REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL DEALING WITH QUESTIONS OF INTEREST IN SCOTS LAW. *(Continued from page 646 ante).*

HOUSE OF LORDS.

Thursday, May 30, 1907.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Macnaghten, James of Hereford, Robertson, Atkinson, and Collins.)

S. PEARSON & SON, LIMITED *v.* DUBLIN CORPORATION.

(ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.)

Contract—Principal and Agent—Fraudulent Misrepresentation—Clause Disclaiming Responsibility for Statements in Contract—Fraud of Agent—Responsibility of Principal.

P. & Son, Limited, entered into a contract with a corporation to construct certain sewage works at a certain price. The engineer of the Corporation prepared plans, which were shown by the Corporation to P. & Son, Limited. These plans misrepresented the state of the *locus* in an important matter, which materially affected the price agreed upon by P. & Son. The Corporation were not actually aware of the fact that the plans were inaccurate. The contract contained a clause that the contractor was to satisfy himself as to dimensions, levels, &c., and "was to obtain his own information on all matters which can in any way influence his tender." P. & Son alleged that the misrepresentations in the plans were false and fraudulent, and brought an action against the Corporation for damages for fraudulent misrepresentation.

Held (1) that the clause which provided that the contractors were to satisfy themselves applied only to inaccuracies and errors, and not to fraud, (2) that accordingly P. & Son were entitled to have an opportunity of proving fraud on the part of the engineers, and (3) that if they were successful the Corporation would be liable.

"It matters not in respect of principal and agent (who represents but one person) which of them possess the guilty knowledge, or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who has the guilty knowledge."

Appeal from a judgment of the Court of Appeal in Ireland (WALKER, C. FITZGIBBON, and HOLMES, L.JJ.), who had reversed a decision of the King's Bench Division (GIBSON, BOYD, and WRIGHT, JJ., LORD O'BRIEN, C.J., *dissenting*) setting aside a judgment of PALLES, C.B., in favour of the respondents—the defendants below—at the trial of the action before him with a special jury, and ordering a new trial. In so far as material the facts appear from the considered judgments of their Lordships, *infra*.

LORD CHANCELLOR (LOREBURN)—This is an action for deceit brought by Messrs Pearson & Son, contractors, against the Dublin Corporation. Inasmuch as I am about to propose that the case be remitted for a new trial, it is desirable that I should say no more than is necessary to explain my view. The plaintiffs' case is that they were induced to enter into a contract for the construction of certain sewage works by statements made by and on behalf of the defendants as to the existence to a depth of 9 ft. below Ordnance datum of an old wall. Undoubtedly evidence was adduced at the trial from which the jury might, if they thought right, conclude that the plaintiffs were so induced by statements made on behalf of the defendants. Also, there was evidence for the jury that those statements were made either with a knowledge of their falsity, or (which is the same thing) with a reckless indifference as to whether they were true or false, on the part of the engineers employed by the defendants to make the plans which were submitted to plaintiffs as the basis of the tender. And had the case rested there I gather that Palles, C.B., would have left the case to the jury, and that the learned Judges who subsequently had this litigation before them would have approved this course. But another feature of the case was considered fatal to the plaintiffs' claim. The contract contained clauses, which I need not cite at length, to the effect that the contractors must not rely on any representation made

in plans or elsewhere, but must ascertain and judge of the facts for themselves. And therefore the Chief Baron withdrew the case from the jury. As I understand it, the view which he held, in substance confirmed by the Court of Appeal, was that the plaintiffs, so forewarned, had no right to rely on any representation, and could not be heard to say they were induced to act on statements on which by contract they were not to rely. Or, at all events, it was said that the defendants, being themselves innocent, are protected by such clauses against the consequence of contractors acting on false statements made by defendants' agents, however fraudulent those agents might be. Now, it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man, himself innocent, may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that, in my opinion, the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes. Counsel for the Dublin Corporation make a further point. They say that, though a principal is liable for the fraudulent representation of his agent, yet that rule only applies where the representation has in fact been made by the agent. I cannot accept that contention. The principal and the agent are one, and it does not signify which of them made the incriminating statement, or which of them possessed the guilty knowledge. I respectfully recommend to your Lordships that this case be sent for a new trial, and that the respondents pay the costs of this appeal and the costs in the Court of Appeal, the costs of the first trial to abide the event.

EARL OF HALSBURY—I concur in thinking that in this case there must be a new trial, and for that reason I wish to say as little as possible on the merits of this case. The Chief Baron refused to leave the case to the jury upon grounds to be presently examined, but in the course of what I have to say I wish to point out at once that all that I wish to affirm is that there was evidence produced by the plaintiff which he had a right to have submitted to the jury. I do not assume that the jury would have found that fraud had been committed by anyone. Still less do I propose myself to find fraud proved as a fact, but simply that it was a question which ought to have been submitted to the jury. The sole question here appears to me to be that question. It was an ordinary action for fraud causing damage to the plaintiff. Tenders were invited for a contract to execute certain work, and certain plans and specifications were held out to intending contractors as what I will at present call notices of what the work was intended to be. A contract was ultimately concluded upon the terms thus held out; and I may say at once that, apart from the question of fraud, there was nothing proved which could have called for an answer from the defendants. It is not necessary to go far in reciting the questions of fact. Palles, C.B., pointed out with great clearness how the question of fact is raised, and it turns upon the existence or non-existence of a certain wall. It is not denied that the wall was represented on the plan as going 9 ft. below the datum line, and the Chief Baron himself states that this statement was acted upon by the contractors so as to induce them to send in the tender at a less sum than they would otherwise have done for the execution of that contract. It is better, perhaps, to quote the Chief Baron's own words. His Lordship says—"In the result, then (and, as I have said, I have arrived at the conclusion with regret), I think that there was a statement contained in these plans which was in fact an incorrect statement. I think that the result of that incorrect statement was that the plaintiffs here sent in the tender which was accepted, and was for a sum much less than that for which they would have tendered if they had known the truth. But I am obliged to hold upon this 43rd section, together with the 46th, 47th, and 48th, which I will not occupy time in reading, that, taken as a whole, or, rather, taking the plans as controlled by the specification, they do not contain a representation intended to be acted upon, that this structure penetrated 9 ft. below Ordnance datum." It will be observed that the Chief Baron affirms both propositions —that the statement was inaccurate in fact, and that the tender was for a less sum than the contractor would otherwise have offered if he had known the truth. The one point which led to the Chief Baron's judgment was, to use his own words, that the statement which he finds as a fact to be inaccurate does not contain a representation "intended to be acted on that the structure penetrated 9 ft. below datum line." With the sincere respect that I have for anything said by the Chief Baron, I cannot help saying that there is some confusion here. The words may be the subject of contract, and they may be so qualified or cut down by other words as to alter their primary meaning, but the intention with which words are used is the condition of mind of the person using them, and that is a question of fact to be ascertained by a jury. If one assumes that the statement is false, and that it has caused a person to act upon it to his prejudice, the question whether it was fraudulently made by the person who made it may and ought to be decided by a jury. But the learned Judge seems to think that the 43rd section of the contract removes it from being a question of fact for a jury, and that it becomes thereby a question of law for the Judge. I must say, notwithstanding my great respect for the learned Judge, that I entirely differ from that view. The action is based on the allegation of fraud, and no subtlety of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact sub-

mitted to a jury. I assume, of course, that there is evidence proper to be submitted to a jury, as in this case I think that there was, and if I rightly understand the Chief Baron he would have submitted it to the jury but for the operation of that 43rd clause. I am wholly unable to understand why it was not proper to submit to the jury the question whether the answer given by the defendants' agents in respect of this very matter did or did not prove that the false statements contained in the plans were or were not fraudulently made, and if they were not intended to be acted on by the persons to whom they were made. The witness Hellens in the course of his evidence stated that he and his assistants had prepared the plans and drawings on behalf of the respondents, with the approval of Messrs Harty & Chatterton, their engineers, and in manner and design that had their consent and concurrence. The design of the plans was for the purpose of saving cost. He knew when preparing the plans that if a contractor had reason to believe that the wall was non-existing his tender would be substantially increased, and that he would practically have estimated for a coffer-dam costing £25,000. About £100 for a trial hole would have at least ascertained the existence of the foundations at any particular spot. The existence of the wall to a depth of 9 feet was the backbone of the scheme. [*His Lordship read a portion of the evidence*]. I do not understand the learned Judge to express any doubt as to the liability of the principals for the fraud of their agent if there was fraud. If *Cornfoot* v. *Fowke* (6 M. & W. 358) was supposed to decide that the principals and agent could be so divided in responsibility that the united principal and agent might commit fraud with impunity it would be quite new to our jurisprudence. One of the learned Judges who decided the case of *Cornfoot* v. *Fowke* explained it by saying that it was only decided on a point of pleading, and another by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons I do not care to inquire. It is enough to say that the case is not law if it is supposed to affirm the proposition to which I have referred. Willes, J., said that he would be very sorry to suppose that the case ever decided anything but a point of pleading, and added in *Barwick* v. *English Joint-Stock Bank* (16 L.T.R. 461, L.R., 2 Ex. 259), in delivering the judgment of himself and Blackburn, Keating, Mellor, Montague-Smith, and Lush, JJ., that the division of opinion in *Udell* v. *Atherton* (7 H. & N. 172) arose not so much upon "the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time (*Hern* v. *Nicholls*, 1 Salk. 289)—but in applying that principle to the peculiar facts of the case, the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business as the manager of a bank is. But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." We have, of course, nothing to do here with the question of damages, which could not be treated of till the questions now in debate have all been decided, but I do not think that the suggestion of one of the learned Judges can be maintained, that because the work is to be measured and valued there could be no damage sustained by the contractor if there were fraud. I think that there is some misapprehension in the mind of the learned Judge as to the application of the agreement as to measure and value. It is, however, enough to say that we have nothing to do here with the question of damages. The sole question before your Lordships is, Was the Chief Baron right in withholding the question from the jury? I cannot conclude without saying that I desire to associate myself entirely with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represents but one person) which of them possess the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge. I concur in the motion of the Lord Chancellor.

LORD ASHBOURNE — I concur in the opinion of the Lord Chancellor that the appeal should be allowed, and as that involves the grant of a new trial I shall say as little as possible upon the merits of the case. With the highest deference for the opinions of Palles, C.B., and the learned Judges of the Court of Appeal in Ireland, I am of opinion that the case should not have been withdrawn from the jury. I think that there was evidence given at the trial upon which a jury might reasonably if they thought proper act in finding that the plaintiffs had suffered serious damage in consequence of the acts of the defendants or of their agents. The evidence went to indicate, first, that the plaintiffs were influenced in making the contract referred to in the case by statements for which the defendants were liable as to the existence of an old wall in an important position to the depth of 9 feet; and secondly, that those statements so made were false in fact, and were made by the engineers of the defendants recklessly and without any real belief in the existence of the facts represented. It may be inferred from the evidence of Mr Hellens that the false representations were of the highest importance, were calculated to deceive, and were intended to be acted on. But the decisions of the Chief Baron and of the learned Judges in the Court of

Appeal were not founded upon the opinion that there was no evidence fit to be submitted to the jury. They rested mainly upon the construction of the contract, the 43rd clause of which provided that the contractors must not rely on any representations made in the plans, but must ascertain and judge of the facts themselves. The Chief Baron laid it down that the contractor was "not entitled, in point of law, to say he acted to the extent of a hair's breadth upon the statement contained in the plans." I am entirely unable to concur in this view, and, with much deference to the opinions of the Chief Baron and the learned Judges of the Court of Appeal, I cannot think that in face of the evidence in the case this clause 43 can be regarded as establishing a defence. Such a clause might in some cases be part of a fraud, and might advance and disguise a fraud, and I cannot think that on the facts and circumstances of this case it can have such a wide and perilous application as was contended for. Such a clause may be appropriate and fairly apply to errors, inaccuracies, and mistakes, but not to cases like the present. The respondents' counsel argued their case with great acuteness, but they could not overcome the broad contentions which they had to face—that there was evidence for the jury, and nothing in the contract to prevent the jury fully considering that evidence. I think that the order suggested by the Lord Chancellor is correct.

LORD MACNAGHTEN—I entirely agree in the motion proposed.

LORD JAMES OF HEREFORD—I fully concur in the view expressed, that it is expedient not to give any opinion upon the merits of this case which might influence a decision hereafter to be arrived at by another tribunal. The question before your Lordships, whether the Chief Baron rightly removed the case from the decision of the jury, depends upon the answers to be given to one or two propositions. Principally your Lordships have to determine whether evidence was given at the trial upon which a jury might reasonably act in finding that the plaintiffs had suffered damage in consequence of the deceit of the defendants or their agents. With the most sincere respect for the judgment of the learned Chief Baron, I am of opinion that such evidence was given, and that the defendants were not relieved from the consequence of such deceit. The defendants being desirous of carrying out some sewage works, had to invite tenders for the necessary contracts. Certain information had to be afforded to intending tenderers. With this object engineers, nominated and employed by the corporation, prepared certain plans. As I understand, these plans were furnished by the engineers to the corporation, and by the latter issued to applicants, of whom the plaintiff company was one. Upon those plans a very important wall was made to appear as existing 9 ft. below Ordnance datum. It did not in fact run to such depth, and the defendants' engineers had no knowledge or reason to believe that it did. The representation appears to have been founded only on surmise. There is no doubt about the object of such false representations. Now in the arguments employed at your Lordships' bar by counsel for the corporation, it was not in face of the evidence contended that if the action had been brought against the engineers there would not have been evidence of deceit; but certain replies were made to the *prima facie* case against the defendants. In the first place, it was said that the plans were furnished by the engineers to the defendants, who are innocent of personal deceit. They passed the plans on, and so they innocently made the representation, not knowing of its untruth. The engineers, who knew of the nature of the representations, made no communication to the tenderers. I cannot admit the soundness of this argument. The engineers were employed by the corporation as their agents to make the plans for the purpose of their being communicated to the plaintiffs and others. In the course of this agency the alleged deceit was committed. Of course the defendants did not personally test the accuracy of the plans, but when they passed them on they surely must bear the burthen of their agents' conduct, and cannot repudiate the wrongful representations upon which they to a certain extent invited the tenderers to rely. In the courts below this argument on behalf of the defendants was not accepted, and I concur in thinking that it cannot be maintained. But Palles, C.B., whilst accepting the view that the plaintiffs had produced *prima facie* evidence of deceit, removed the case from the jury apparently upon the ground that clause 43 of the specification protected the defendants from liability. Now, the learned Chief Baron in respect of this clause expressed the opinion that the contractor was not entitled in point of law to say he acted upon the statement contained in the plans. He was told to act upon his own judgment, and ought to have done so. If this dictum be read as general in its terms, and so applied, it may be read as conferring considerable advantage upon the designers of fraud. At any rate, by inserting such a clause those who framed it would run a fair chance of the contractors saying—"I assume that those with whom I deal are honest and honourable men. I scout the idea of their being guilty of fraud. An inquiry testing the plan will be expensive and difficult, and so I will not make it." The protecting clause might be inserted fraudulently, with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a contract would be bad

in law, but it is unnecessary in this case to determine whether special circumstances may not create an exception to that rule. I therefore think that the appeal must be allowed, and the case sent for a new trial, costs being allowed in accordance with the Lord Chancellor's judgment.

LORD ROBERTSON—I concur in the judgment proposed.

LORD ATKINSON—I, like the noble and learned Lords who have preceded me, wish to guard myself against being supposed to express any opinion on the merits of this case or upon the weight or credibility of the evidence to the existence of which I shall have to refer. I think that there was abundant evidence given on behalf of the plaintiffs proper to be submitted to the jury with a view to establish—first, that several of the maps and plans prepared by the defendants' engineers contained a representation that the North Harbour wall, the backbone of the scheme as it is styled, went down to a depth of 9 ft. below Ordnance datum; secondly, that this representation as to a most material matter was false in fact; thirdly, that it was acted upon by the plaintiffs; fourthly, that it was made by these engineers recklessly, without any real belief in the existence of the fact represented. I assume for the present, as was held by Palles, C.B., and both the Irish Courts, that the defendants are responsible for the acts of these officers of theirs. In this state of facts it was the province of the jury to determine with what intent the representation was made. They would, from the fact that the representation was false, have been entitled to draw the inference that the persons who made it intended that it should be acted upon. But in addition there is, in my opinion, substantive evidence to show that these engineers intended that the representation should be acted upon. And it is difficult, if not impossible, to see how the representation could induce the contractor to moderate his estimate unless he trusted in that representation and acted upon it. As I understand the Chief Baron's decision, he withdrew from the jury the questions which it would *prima facie* have been the right of the plaintiffs to have left to them—not because there was not evidence given upon each proper for their consideration, but because he thought that the plaintiffs had by their contract deprived themselves of the right to have the question as to the intention with which the representation was made submitted to the jury at all—had in effect contracted that they would not allege that any representation such as that in fact made was made with the intent that it should be acted upon, or that it had in fact been acted upon. In commenting on clause 43 he expresses himself as follows—"My clear opinion is, that with that statement in the specification, upon which the contractor was to make his tender, he is not entitled, in point of law, to say, 'I acted to the extent of a hair's breadth upon the statement contained in these plans.' He was told that he should act upon his own judgment, and satisfy himself as to the dimensions, levels, character, and nature of the existing works, and I regret to say, that if he has not done that, but on the contrary has acted upon their statement, he is not entitled to recover upon that as a representation made with intent to be acted upon." The rule of law thus laid down by the Chief Baron would apply to any action for deceit founded upon plans and specifications. He makes no distinction between conscious and unconscious fraud, such as is made by the Court of Appeal—a distinction which, if sound, would appear to me to amount to this, that the contractor should be held to have a cause of action for deceit if he was deceived by a deliberate lie, but no cause of action if he was deceived by a false and reckless statement not really believed in by those who made it, though in law equally fraudulent and equally valid as the ground of such an action. With all respect for the learned Judges presiding in the Court of Appeal, I think this distinction unsound, and as I understood it, it was not insisted upon before your Lordships by the defendants' counsel. It would appear to me that a clause such as art. 43, deliberately introduced into a contract by a party to the contract, designed beforehand to save him from all liability for a false representation made recklessly and without any real belief in its truth, is as much "conceived in fraud" and as much "part of the fraud" as if the representation had been false to the knowledge of the person who made it, because, to use Lord Bramwell's words in *Smith* v. *Chadwick* (50 L.T. Rep. 697, 9 App. Cas. 187), "An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent, for in making it he affirms that he believes it, which is false." If, therefore, the direction given to the jury is to be upheld on the grounds upon which it was purported to be based, it must, in my opinion, be because these several articles of the specification, on their true construction, are to be held to embody a contract by the plaintiffs that they in effect are not, under any circumstances, to have a remedy by action for deceit for any fraud which may be practised upon them by the defendants or by those acting on their behalf in the nature of a false representation—that is, a contract to submit to a fraud. As at present advised, I am inclined to think, on the authority of *Tullis* v. *Jacson* (67 L.T. Rep. 340; (1892) 3 Ch. 441) and *Brownlie* v. *Campbell* (5 App. Cas. 925), that such a contract would be illegal in point of law. And, with the most profound respect for the Chief Baron, I do not think that the articles of the specification relied upon can, on their true construction, be held to have had fraud, whether conscious or unconscious, within their purview or contemplation, or to apply at all to such a case of fraud as the present is alleged to be. They were, I think, intended to apply, and do apply, to inaccuracies, errors, and mistakes, or matters of that sort, but not to fraud, whether of principal or agent or of

both combined. I observe that the Chief Baron refers to *Thorn* v. *London Corporation* (34 L.T. Rep. 545, 1 App. Cas. 120) as an authority for holding, to use his own words, "that the object and effect of this clause 43 is to render the contractor a person who must depend upon his own knowledge, acquired by his own engineers"; but the action in that case was an action for breach of warranty, not for deceit. The contention of the plaintiff there was that if a man "stipulates that work shall be done in a certain manner, he undertakes that it can be done in that manner," and the decision in effect was that no such undertaking is given by a stipulation of this kind. If the present action were founded on a warranty, expressed or implied, that the information given by the plans was accurate, or the works feasible, it may well be that art. 43 would furnish a complete answer to the plaintiffs' claim; but that is an entirely different matter. As I understand the argument addressed to your Lordships by the counsel for the defendants, they rested their case on grounds totally different from those on which the decision of the Court of Appeal was based. They did not rely upon the distinction between conscious and unconscious fraud at all, but contended that on a true construction of the contract, incorporating as it does the plans and specifications, it was plain that the only representations made to the plaintiffs were made by the defendants themselves, not by their engineers; that it was admitted that they themselves gave to the plaintiffs such information as they had; that they did so innocently, believing it to be true; that they did not warrant this information to be accurate; that they were therefore not responsible for the fraud of their engineers, if fraud there was; and that it was perfectly legitimate for them to protect themselves, as they contended that they had protected themselves by this article 43 and the other articles referred to; and that they were therefore in point of law entitled to the direction which their counsel had asked for and obtained. I do not think that this contention is sound. Indeed, Mr Ronan was obliged to admit that if the defendants had authorised their engineers to communicate directly to the contractor the plans, and therefore the representation appearing on the face of them, his clients would, within the authority of *Barwick* v. *English Joint Stock Bank* (*sup.*) and the cases following it, have been responsible for the fraud of the engineers thus made their agents; but that inasmuch as the plans had been supplied to the contractor by the defendants themselves, the engineers were not their agents to make any communications to the plaintiffs concerning them. But by the terms of the contract the engineers are expressly named as the persons to prepare the plans for the "use" of the contractor. The tender was to be based upon them. The work was to be carried out in accordance with them. The engineers were therefore by the express terms of the contract constituted the agents of the defendants to draw up the plans, which must of necessity be communicated to or supplied to the contractor. Both the engineers and the defendants must, I think, be held to have intended that the plans should be so communicated or supplied. The engineers were admittedly acting within the scope of their authority in preparing the plans and forwarding them to the defendants or to their committee or their town clerk for transmission to the contractor. The committee was simply the medium through which the plans were to be transmitted; they had no power to alter them in any way. And it would appear to me that the representations contained in these plans might under these circumstances be held, as a matter of fact, to have been made by the engineers to the contractors as truly as if the documents had been sent by the engineers to them through the post or by the hand of a messenger. I think, therefore, that the defendants are responsible for the fraud of their engineers in framing the plans, if fraud there were. The only other point relied upon by the defendants on this appeal was that they were within the protection of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), the fraud for which they were sued having been an act done by them "in pursuance or execution of any public duty or authority"; and that the action, which was only instituted on the 30th July 1904, over four years after the false representation had been made, and over three years after the damage had commenced to accrue, was late. The answer to that, upon the facts, is that where, as in this case, the damage is continuing damage, the period of six months does not, under the express words of the statute, commence to run until after the damage has ceased. Here the damage continued till the 27th August 1903, and on the 2nd December previous it was agreed between the plaintiffs and the defendants that the claims of the former in respect of the wrong now sued for should stand over till after the completion of their contract, an event which did not take place till the month of June 1904. The Chief Baron decided on the authority of *Sharpington* v. *Fulham Guardians* (91 L. T. Rep. 739, (1904) 2 Ch. 449) that the making of a false representation by which a person was induced to enter into a private contract with a public authority for the construction even of works authorised by statute could not be held to be an act done by that authority "in pursuance or execution of a public duty," and that therefore the statute did not apply. The Judges of the King's Bench Division concurred, and the question was not dealt with by the Court of Appeal. Were it necessary to decide the point now, I should for myself be ready to concur in opinion with the Chief Baron, but owing to the existence of the arrangement which I have mentioned, I think it is not necessary to decide it. On the whole, I am of opinion that the decision of the Court of Appeal in Ireland was wrong and should be reversed, and the judgment of the King's Bench Division affirmed, and that this

appeal should be allowed, and the order as to costs suggested by my noble friend on the Woolsack made.

LORD COLLINS—I agree.

Appeal sustained.

Counsel for the Appellants—Campbell, K.C. (of the Irish Bar)—Danckwerts, K.C. —E. A. Collins (of the Irish Bar). Agents —Le Brasseur & Oakley, Solicitors.

Counsel for the Respondents — C. A. O'Connor, K.C.—Ronan, K.C.—J. J. O'Brien, K.C.—P. A. O'C. White (all of the Irish Bar). Agent—R. Leslie S. Badham, Solicitor.

HOUSE OF LORDS.

Thursday, November 21, 1907.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Macnaghten and Atkinson.)

CLIFFORD *v.* TIMMS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Partnership — Dissolution — Dentist — Professional Misconduct.

A partnership contract between A and B, two dentists, provided that if either should "be guilty of professional misconduct or any act which is calculated to bring discredit upon or injure the other partner or the partnership business," the other should have the right to terminate the partnership. A joined with other persons in forming, and became a director and shareholder in, a company called the American Dental Institute, Limited. This company issued large numbers of advertisements, in which they praised their own work and products in the most extravagant terms, and at the same time decried those of rival practitioners in general, against whom they also made charges of moral misconduct.

Held that A's conduct was such as to entitle B to terminate the partnership under the clause above narrated.

Appeal from a judgment of the Court of Appeal (COZENS-HARDY, M.R., SIR J. GORELL BARNES, P., and BUCKLEY, L.J.), [1907] 2 Ch. 237, reversing a judgment of WARRINGTON, J., [1907] 1 Ch. 420.

The facts sufficiently appear from the rubric and the Lord Chancellor's opinion, *infra*.

LORD CHANCELLOR (LOREBURN)—I am of opinion that this appeal must be dismissed. The question is whether a particular dental practitioner has been guilty of professional misconduct and thus enabled his partner to cancel the arrangement between them. I do not think it in the least necessary to enter upon the legal question, interesting as it may be, which was discussed so much in the Court of Appeal. It seems to me to be a matter of indifference whether the order made by the General Medical Council be admitted in evidence or be excluded. What seems to me quite clear is this—that the form of advertisement which was sanctioned by the gentleman in question amounted in the circumstances to professional misconduct. I will not dwell upon the case. There was profuse advertisement in every form of self-praise and self-commendation on the part of this company and of those who carried on business under its authority. For the present purpose it is enough to say that there were two particular advertisements which I consider to be thoroughly discreditable, and to amount to professional misconduct of a serious and inexcusable kind. One of them was that which related to a suggestion that most, or nearly all, other dental practitioners omitted the necessary precaution of sterilising their instruments, whereas those who carried on the business of this company were careful not to omit that precaution. Now that was a peculiarly dangerous form of disparagement levelled against other practitioners, because it was not levelled against any one in particular, and therefore the falsity of it could not have been vindicated in any action. The second instance, which I deprecate still more strongly, is the report of an interview which appeared in the *Review of Reviews*, and contained the undisguised suggestion that in cases—I will not apply strictly the numerical test suggested in the *Review*—but in cases of English dentists it was at all events a not uncommon thing that disgraceful advantage should be taken by the operator, in the case of a woman, of the absence of some other woman to guard her honour. I can see nothing that can justify anything of that kind. It has all the elements of disgraceful imputation—it is so general that it cannot be denied, that it cannot be proved, and that it cannot be made the subject of investigation; yet it suggests to those who are sensitive about the honour of others who belong to them the most powerful motive to avoid other establishments and to seek relief from those who are engaged by this company, with the object and with the result of pecuniary profit. For my part, if this be not disgraceful conduct, if it be not professional misconduct, I know not what the terms mean.

EARL OF HALSBURY—I entirely agree.

LORD MACNAGHTEN—I agree.

LORD ATKINSON—I agree.

Appeal dismissed.

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