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*599 The Imperial Loan Company, Limited v Stone.

Positive/Neutral Judicial Consideration

Court
Court of Appeal

Judgment Date
3 March 1892

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[1892] 1 Q.B. 599

ICLR

Court of Appeal

Lord Esher M.R. , Fry L.J. and Lopes L.J.

1892 March 3.

Lunatic—Capacity to Contract—Knowledge of the other Contracting Party—Averment of Knowledge—Onus of Proof.

Where a defendant in an action of contract sets up the defence that he was insane when the contract was made, he must, in order to succeed in this defence, shew that at the time of the contract his insanity was known to the plaintiff.

APPLICATION for a new trial.

The action was brought on a promissory note which the defendant, who had since the making of the note been found by inquisition to be a lunatic, signed as surety. The statement of defence alleged that the defendant when he signed the note was so insane as to be incapable of understanding what he was doing, and this allegation was repeated with the further allegation added that the insanity of the defendant was known to the plaintiffs.

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The case was tried before Denman, J., who left to the jury the questions whether the defendant, when he signed the note, was so insane as not to be capable of understanding what he did, and whether this incapacity was known to the agent of the plaintiffs who was present when the note was signed. The jury found that the defendant was insane when he signed the note; but they could not agree upon the question as to the knowledge of the plaintiffs' agent. The learned judge entered a verdict for the defendant. The plaintiffs applied for judgment or for a new trial.

Channell, Q.C. , and *Le Riche* , in support of the application. The entry of judgment for the defendant must be wrong, for the issue whether the plaintiffs knew of the incapacity of the defendant to contract was one that could not have been withdrawn from the jury. It was always necessary to aver such knowledge: *Lovatt v. Tribe* [1] ; and it must be proved by the defendant in order that he may succeed: *Harrison v. Richardson* [2] ; *Molton v. Camroux* [3] ; *Beavan v. M'Donnell* [4] .

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Witt, Q.C. , and *G. A. Scott* , for the defendant. There is no authority that a man can be sued and made liable on an executory contract which he was incapable of understanding by reason of insanity. There are cases in which a contract for necessaries has been enforced; but there is an implied contract to pay in such cases arising from the circumstances: *Gore v. Gibson* [5] ; and where the position of the parties has been altered the Court of Equity will not interfere: *Niell v. Morley* . [6] There is a distinction between executed and executory contracts, between getting back money that has been paid and avoiding liability to pay it: *Valentini v. Canali* . [7] If the mind does not go with the act, that is sufficient to release the defendant from liability on a contract, whatever be the cause of the incapacity: *Foster v. Mackinnon* [8] ; *Jenkins v. Morris* . [9]

In *Drew v. Nunn* [10] , Bramwell, B., says: "If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting;" so that when total incapacity is proved, there is no contract on which to proceed. The contract of suretyship is one which "should be based upon the free and voluntary agency of the individual who enters into it": *Williams v. Bayley* [11] , and *Davies v. London and Provincial Marine Insurance Co.* [12] It cannot be said that the act of an insane person in making such a contract could be so described.

LORD ESHER, M.R.

In this case judgment has been entered for the defendant on the findings of the jury, although the jury have not agreed on one of the questions left to them. If we are of opinion that the entry of judgment is wrong, no other course is open to us but to direct a new trial.

The action is on a promissory note signed by the defendant as surety, and his answer is that he was so insane at the time he signed the note that he was not capable of understanding the transaction, and the jury have found that this was so. The defence added another matter, namely, that the plaintiffs knew of the defendant's state, and on that point the jury have been ***601** unable to agree. This

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raises the questions whether that allegation is a necessary part of the plea, and if so on whom the burden of proving it lies.

I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shews that the law as I have stated it was generally accepted. The burden of proof, in such a case, must lie on the defendant; the jury have disagreed on a material question in the cause, and as there is no finding on that question the case must go back for a new trial.

FRY, L.J.

I also disagree with the conclusion of the learned judge. The law relating to this matter I take to be of very old date, and much light is thrown upon it by Littleton in his treatise on Tenures. That learned author, in treating of descents, laid down (Litt. s. 405) that "no man of full age shall be received in any plea by the law to stultify and disable his own person"; but he went on to point out that the heir can avoid a deed made by a person non compos mentis, though the person himself could not. The subject came before the Court of King's Bench in *Beverley's Case* [13] , where the Court laid down, "that every deed, feoffment, or grant, which any man non compos mentis makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea ***602** to be pleaded by him, received by the law to stultify himself," and reference was made to Littleton's Tenures. Before that date Fitzherbert (F. N. Br. 202 D.) took a different view; but his view was overruled by *Stroud v. Marshal* . [14] Then came Coke, who adopted the view of Littleton (Co. Litt. 247 b), who, he said, was of opinion "that neither by plea nor by writ nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was non compos mentis) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so it was resolved with Littleton in *Beverley's Case* [15] , where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe." Therefore, although in certain cases the Crown, and in other cases persons who claimed under one who was non compos mentis, could set up the disability, the man himself could not. In *Molton v. Camroux* [16] , which was affirmed in the Exchequer Chamber [17] , Pollock, C.B., in delivering the judgment of the Court, said the rule had in modern times been relaxed, and unsoundness of mind would now be a good defence to an action upon a contract, if it could be shewn that the defendant was not of capacity to contract, "and the plaintiff knew it," and for this he referred to *Browne v. Joddrell* [18] ; *Baxter v.*

Earl of Portsmouth [19] ; and *Dane v. Viscountess Kirkwall* . [20] It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is non compos mentis may be avoided when his condition can be shewn to have been known to the plaintiff. So far as I know, that is the only exception. The question whether that knowledge exists has not been determined in this case, and consequently we cannot say that the exception applies, and judgment could not properly be entered for the defendant. There must, therefore, be a new trial.

LOPES, L.J.

It seems to me that the principle to be deduced from the cases may be summarised thus: A contract made by a person of unsound mind is not voidable at that person's option ***603** if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed. Applying that in the present case, it is apparent that the verdict entered for the defendant cannot stand, but that there must be a new trial.

Representation

Solicitor for plaintiffs: Charles Thomas Foster .
Solicitor for defendant: T. H. Hiscott .

Order for new trial. (A. M.)

Footnotes

1 *3 F. & F. 9* .
2 1 Mood. & Rob. 504.
3 *2 Ex. 487; 4 Ex. 17* .
4 *9 Ex. 309* .
5 *13 M. & W. 623* .
6 *9 Ves. 478* .
7 *24 Q. B. D. 166* .
8 Law Rep. 4 C. P. 704.
9 *14 Ch. D. 674* .
10 *4 Q. B. D. 661* , at p. 669.

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11 Law Rep. 1 H. L. 200, at p. 219.
12 *8 Ch. D. 469* , at p. 475.
13 *4 Co. Rep. 123* b.
14 Cro. Eliz. 398.
15 *4 Co. Rep. 123* b.
16 *2 Ex. 487* .
17 *4 Ex. 17* .
18 1 Mood. & M. 105.
19 *5 B. & C. 170* .
20 *8 C. & P. 679* .

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