase by delivering to B a copy of the "original appropriation", which B would be bound by his

---

[10] Grant v. Hushkle, 74 Wash. 257 (1913); Scholfield Pulley Co. v. Scholfield, 71 Conn. 1 (1898); Holcomb v. Noble, 69 Mich. 396 (1888).

[11] Directors' Liability Act of 1890.

[12] See remarks of Lord Herschell, *supra*, note 4. See also criticism by Lord Haldane, in the principal case, as follows: "If among the great common lawyers who decided Derry v. Peek there had been present some versed in the practice of the Court of Chancery, it may well be that . . . more attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, courts of equity gave a remedy."

contract to accept. But before A could do this, he received word that the ship had sunk and the cargo was lost. Nevertheless he tendered the "copy of original appropriation" to B, as provided by the contract. B refused to accept it, knowing the cargo was at the bottom of the sea. The dispute was referred to arbitrators, under a clause in the contract, and they decided that B was bound to accept the tender. From that award B appealed to the Committee of Appeal of the Incorporated Oil Seed Association, and the committee stated a special case for a King's Bench Divisional Court to decide the point of law. It was held (Avory, Rowlatt and Shearman, JJ.), reversing the award, that B was not so bound.[1] The procedure in the case is an illustration of a method by which merchants in London submit their disputes to extra-legal authorities for settlement, in the course of which involved legal problems may be submitted by those authorities to the High Court for elucidation. It is a very common practice.

It is clear that a buyer may agree, in his contract, to be bound by the seller's appropriation of goods, without further assent.[2] But if the goods perish before they are appropriated to the buyer's contract it is as though the seller had never had them and his "appropriation" will be a mere empty form which cannot bind the buyer. It is not one of the cases where impossibility of performance renders the contract void, as provided for by Sections Six and Seven of the Sale of Goods Act;[3] they apply only where specific goods are appropriated to the contract by the terms of the contract itself, not where they are to be subsequently appropriated thereto. If the contract here, for instance, between A and B, had been for the sale of beans in that particular cargo, the loss of the cargo would have avoided the contract, under these sections of the act.

There is, it is true, an equitable rule that where a contract purports to assign goods to be acquired *in futuro*, as in this case, "if the goods be sufficiently described to be identified on acquisition by the seller, the equitable interest in them passes to the buyer as soon as they are acquired."[4] But as it is well understood that the seller can, before actual appropriation, defeat this equitable interest by a resale to a second purchaser who is without notice,[5] so also that equitable interest would be wiped out by the loss or destruction of the goods before actual appropriation.

The decision involves no novel point of law but registers formally the opinion of a court on a point in the law of sale which, though clear, does not seem to have been the basis for any reported judgment.

S. R.

---

[1] *In re* an Arbitration between The Olympia Oil & Cake Company, Limited, and the Produce Brokers Company, Limited, [1915] 1 K. B. 233.

[2] See Blackburn, p. 137.

[3] 56 & 57 Vict., c. 71 (1893).

[4] Chalmers, p. 27; Holroyd v. Marshall, 10 H. L. 191 (Eng. 1862).

[5] Joseph v. Lyons, 15 Q. B. D. 280 (Eng. 1884).