

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Bear  
and another v. Stevenson and another, from  
the Supreme Court of the Colony of Vic-  
toria; delivered January 22nd, 1874.*

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Present :

LORD CHANCELLOR.

SIR BARNES PEACOCK.

SIR MONTAGU E. SMITH.

SIR ROBERT P. COLLIER.

THE Appellants were the Defendants in a suit brought by the Respondents Messrs. Stevenson against them and the co-Defendant Banks, for conspiring together with intent to procure Landale, who was the agent of the Australian Pastoral Investment Company Limited, to make a fraudulent representation.

Assuming that under the plaint which charges a conspiracy the Plaintiffs were not bound to prove an actual conspiracy, in which two persons at least were implicated, and that they might succeed upon proof that any one of the Defendants fraudulently caused Landale to make a wilful and fraudulent misrepresentation, the question is, whether any evidence was given to prove that the Defendants, or either of them, were or was guilty of such misconduct.

The plaint in the suit charges "that before  
" the committing of the grievances. Landale  
" had requested the Plaintiffs to advance and  
" lend to the said company 20,000*l.*, upon the  
" security of a lien upon the then ensuing  
" clip of wool of the said company, and that  
" the Defendants, contriving to induce the Plain-  
" tiffs to advance and lend the said money on

“ the security aforesaid, and to obtain the same  
“ for the said company, falsely, wickedly, and  
“ maliciously did amongst themselves conspire,  
“ combine, confederate, and agree together to  
“ procure the said Robert Russell Landale  
“ falsely and fraudulently to pretend and repre-  
“ sent to the Plaintiffs that a certain mortgage  
“ to one Robert William Nutt and others was  
“ the only incumbrance on the said sheep and  
“ wool, and that in pursuance of the said  
“ conspiracy, combination, confederacy, and  
“ agreement, and in order to carry the same into  
“ effect, the Defendants did wickedly and ma-  
“ liciously procure the said Robert Russell Lan-  
“ dale falsely and fraudulently to pretend and  
“ represent to the Plaintiffs, and that the said  
“ Robert Russell Landale did by such procurement  
“ of the Defendants falsely and fraudulently pre-  
“ tend and represent to the Plaintiffs that the  
“ said mortgage was the only incumbrance on  
“ the said sheep and wool.”

The plaint does not go on to say that in consequence of that misrepresentation the Plaintiffs were induced to lend money upon a security which failed, and from which they derived no benefit in consequence of a previous incumbrance. That is not their charge; nor do they charge that any misrepresentation was made to them respecting the solvency or the state of affairs of the company. The charge is simply for misrepresenting that the mortgage was the only incumbrance upon the clip of wool which they were about to charge as a security for the loan.

Some attempt was made in the course of the argument to show that the Defendants were liable for a false representation upon the first negotiation for the loan, when Landale stated that the clip was all straight. It is said that at that time the clip was not all straight, because there were incumbrances upon it, and that that was a false

and wilful misrepresentation. But if Landale was under the impression at that time that those incumbrances would be discharged with the money which was to be advanced, and they were so discharged, it was no fraudulent representation on his part at that time to say that the clip was all straight. But even if it was a false representation on the part of Landale, it is not the false and fraudulent representation which is the subject of the plaint. If there is one case more than another in which a Plaintiff ought to be bound to his allegations, and to recover *secundum allegata et probata*, it is a case in which the Defendant is charged with a false and fraudulent representation, or in which he is charged with having conspired with another person to induce a third person to make a false and fraudulent representation.

Their Lordships in the course of the argument expressed an opinion that the Defendants were not liable under the declaration in this suit, in respect of any statement made by Landale on the first negotiation for the loan.

The case, then, comes to this: Was there a false and fraudulent representation made by Landale when he stated that the mortgage to Messrs. Nutt and others was the only incumbrance on the sheep and wool; and if so, was it a false and fraudulent representation upon which the Plaintiffs acted, and in consequence of which they sustained damage; and further, whether, assuming it to be a false and fraudulent representation, whether the Defendants, if they did not induce Landale to make it, were liable for it because Landale was their agent?

Now the Defendants, as directors, were only the agents of the company; and no case has gone to the extent of showing that a principal agent is responsible for the acts of a sub-agent with respect to a representation made in favour of his principal.

The company was a company with limited liability, and if the Defendants actually made or authorised Landale to make a fraudulent representation, of course they would be personally liable; but if they are to be made liable simply because Landale was the agent of the company, and they were the directors, they, as directors, would be made liable to an unlimited amount of damages, while the company could be responsible only to the extent of their limited liability.

The case depends principally upon the letters of the 20th and the 21st of May 1867; but previously to those letters there had been a letter of the 13th of May 1867, and another of the 15th of May, which have been alluded to by the learned counsel for the Respondent.

The letter of the 13th of May 1867 was written by Messrs. Stevenson and Sons to Mr. Landale. They say, "Having perhaps  
" led you to expect an answer from us this  
" afternoon as to our decision about the advance  
" on next season's clip of wool of the Australian  
" Pastoral Investment Company, we send  
" this to say that our solicitor is, according  
" to promise, using every despatch in perusing  
" the necessary deeds. As a guide to yourself  
" we may state that we see every prospect of our  
" acceding to the proposed terms, as we only  
" await our solicitor's approval, which we hope  
" will reach us in a day or two."

On the 15th of May, Messrs. Stevenson wrote to Mr. Landale: "Confirming our note  
" of the 13th of May, we now beg to accept  
" the proposed terms for consignment of your  
" Company's next clip of wool, to be shipped  
" through our house. It is understood that  
" the following terms are agreed upon: You  
" to give us the usual lien over the forthcoming  
" clip to be shorn from 143,000 sheep at  
" least, with the consent of the mortgagee  
" of sheep, to satisfy our solicitor, for which

“ we agree to give our acceptances, each for  
“ £10,750, maturing respectively the 28th of  
“ January 1868 and the 28th of February 1868,  
“ being advances upon the consignment.”

So that at that time they had agreed to accept the proposal, and to make the advance, and having accepted the proposal, all that remained to be considered was, whether the security could be given, whether the Defendants or the company were in a position to assign over the next season's clip of wool, or whether there was any incumbrance upon it; and the matter had been put into the hands of the Plaintiff's solicitors for the purpose of determining that question, and seeing that they could fairly and properly obtain the security which they wanted. But at the time when this letter was written there was no suggestion whatever made that if the security could be given, they wished to be satisfied as to the responsibility of the company.

At that time Messrs. Miles and Company were willing and desirous to make the advance upon the clip, and it was supposed by all parties that the next clip of wool would be sufficient to satisfy the whole amount of the 22,900*l.* which was to be advanced upon it, and all necessary expenses. In fact, it was supposed at that time that the making of the advance upon the clip of wool would be a profitable undertaking, as doubtless it would have been if the proceeds of the clip had been, as it was supposed they would be, sufficient to answer the amount of the loan. It was a beneficial thing to make advances upon wool, because the parties got the interest of their money; they got the business of selling the wool, and they got the commission upon selling it, and so far was it considered by Messrs. Stevenson as a profitable matter, that they actually offered to Mr. Landale,

who was the agent of this company, to give him one half per cent. upon all loans upon clips of wool which he should introduce to them. They, therefore, thought it was a profitable thing to lend money upon clips of wool, and at that time it was expected that the clip of wool would be sufficient to answer all the monies they were to advance upon it. All they wanted to know was, whether they would get a title to the next clip of wool as a security for their advance, and that, without incumbrance.

Their solicitors, on the 20th of May, wrote to Mr. Bennett, who was the solicitor of the company:—"Before preparing the lien on wool  
" for the proposed advance in this case, we  
" shall be glad if you will furnish us with  
" evidence that the directors have authorised the  
" company obtaining the advance, and the par-  
" ticular security to be given for it. A certified  
" copy of the minute of the directors would be  
" satisfactory evidence. We also wish to have  
" some evidence (such as the statutory declara-  
" tion of the secretary) that all interest on the  
" debentures payable on the 1st of April last  
" has been paid."

Now to that extent and to that alone they were enquiring with regard to the responsibility of the company. They wished to know whether the company had paid up the interest which was due on their debentures. They did not express a wish to know whether the company had been borrowing money from other persons, or whether they were in a solvent state or not. All that they asked, with reference to that subject, was whether they had paid the interest on the debentures due on the 1st April, and whether the full "number of 150,000 sheep bearing simi-  
" lar brands, and equal in all respects to those  
" comprised in the mortgage, were then de-  
" pasturing on the runs named in the first

" schedule to the mortgage." Then it was  
 thrown in, not actually asking for it, but put  
 in this way: "and the declaration might also  
 " state that the mortgage to Messrs. Nutt  
 " and others is the only existing incumbrance  
 " on those sheep." Not whether there had  
 ever been any other incumbrance upon them,  
 but whether Messrs. Nutt's was the only  
 existing incumbrance. They add,—“ We may  
 " mention that the result of the registry  
 " search is satisfactory, and that on receiving  
 " the evidence asked for, the matter can be  
 " completed forthwith.” Mr. Landale, on the  
 21st May 1867, wrote as follows:—“ Dear sirs,—  
 " In reply to your letter of yesterday's date, ad-  
 " dressed to the company's solicitor, I beg to  
 " hand you enclosed certified extract from the  
 " minutes of the Board, authorising the pro-  
 " posed wool lien and advance. With regard  
 " to the payment of the interest on the com-  
 " pany's debentures, £2,880 of that due  
 " 1st April last is payable in Melbourne and has  
 " been duly retired. A further amount of  
 " £2,020 is payable in London, and this has been  
 " duly attended to by the company's bankers,  
 " but as the coupons appertaining thereto cannot  
 " arrive here till the June mail, no positive  
 " evidence of the payment of them can be given  
 " till that time. The number of all the sheep  
 " on the company's stations at 30th March last  
 " was 158,324, of which 15,190 were started for  
 " market, leaving 143,124 on the stations at that  
 " date, but as the season is favorable, I have no  
 " hesitation in stating that the number likely to  
 " be shorn will be over 150,000.” Then there  
 was a postscript as follows: “The mortgage to  
 " Messrs. Nutt and others, is the only incum-  
 " brance on the sheep and wool.” The letter  
 was written on the 21st of May, but it was  
 proved beyond all doubt by Mr. Landale that the

postscript was not written until the 22nd of May. The question is, whether that was a fraudulent representation made by Landale, and, if it was a fraudulent representation made by Landale, whether Landale had the authority and direction of the Defendants to make it, and, if he had not their authority and direction to make it, whether the Defendants were liable upon the ground that Landale was their agent.

It was contended that the postscript was fraudulent and false, because there were two outstanding incumbrances, viz., an incumbrance of 8,000*l.* in favour of the Bank of Victoria, and an incumbrance of 2,000*l.* upon another portion of the sheep in favour of Messrs. Miles. But it was proved that before the postscript was written, the company had received back from the Bank of Victoria their charge upon the clip of wool, and that they had also received back from Messrs. Miles the incumbrance upon the clip of wool for their 2,000*l.*, and those charges upon the wool were in the hands of the company, and in the hands of Mr. Landale before he wrote that postscript.

Mr. Bear, who is one of the Defendants, and the managing director of the company, gave a receipt to the bank when he received back their charge for the 8,000*l.* It was as follows:—  
 “ Received from Bank of Victoria a wool lien  
 “ dated 1st May 1867 (A. P. J. Co. W. Bk. of V.)  
 “ for 8,000*l.*, said lien to be returned, or Messrs.  
 “ L. Stevenson and Sons’ bills at six months of  
 “ equivalent value substituted.” The charge in favour of the Bank of Victoria was in the hands of the company, and in the hands of Mr. Landale when the postscript was written, subject only to the condition that, if the company should not give Stevenson and Sons bills at six months of equivalent value, the lien was to be returned to the bank. But the company intended at that time to give Messrs. Stevenson bills; they never



intended to be in the position in which they would have to give back that lien to the Bank of Victoria, and they never were in that position; for with the bills which they received from Messrs. Stevenson on account of the loan, they paid off the debt to the bank and discharged the lien, which was thenceforth no longer an incumbrance upon the clip of wool.

The same thing took place with regard to Miles's charge for the 2,000*l*. Landale had got back into his hands the lien which Messrs. Miles had upon the clip, and he was only to return it in the event of the company's not paying off the money. They did pay it off by means of the advance which they obtained from Messrs. Stevensons. Substantially, then, there was no incumbrance on the sheep and wool other than that of Messrs. Nutt and others when the postscript to the letter of the 21st of May was written. Even if the statement was not verbally correct, it certainly was not a false and fraudulent misrepresentation. Messrs. Stevenson got the security which they intended for their loan of 22,000*l*. No other incumbrance was ever set up against them. They received the clip of the wool for the next season, but they were disappointed in this respect, that in consequence of drought the wool fell short and was of an inferior quality to that which they expected. The market price had fallen, and the clip of wool which they anticipated would be sufficient to realise the money which they advanced, and their commission upon the sales, fell short, and they were out of pocket to the extent of 9,500*l*., which were admitted to be the damages in this suit, provided they were entitled to damages at all.

Then the question arose,—as the wool only realised an amount short of their actual advance, where were they to get the difference. The

company they say is not able to pay, and therefore this misrepresentation has caused the damage. The plaint goes on to state, "By means of which said premises the Plaintiffs were compelled to pay and did pay to the persons to whom the said company had endorsed the said promissory notes the said several sums." But it was not any misrepresentation which compelled them to pay these notes. The notes were given by way of advance. It was intended that they should be negotiated, and that the Plaintiffs should pay them. But then they go on further, and say that the said sums have not been repaid to the Plaintiffs, and that they are likely to lose the same. That however was not in consequence of any false representation made by Landale. The monies have not been repaid to the Plaintiffs because the security which they thought would realise 22,000*l.* and their expenses did not realise that amount, and they have not been able to recover the difference from the company; not because there was any other incumbrance upon the sheep or wool which affected the Plaintiff's right to avail themselves of it. Their liability to pay the notes did not, nor did their inability to recover the difference from the company arise from any misrepresentation on the part of Landale. If in consequence of the state of the company's affairs the Plaintiffs have not been able to recover the difference between the amount of their advances and the amount realised from the clip of wool, that loss was not the consequence of any misrepresentation made by Landale; for no inquiry was ever made by the Plaintiffs, nor was any representation made by Landale respecting the state of the affairs of the company. There is no charge in the plaint, either against Landale or against the Defendants, that they misrepresented the state of the affairs of the company, by means

of which the Plaintiffs were induced to advance the money.

It appears to their Lordships that there was no evidence to go to the jury that Landale was guilty of making a false and fraudulent misrepresentation; and even if he did make a false representation, there was no evidence to go to the jury that the Defendants authorised him to make it.

The Court in Victoria held that the Defendants were liable in consequence of a false representation made by Landale, because Landale was their agent. But Landale was not their agent. They were agents for the company. Landale was also an agent for the company; and although the company might have been liable for a false representation made by Landale without their authority, the Defendants were not the principals of Landale, and therefore were not liable for any misrepresentation made by him, unless he was induced or authorised by them to make that representation.

Their Lordships, therefore, are of opinion that the Court below ought, instead of discharging the rule for a nonsuit with costs, to have made it absolute with costs. They will, therefore, humbly recommend Her Majesty that the rule of the 27th of March 1872, by which it was ordered that the rule nisi of the 27th November 1871 for setting aside the verdict and entering a nonsuit be discharged with costs, be set aside; and that the said rule nisi be made absolute, with costs, and that the Respondents do pay the costs of this Appeal.

The sum of £10,206 15s. 7d., paid by Mr. Bear and Mr. Macintosh in satisfaction of the damages, interest, and costs, on the 8th May 1872, is to be repaid by the Respondents to the Appellants with interest at the Court rate in the colony, from the date of payment to the date of repayment.

INDEX

Page

Introduction

Chapter I

Chapter II

Chapter III

Chapter IV

Chapter V

Chapter VI

Chapter VII

Chapter VIII

Chapter IX

Chapter X

Chapter XI

Chapter XII

Chapter XIII

Chapter XIV

Chapter XV

Chapter XVI

Chapter XVII

Chapter XVIII

Chapter XIX

Chapter XX

Chapter XXI

Chapter XXII

Chapter XXIII

Chapter XXIV

Chapter XXV

Chapter XXVI

Chapter XXVII